

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

Injury No.: 00-107278

Employee: John Jester
Employer: Miltenberger Oil Company, Inc.
Insurer: Federated Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 30, 2000
Place and County of Accident: Lawrence County, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 25, 2007. The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued September 25, 2007, 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 31st day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: John Jester

Injury No. 00-107278

Dependents: N/A
Employer: Miltenberger Oil Company, Inc.
Additional Party: Second Injury Fund
Insurer: Federated Mutual Insurance Company
Hearing Date: June 18, 2007 (July 18, 2007, close of record)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

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: JULY 30, 2000
5. State location where accident occurred or occupational disease was contracted: LAWRENCE COUNTY, MO
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:
PLUGGING IN TIRE BALANCER
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: BRAIN AND INNER EAR
14. Nature and extent of any permanent disability: PTD
15. Compensation paid to-date for temporary disability: \$10,300.58
16. Value necessary medical aid paid to date by employer/insurer? \$1,849.13
17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$303.81
19. Weekly compensation rate: \$202.54
20. Method wages computation: STIPULATION

COMPENSATION PAYABLE

21. Amount of compensation payable: \$202.54 per week for the employee's lifetime, effective as of July 6, 2004.

Unpaid medical expenses: -0-

N/A weeks of temporary total disability (or temporary partial disability)

N/A weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

22. Second Injury Fund liability: NONE

TOTAL: UNKNOWN

23. Future requirements awarded: FUTURE MEDICAL AND PTD ORDERED

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 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

PATRICK PLATTER

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	John Jester	Injury No. 00-107278
Dependents:	N/A	
Employer:	Miltenberger Oil Company, Inc.	Before the DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Federated Mutual Insurance Company	Jefferson City, Missouri
Hearing Date:	June 18, 2007 (July 18, 2007, close of record)	

AWARD ON HEARING

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on or about June 18, 2007. The evidentiary record, however, was left open for the submission of additional evidence, resulting in the record being closed on July 18, 2007. Also, the parties were afforded an opportunity to submit briefs, which resulted in the case being submitted to the undersigned for issuance of an award on or about July 23, 2007.

The employee appeared personally, and through his attorneys, Patrick Platter, Esq. and Scott Petit, Esq. The employer and insurer appeared through their attorney, Susan Turner, Esq. The Treasurer of Missouri, as Custodian of the Second Injury Fund, appeared through its attorney, Christina Hammers, Asst. Atty. Gen.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about July 30, 2000 Miltenberger Oil Company, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time

was fully insured by Federated Mutual Insurance Company.

- (2) On the alleged injury date of July 30, 2000 John Jester was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about July 30, 2000 the employee sustained an accident, which arose out of and in the course and scope of his employment with the employer.
- (4) The above-referenced employment and accident occurred in Lawrence County, Missouri. The parties agree to venue lying in Joplin (Newton County), Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the claimed accident the employee's average weekly wage was \$303.81, which is sufficient to allow a compensation rate of \$202.54 for both temporary total and permanent disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$10,300.58, representing 50 6/7 weeks in disability benefits, payable for the period of August 2, 2000 to July 24, 2001.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$1,849.13 in medical expenses.

The sole issues to be resolved by hearing include:

- (1) Whether the July 30, 2000 accident caused the injuries and disabilities for which benefits are now being claimed?
- (2) Whether the employee has sustained injuries that will require additional medical care in order to cure and relieve the employee of the effects of the injuries?
- (3) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what is the nature and extent of the disability? (The employee seeks permanent total disability effective as of July 24, 2001, when the employer ceased payment of temporary total disability compensation.)
- (4) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The employee testified at the hearing in support of his claim. Also, upon being called by the employee, John Bunt, Dan Cline, Judy Jester, and Paul Jester testified in person on June 18, 2007. In addition, the employee offered for admission the following exhibits:

Exhibit A..... Photograph of electrical cords
Exhibit B..... Report of Injury filed by the Employer
Exhibit C..... Deposition of Timothy Hain, M.D.
Exhibit D..... Medical Records from Timothy Hain, M.D.
Exhibit E..... CV of Dale Halfaker, Ph.D.
Exhibit F..... Psychological Report from Dale Halfaker, Ph.D.
Exhibit G. Medical Records from Aurora Community Hospital (July 31, 2000)
Exhibit H..... Medical Records from Ronald Williams, D.O.

Exhibit I..... Medical Records from Kenneth Sharlin, M.D.
 Exhibit J..... Medical Records from St. John's Physical Therapy
 Exhibit K..... Medical Records from Missouri Rehabilitation Therapy
 Exhibit L..... Medical Report from Jay Duffield, M.D.
 Exhibit M..... Psychological Report from Philip Mothersead, Ph.D.
 Exhibit N..... Medical Records and Report from Sam Caputo, D.O.
 Exhibit O..... Medical Records from Dr. Faulkner
 Exhibit P..... Medical Record from Dr. Roller
 Exhibit Q Medical Records from St. John's Regional Health Center (Aug. 2001)
 Exhibit R..... Medical Records from Aurora Community Hospital (Aug. 2001)
 Exhibit S..... Medical Records from Cox Medical Center (Aug. 2001)
 Exhibit T..... Medical Records from Papaiah Sreepada, M.D.
 Exhibit U..... Medical Records from James Neal, M.D.
 Exhibit V..... List of Medications
 Exhibit W..... Motion to Quash Subpoena Duces Tecum
 Exhibit X..... Work History Summary of John Jester
 Exhibit Y..... Motion of Employee for a Temporary or Partial Award
 Exhibit Z..... Attorney's Fees Statement of Pettit & Pettit
 Exhibit AA..... Attorney's Fees Statement of Neal & Newman, L.L.P.
 Exhibit BB..... Deposition of Wayne Stillings, M.D.
 Exhibit CC..... Deposition of John Jester
 Exhibit DD..... Deposition of Kiman Kingsley
 Exhibit EE..... Deposition of P. Brent Koprivica, D.O.
 Exhibit FF..... Medical Records from Dade County Family Medical Clinic
 Exhibit GG..... Medical Records from Ferrell-Duncan Clinic
 Exhibit HH..... Medical Records from Ozark Center
 Exhibit II..... Photograph of feet
 Exhibit JJ..... Work History of John Jester
 Exhibit KK..... Medication List
 Exhibit LL Subpoena of Kiman Kingsley (including proof of services and fee)
 Exhibit MM..... Deposition of Kiman Kingsley

Exhibits A through CC (with exception of Exhibit W) were received and admitted into evidence at the earlier hearing (Hearing for Temporary or Partial Award) before Judge Holden. Exhibit W was denied admission into evidence. Exhibits DD, EE, FF, GG, HH, II, JJ, KK, and LL were received and admitted into evidence before the undersigned judge at the Final Hearing. Exhibit MM was received and admitted into evidence subsequent to the Final Hearing by agreement of the parties.

The employer and insurer did not present any witnesses at the June 18, 2007 hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

Exhibit 1..... Medical Records from Springfield Physical Medicine
 Exhibit 2..... Medical Report from Wayne Stillings, M.D.
 Exhibit 3..... Deposition of Shelby Kopp, M.D.
 Exhibit 4..... Deposition of Jeffrey Woodward, M.D.
 Exhibit 5..... Deposition of Wayne Stillings, M.D. (October 17, 2005)

Exhibits 1 through 4 were received and admitted into evidence at the earlier hearing (Hearing for Temporary or Partial Award) before Judge Holden. Exhibit 5 was received and admitted into evidence before the undersigned judge at the Final Hearing.

The Second Injury Fund did not present any witnesses at the hearing of this case. However, the Second Injury Fund offered for admission the following exhibit:

Exhibit I..... Deposition of John Jester

Exhibit I was received and admitted into evidence before the undersigned judge at the Final Hearing.

Exhibits A through CC, together with Exhibits 1 through 4, were incorporated into the evidence file submitted before

and considered by the undersigned judge. Similarly, the evidentiary record produced at the earlier hearing before Judge Holden and subsequently transcribed has been read and considered by the undersigned judge.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include:

- Minute Entries;
- Order Dismissing Application for Review;
- Application for Review;
- Temporary or Partial Award Denying Benefits;
- Request for Hearing-Final Award;
- Answer of Second Injury Fund to Amended Claim for Compensation;
- Answer of Employer and Insurer to Amended Claim for Compensation;
- Amended Claim for Compensation;
- Answer of Employer & Insurer to Claim for Compensation;
- Claim for Compensation; and
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

The employee, John Jester, is 41 years of age, having been born on May 22, 1965. He resides in LaRussell, Missouri with his wife. He and his wife have one son. Also, Mr. Jester enjoys limited education. He graduated from high school in 1983, but attended special education classes and received below average grades.

Mr. Jester enjoys a varied work history involving labor-oriented jobs. During the period of 1983 to 1997, Mr. Jester worked as a farm hand and water driller. In or around 1997, Mr. Jester obtained employment with HW Oil, which eventually became Miltenberger Oil, working as a pre-maintenance diesel mechanic. Later, in the early part of 1998, however, Mr. Jester changed employment and began working for Dan Cline Transport, working as a diesel mechanic. Preferring to work the 3:00 p.m. to 11:00 p.m. shift over an early morning shift, Mr. Jester elected to terminate his employment with Dan Cline Transport, and to return to his employment with Miltenberger Oil as a pre-maintenance diesel mechanic. Notably, in this employment Mr. Jester performed a variety of duties, including changing oil and tires, as well as inspecting the work of others.

Personal Background of Mr. Jester

Dan Cline, who has owned Cline Trucking Company for approximately 23 years, first became familiar with Paul Jester in the late 1980's when Mr. Jester would work on trucks he owned. Similarly, Mr. Jester worked for Mr. Cline briefly in between the stints for Miltenberger Oil/STOS. According to Mr. Cline, he found that, Mr. Jester's work ethic to be "above average"; Mr. Jester did an "excellent job" as a mechanic; Mr. Jester understood instructions; and Mr. Jester was able to express himself, being able to speak and conduct himself with the proper affect.

Kimman Kingsley testified by deposition. He is a grain farmer and crop sprayer. He farms several thousand acres and sprays crops from Lawrence County through southeast Kansas. He will employ as many as 12 to 14 workers in his grain farming operation. Four people work on fueling and chemical application. Much of the work is seasonal, though the warm weather seasons will see his company work from daylight to midnight. He has known Paul Jester all of their lives.

Mr. Kingsley described Mr. Jester before the accident as a "real good hand". He called Mr. Jester "one of the best" of his farm employees. According to Mr. Kingsley, Mr. Jester could work without confusion, without sickness, without becoming heated, and was able to express himself. Similarly, according to Mr. Kingsley, before the accident Mr. Jester was "excellent" at "working ground", such as plowing a field with a disc. For example, Mr. Jester could "lay off a field" reasonably quickly, and while doing so, could disc a field within 6 inches of a fence line on an 18-foot disc. The ability to drive a tractor with this type of disc required skill, and Mr. Jester was able to perform these functions regularly and without considerable supervision.

Further, Mr. Kingsley testified that, since the accident, Mr. Jester has not been able to work either as a plow

hand in farming or as a helper in the airplane during crop dusting. According to Mr. Kingsley, Mr. Jester is not now able to focus, and has vomited in the plane. Similarly, according to Mr. Kingsley, Mr. Jester can no longer run a plow disc in a straight line and cannot follow instructions. Mr. Kingsley went so far as to describe Mr. Jester as a “basket case”.

Circumstances of Accident

On the Sunday evening of July 30, 2000, Mr. Jester was engaged in his employment with Miltenberger Oil Co., Inc., working at the truck stop with two co-workers – Eric Robertson (Mr. Jester’s supervisor) and John Bunt (a diesel mechanic trainee). The three men were working the “night shift” (3-11 p.m.).

During this evening, between 6:30 to 7:00 p.m., the computer of a tire-balancing machine malfunctioned, resulting in Mr. Jester attempting to correct the malfunction. As the men had done in the past to correct this type of malfunction, Mr. Jester reached to unplug the tire balancer from the connection, in order to plug it back in (in effect, to “reboot” the tire balancing machine. In the process of rebooting this machine, a bare cord touched Mr. Jester on the right wrist. Unable to get away from the wire, Mr. Jester lost consciousness. (An issue in dispute is whether Mr. Jester fell and lost consciousness because of suffering a fall.)

Immediately following this incident, Mr. Jester became dizzy and nauseous, but remained at work the better part of one hour. Additionally, according to Eric Robertson, Mr. Jester vomited while remaining at work. Later, Mr. Jester informed Eric Robertson that he did not feel well and needed to leave. Mr. Jester has no memory of driving home, but according to his wife, Mr. Jester reached home about 10:30 p.m. that evening. Subsequently, Judy Jester contacted Eric Robertson, who stated Mr. Jester had left work at 8:30 p.m. Mrs. Jester provided Mr. Robertson with information necessary to allow for the filing of the Report of Injury.

John Bunt was working with Jester that evening shift. He had been working with Mr. Jester for about three weeks before the accident. There is no ongoing relationship between the two men. Mr. Bunt testified that he and Jester were the two main employees in the shop that evening.

According to Mr. Bunt, at the time of this incident, Mr. Jester was attempting to balance the tire of a truck having a tire and oil change. Unfortunately, however, the balancer experienced a “short”, causing Mr. Jester to unplug the balancer and replug it in order to reset it. In doing so, Mr. Jester knelt down upon one knee, as the machine is low to the floor. At that moment, Mr. Bunt states, he saw Mr. Jester suffer an electrocution and fall backwards. Mr. Bunt is of the belief that, upon falling backwards, Mr. Jester hit his head. Immediately afterwards, according to Mr. Bunt, Mr. Jester became dazed (“in and out of it”), and he then helped Mr. Jester get up.

Notably, when questioned about whether Mr. Jester fell and hit his head on the floor, Mr. Bunt noted that he was of the belief that Mr. Jester hit his head on the floor. Yet, Mr. Bunt did not make such a statement with absolute certainty. In this context, when responding to this particular question on cross-examination, Mr. Bunt stated, “I believe he hit his head on the floor.”

Judy Jester testified that Paul arrived home at approximately 2 or 3 o’clock a.m., the early morning after the accident. He appeared to her to be confused, jittery and upset. Mr. Jester explained that he did not feel right. The two sat for a few hours in their home, and she then took him to the Emergency Room.

Medical Treatment

The history of Mr. Jester’s medical treatment can be divided into three separate categories:

- Mr. Jester’s initial treatment before seeing specialists
- Mr. Jester’s consultation with specialists
- Evaluations by specialists who either provide or disagree with the prognosis concerning further treatment.

Mr. Jester received his initial treatment with Aurora Community Hospital and Dr. Ronald Williams. Mr. Jester presented himself to the Aurora Community Hospital at 10:00 a.m. on July 31, 2000 - the morning after the accident. At the time of this visit, Mr. Jester presented a history to the Emergency Room staff that he was working with a plug and received an electrical shock. Further, Mr. Jester indicated to this staff that he had a problem recalling the incident, and did not remember driving home the previous evening. Additionally, Mr. Jester reported that he felt “tingling” and also used the word “earthquake” to describe the incident. He stayed at the Emergency

Room for four hours, and started to feel "some better". The initial diagnosis was dehydration with a low dose electrical shock.

Subsequently, on or about August 2, 2000, Mr. Jester presented to Dr. Ronald Williams for follow-up treatment. In light of Mr. Jester wanting to attempt to return to work, Dr. Williams released Mr. Jester to return to work on Friday, August 4, 2000.

On September 25, 2000, Mr. Jester presented to Dr. Williams for follow-up treatment. Notably, at the time of this visit, Mr. Jester demonstrated a blackened toenail. Also, at the time of this examination, Mr. Jester complained of pain in his right arm. The examination on September 25, 2000 indicated paresthesia of about 2 to 3" in diameter on the lateral calf of the left leg, with pain and numbness in the right arm, a first rib lesion, and muscle spasm in the neck and thoracic areas. Dr. Williams performed osteopathic manipulative therapy and prescribed Naprosyn.

Dr. Williams then referred Mr. Jester to neurologist Kenneth Sharlin, M.D. of the Smith-Glynn-Callaway Clinic, who first saw Mr. Jester on November 27, 2000. Dr. Sharlin found that Mr. Jester had a rather prolonged exposure to alternating current electricity because of the bare wire on the tire balancer. Much of the findings on the neurological examination were within the normal range, though credible symptoms included ataxia, slurred speech, visual change and poor memory, all of which localized to the brain stem, and vascular distribution of the vertebral and basilar artery systems. Dr. Sharlin therefore felt that Mr. Jester presented a legitimate neurological condition. He recommended an electroencephalogram and MRI scan of the brain with gadolinium. Additionally, Dr. Sharlin asked Mr. Jester to taper down on amitriptyline. Even after the MRI scan, symptoms still suggested localization to the brain stem. Dr. Sharlin, on January 9, 2001, indicated that Mr. Jester suffered from vertigo. He referred Mr. Jester for neuropsychological testing, vestibular rehabilitation, and an EEG. He also prescribed Neurontin for headaches.

Dr. Phillip Mothersead performed a neuropsychological evaluation on March 1, 2001. He diagnosed a cognitive disorder with mild neuro-cognitive disorder and a pre-existing learning disability. Testing indicated weakness with attention in concentration, with variable performance in visual and spatial ability. Dr. Mothersead believed that, Mr. Jester's description of the incident, reflected "poor attention with reduced encoding of information". Dr. Sharlin, on May 1, 2001, suggested that Mr. Jester see a psychologist or psychiatrist. He prescribed Effexor for mood control.

The Insurer then referred Mr. Jester to Dr. Jay Duffield of Joplin for a second opinion concerning Mr. Jester's neurological status. Dr. Duffield concluded that Mr. Jester's work injury "probably does have some pertinence to his cognitive state with some underlying abnormality". He noted that Mr. Jester did not have a direct head electrical shock. He recommended continuation of the symptomatic treatment, which was being performed by Dr. Sharlin. He felt Mr. Jester was able to work since cognition revealed an average memory.

Dr. Dale Halfaker evaluated Jester on August 6, 2001. He agreed with the diagnosis of mild neuro-cognitive disorder. Persons with this disorder have new deficits in at least two areas of cognitive functioning. These include disturbances in memory, executive functioning, attention or speed of information processing, perceptual motor abilities, or language functioning. Dr. Halfaker agreed that Mr. Jester displayed difficulties with attention and concentration that affected his ability to recall information at a later time, as well as impairment in processing speed. After reviewing school records, Dr. Halfaker believed that the pre-existing learning disability did not account for problems Mr. Jester was currently experiencing.

Also, Dr. Halfaker diagnosed Mr. Jester with an adjustment disorder and considered the injury to have had a significant effect upon him. According to Dr. Halfaker, it is quite common for individuals with a mild neuro-cognitive disorder to experience themselves as being changed or different in a functional cognitive sense. Mr. Jester's skill and ability at attention and concentration was not as predictable or reliable. This was compounded because he was not able to describe fully his condition to medical providers. This, plus his symptoms of headaches, dizziness and nausea, interfered with his ability to carry out functional activities.

Psychiatrist Sam Caputo also evaluated Mr. Jester, which initially occurred on July 6, 2001, and continued to June of 2002. He agreed with Dr. Halfaker's assessment, which he described as "very comprehensive and

accurate". Dr. Caputo prescribed Zyprexa, Wellbutrin, and Effexor.

Mr. Jester has also seen neurologist Papaiah Sreepada, M.D. of the Ferrell Duncan Clinic. Dates of that treatment include May 16, 2002, August 19, 2002, September 16, 2002, and December 3, 2002. Dr. Sreepada noted the cognitive difficulty, chronic headaches, and balance problems experienced by Mr. Jester, though he has not started the treatment as recommended by Dr. Hain.

Since the death of psychiatrist Dr. Caputo, Mr. Jester has seen the physician's assistant employed by Dr. James Neal, a psychiatrist in Bolivar. The diagnosis of the physician's assistant has been organic affective disorder, adjustment disorder, chronic with depression, a history of learning disability, and mild neuro-cognitive disorder. The physician's assistant, in conjunction with review by Dr. Neal, discontinued the medication of Paxil, continued Topamax, continued Zyprexa, and started Lexapro.

Most recently, in light of the employer and insurer denial of liability, Mr. Jester initiated treatment on his own with Dade County Medical Clinic, the Ferrell Duncan Clinic, and Ozark Center. Treatment at the Ferrell Duncan Clinic has been to see whether there was an organic brain injury, which could be detected by MRI scan. The MRI scan findings were negative. A psychiatrist affiliated with the Ozark Center has provided maintenance basis treatment for Mr. Jester's various mental disorders and prescribed his medications. Mr. Jester's present primary care physician is associated with Dade County Medical Clinic, who likewise prescribed some of his medications on a maintenance basis.

Mr. Jester is continuing to receive medication for treatment of physical and mental symptoms. The medications now include prescriptions for Zyprexa; Trazodone; Xanax; Flexeril; Lunesta; and Lidoderm patches.

Benefits Paid or Denied

Judy Jester testified that, while the employer and insurer provided Mr. Jester with certain medical treatment, the medical treatment is limited to payment of the medical expenses associated only with treatment at Aurora Community Hospital Emergency Room and Dr. Williams. The remainder of expenses paid by Federated is apparently with Dr. Duffield, Dr. Woodward and Dr. Kopp, since Federated arranged those appointments.

Mr. Jester received two days of temporary disability benefits. It is unclear why these benefits were discontinued or otherwise not provided by the employer and insurer..

After Dr. Sharlin recommended that a psychologist or psychiatrist evaluate and treat Jester on May 1, 2001, Federated then sent Dr. Sharlin correspondence dated May 15, 2001, to inform him he was no longer the authorized treating physician.

Jester suffers from the following conditions: dizziness and lack of balance; headaches and earaches; blurriness of peripheral vision; inability to remember; inability to reason; inability to concentrate; difficulty in speaking; change in appetite; difficulty in accommodating temperature. Further, in describing Mr. Jester's symptoms and condition, Mrs. Jester testified that, she has noticed that Mr. Jester stays socially withdrawn; he cannot use his hands; he cannot remember items from a short time ago (short term memory); he cannot concentrate; he gets lost in familiar surroundings; he will lose track of his tools and parts; and he is unable to express himself and becomes increasingly frustrated over these things. Also, Mrs. Jester testified that the employer's examining physician Dr. Wayne Stillings did not give Mr. Jester the chance to read and concentrate upon the test items. She also testified that Mr. Jester suffers from mood swings and dizziness.

Dr. Timothy Hain

Dr. Hain is a practicing neurologist and full professor at Northwestern University. He works in three departments - Neurology, Otolaryngology, and Physical Therapy and Human Movement Science. He emphasizes otoneurology. This is a clinical specialty in which there is a blend of neurology and otolaryngology. Physicians with this emphasis focus their practice upon matters related to the ear, such as dizziness. He is Board Certified in neurology by the American Board of Psychiatry and Neurology, and is also Board Certified in Clinical Neurophysiology. He teaches as well as treats patients in a private practice. Before becoming affiliated with Northwestern in 1990, he taught at Johns Hopkins University in Baltimore, Maryland, between 1985 and 1990, as Assistant Professor of Neurology and Otolaryngology. His academic research is largely related to otoneurology.

He served on a Committee for the National Institute for Health, which has decided upon funding for peer-reviewed journals. His private practice is now known as “Chicago Dizziness and Balance”.

Dr. Hain diagnosed Mr. Jester to have a brain injury (central nervous system injury) and an inner ear injury (BPPV). BPPV is benign paroxysmal positional vertigo. In BPPV, there are small particles of calcium, which are normally attached to a structure in the ear called “otoliths”. When people hit their heads, these particles become detached and are loose and free to roll around within the inner ear. These particles can roll into sensitive parts of the ear and cause a characteristic type of dizziness known as “BPPV”. Physical findings to support these diagnoses included a positive Babinski sign on the right side and inaccuracy of rapid eye movements, poor smooth pursuit, and square-wave jerk nystagmus indicated on video ENG. Positive physical findings to support the BPPV included positional nystagmus, as indicated on the video ENG, and likewise indicated on what is known as the Dix-Hallpike test. In this test, the patient would lie down on the left side, and he consistently developed a small but definite nystagmus, or jumping of the eyes.

Dr. Hain believed there were two mechanisms that conceivably produced these conditions. One was an electrical injury. The second mechanism and the one he considered more likely was that in the process of contacting the electrical cord, he had a fall and hit his head. The symptoms Jester had at the moment would be very typical of someone with a head injury. Dr. Hain testified that it was most likely that Mr. Jester had a fall, and testified such to a reasonable degree of medical certainty. Further, he testified that the fall resulted from exposure to the electrical wire.

“Yes, the second possibility, which I think is the more likely one, is that in the process of contacting this electric cord, he had a fall and hit his head, because the symptoms he has right at the moment would be very typical of someone with a head injury.”

Dr. Hain testified that treatment was available for the BPPV. There is a specialized physical therapy known as vestibular rehabilitation. Patients with this disorder have 3 to 4 visits to a specialized physical therapist. Dr. Hain knew of at least two places in Illinois and one location in St. Louis in which the treatment was available. The treatment procedure involves putting the head through a number of positions in which the debris is rolled out of the sensitive part of the ear into a less sensitive part of the ear, where it is also gradually absorbed over time. The treatments are usually very successful and involved a few sessions in which the person is placed into positions sequentially.

“I think that the treatment for BPPV is quite well developed, and I think that it would be quite possible that additional treatment might help him with his dizziness.”

* * * *

“Well, BPPV is treated with a specialized type of physical therapy called vestibular rehabilitation, and it’s a fairly simple and straightforward process. Usually, patients with BPPV undergo three or four visits to a specialized physical therapist, and about 90 to 95 per cent of the time the dizziness can be eliminated.”

Dr. Hain believed Mr. Jester to have a significant disorder from the head injury, but did not have any treatment recommendations for it. He deferred to a neuropsychologist or similar professional upon whether cognitive rehabilitation would be proper.

Dr. Hain recommended that a psychiatrist follow-up with Mr. Jester to decide what psychiatric medications Mr. Jester should and should not take. It would be necessary for a psychiatrist to examine Mr. Jester in order to weigh the potential benefits and side effects of each psychiatric medication. Mr. Jester was taking, for example, 6 medications at the time he saw Dr. Hain. At that time, Dr. Hain would have kept Mr. Jester on Effexor, Neurontin and Zantac (for stomach upset). He would have discontinued Zyprexa, tapered Amitriptyline as much as possible, and suggested Compazine for nausea (as little as possible). Anti-depressants are particularly known to impair balance.

Dr. Hain also believed Mr. Jester to be unemployable and unable to work. There were two reasons for this.

One is that Mr. Jester was dizzy, and usually people who are involved in occupations, which require good hand-eye coordination or operation of heavy machinery, are not safe to return to work when dizzy. The second reason was Mr. Jester's cognitive disturbance.

"Well, there was really two reasons. One is that he's dizzy and usually people who are involved in occupations which require good hand/eye coordination or operation of heavy machinery, which I think would be indeed the case with Mr. Jester, it's not safe for them to go back and work in an environment where they might get even more injured. And the second reason was because of his cognitive disturbance. I think that also would make it more difficult for him to go back to work. It might make him unsafe."

The undersigned finds Dr. Hain to be most qualified in his speciality, careful in his findings, and persuasive. The Employer and Insurer do not attempt to contradict his testimony.

Dr. Dale Halfaker

Dr. Dale Halfaker evaluated Mr. Jester on July 24, 2001, and later reviewed his educational records. He diagnosed Mr. Jester to suffer from a mild neuro-cognitive disorder with documented difficulties in concentration and attention. He also found Mr. Jester to suffer from an adjustment disorder characterized by depression and anxiety. He considered both conditions to result from the incident of July 30, 2000. He found the conditions to have directly resulted from the closed head injury, given retrograde amnesia and the dazed condition of Mr. Jester the evening of the accident. He did not believe that the pre-existing learning disability of Mr. Jester was the condition, or cause of the conditions being diagnosed by him. Rather, the pre-existing learning disability made it more difficult for Mr. Jester to recover, and indeed, to be able to explain himself to medical providers.

Dr. Halfaker recommended that Mr. Jester have a case manager affiliated with the Missouri Department of Health monitor his condition. He also testified that, in his opinion, Mr. Jester needed to see psychiatrist Dr. Neal himself rather than the physician's assistant. It would be important for Mr. Jester to see Dr. Neal himself in order that Dr. Neal could personally assess Mr. Jester's condition in order to form an accurate history and to likewise monitor the use of medications.

Dr. Halfaker provided testimony explaining the testing that supported his findings that Mr. Jester suffered a mild neuro-cognitive disorder with impaired memory, concentration, and processing speed. Notably, this testing included finding from the Halstead-Reitan Neuropsychological Test Battery for Adults, which is identified as the most widely used standardized psychological test battery used in the United States. It is designed to assess a full range of neuropsychological functions so that neuropsychologists may examine motor skills, sensory abilities, visual/spatial skills, high level intellectual functioning and higher-level problem solving skills. One can also review emotional functioning, such as whether there is depression, anxiety and similar disorders.

Dr. Halfaker identified abnormal findings in at least seven (7) tests of the battery tests administered to Mr. Jester. These test results, plus others, indicated to Dr. Halfaker that Mr. Jester could not perform higher levels of concentration skills and could not perform more than one task at one time. For example, Mr. Jester suffered diminished abilities in trail making, tactual performance, memory component and speech sounds perception. His test scores indicated that he suffered more impairment than persons without head injuries. Mr. Jester had difficulties with higher levels of attention and concentration and in doing two activities at once, such as being able to drive a car and listen to a radio, being able to prepare a meal and listen to your children talk, or being able to watch television and listen to his wife talking to him. These kinds of attention skills appeared reduced for him because he was not mentally flexible enough to keep up with both activities at the same time.

Dr. Halfaker also explained that the validity scales on the MMPI-2 were within normal limits when an examiner would factor out Mr. Jester's response to his physical condition in accord with the protocol of the Cripe items.

In addition, in examining Mr. Jester's ability to reason, Dr. Halfaker testified as follows:

That (a portion of the Halstead findings) suggested to me that he is, because of his cognitive inefficiency, he is having some rather significant problems with higher level reasoning, planning and

problem solving, knowing what to do.

And it really was surprising, because these kinds of reasoning processes are what we have to go through to diagnose problems, so that when someone who's a mechanic, they have to listen for the noise, so to speak. And with the clack, clack, clack, they are going to draw certain conclusions as to what that clacking sound means, and maybe begin to examine a part of the motor, and if it's not that, go to the next one.

And what we see is that he's having trouble with that kind of functioning, so that he gets confused usually, doesn't recognize how to respond in a given situation, may not recognize how...what he's learned in one situation can be applied in a different situation.

So in terms of his cognitive inefficiency, he's constantly re-inventing the wheel, so that the amount of effort he's going to exert in getting through his daily life is going to be significantly greater than you or I or with somebody with improved cognitive efficiency, so that's going to promote his depression, his fatigue, his motivation, and that sort of thing."

Further, in finding that Mr. Jester could not perform these higher levels of concentration skills and could not perform more than one task at one time, Dr. Halfaker propounded the following testimony:

If all he had was the mild neurocognitive disorder, I would scratch my head and say it would be inconceivable. But since what we have is an individual who has a pre-existing learning disorder, so he came with a set of deficits to start with. And I really believe that we had an individual who was probably functioning at his maximum to do what he was doing.

He then sustained his injury, resulting in the mild neurocognitive disorder, which takes away his ability to function as effectively as he did before.

So we have a combination effect of his pre-existing learning disorder, the mild neurocognitive disorder, and then really the effect of the depression that results from the losses sustained as a result of mild neurocognitive disorders. So then, when we pull all three entities together, you end up with an individual with a significant degree of impairment."

Nor does Dr. Halfaker believe Mr. Jester is exaggerating his condition, and was quite specific in explaining why:

The results that we obtained on our testing suggested that he was getting reasonable expression of his problems. I could perhaps see how someone might conclude that he was exaggerating his problems, but I think part of what happens is because of his level of cognitive functioning, I see an individual who thinks in a fairly concrete manner. He is not very cognitive, sophisticated or complex.

So if he comes into my office, and I ask him a series of questions, and ask for symptoms, he is more than likely going to give me what I ask for and may not give me any more.

But if he goes to someone else's office, and they ask for a different set of symptoms, he may respond with those, and it may look like he failed to tell me that when I didn't ask him; or if a questionnaire is utilized in which he responds to a list of symptoms, he may respond with more answers than he may have in a situation where I only asked about certain things.

So due to his level of cognitive complexity and sophistication, I can see how he might produce an inconsistency that may appear to be as though he were exacerbating his problems.

In being questioned about the inability of Mr. Jester to remember details and to provide a more complete history while presenting to the emergency room the day after the accident, Dr. Halfaker provided the following testimony.

Typically, when there is injury to the brain sufficient to cause dysfunction, there will be a - either a period of loss of consciousness, a transient confusion, or feeling dazed or confused. Typically, individuals complain of not remembering some things after an injury where they will be confused for a period of time.

And when you talk about someone leaving work at 8:30 [p.m.] and not arriving home until 11:00 [p.m.] when they may live close, the time would not be required for them to get home at 11:00. This sounds as though he was confused and may have been wandering.

Dr. Halfaker is of the opinion that Mr. Jester is unable to work due to the diagnosed conditions. Notably, in finding Mr. Jester not to be employable, Dr. Halfaker propounded the following comments:

Given what we talked about, the Halstead category tests, and the number of problems that he has, I believe it would be difficult for him to do a strenuous type of job such as that.

Also, in explaining why Mr. Jester will socially withdraw, Dr. Halfaker explained:

Since I've diagnosed him as having an adjustment disorder, one of the things we see with people who have these injuries is that their adjustment is dynamic. It doesn't always stay in a real static place, especially when someone has not fully adjusted to their injury.

They may go for a period of time and feel better and perhaps function a little better, but then experience some difficulty: meet someone at the grocery store where they can't recall their name, and have to admit that, or just feel very uncomfortable or embarrassed, which is like "oh, man, I can't deal with this", causing them to withdraw into themselves, causing them not to want to go out and take those kinds of risks again until, perhaps, they build up a little bit of self-confidence.

And it's kind of a waxing and waning kind of thing until somebody really gets into therapy and begins to get some insight and self-understanding ways of dealing with that to have a more stable and static level of adjustment.

Finally, Dr. Halfaker provided recommendations relative to treatment for Mr. Jester. Notably, in this context, Dr. Halfaker agrees with the recommendation of Dr. Kenneth Sharlin for speech therapy; and recommends Mr. Jester receive a referral to the Missouri Division of Vocational Rehabilitation; and a referral to consult with a psychiatrist relative to receipt of a medication program.

Dr. Brent Koprivica

Dr. Brent Koprivica evaluated and examined Paul Jester on July 6th, 2004, at the referral of Mr. Jester's counsel. He testified by deposition on June 21, 2005.

Dr. Koprivica is of the opinion that Mr. Jester sustained a closed head injury as a result of the July 30, 2000 fall from the electrocution, as opposed to being a direct electrical injury to the brain. He felt that Mr. Jester, therefore, had aggravated a pre-morbid learning disability. He also agreed that there had been evidence of psychological dysfunction as well. He believed that Mr. Jester's condition was permanent.

Dr. Koprivica described the mechanism of injury as follows:

I am relying on some facts that I'm - that are recorded historically or subjectively, as well as the treatment records. Specifically, the fact that prior to this event, he was functioning; that as a result of this affect event, he began having subjective symptoms in terms of a neurocognitive dysfunction; that he describes having a fall associated with electrocution and amnesia to the event, or certainly an inability to recall specifics after first being electrocuted and then falling to the ground. That would all fit with him having a closed head injury, and that would correlate with the neuropsych findings of some aggravation to the learning disability that presents with mild neurocognitive dysfunction. In my opinion, that all fits.

Further, Dr. Koprivica is of the opinion that Mr. Jester is not employable in the open and competitive labor market. In rendering this opinion, Dr. Koprivica opines:

I have to assume hypothetically that he is being truthful in his presentation. A large component of his presentation is psychologically based. I feel comfortable stating that with medical certainty with the assumption that he is not consciously faking his disability. That's something that I can't testify to or eliminate, but if I accepted that as true, my opinion is as he presents, that an ordinary employer could not employ him. He has unpredictable capabilities on a daily basis. His dysfunction is to a point where he is socially isolating himself, and with the understanding that I can't independently verify that level of disability other than what he records historically, my opinion is he's totally disabled."

Further, Dr. Koprivica is of the opinion that the July 30, 2000 accident was a substantial factor in contributing to the disability, and that his total disability resulted from this accident alone, as opposed to a combination of this disability with pre-existing learning disabilities. And, in regard to future or additional medical care, Dr. Koprivica is of the opinion that Mr. Jester will require future medical care, which should include psychological counseling and a review of a medication regimen with a psychiatrist. Unfortunately, Dr. Koprivica finds Mr. Jester's prognosis to be poor.

Dr. Wayne Stillings

Dr. Stillings is a psychiatrist who evaluated Mr. Jester on February 27, 2002. His diagnoses were that of a learning disability, borderline intellectual function, and malingering versus facetious disorder. He based these conclusions primarily upon the lack of apparent electrical burn injuries on the skin and a "fake bad" profile as indicated in the MMPI-1. He did not find any permanent disability or impairment from the incident of July 30, 2000, and did not believe any further psychiatric treatment was necessary. However, he did not analyze the elevated scales on the MMPI-1 in accord with the Cripe factors as Dr. Halfaker did, nor did he refer the MMPI he conducted to a psychologist for evaluation, preferring instead to consider the information himself. In addition, the test answers on the MMPI conducted by Dr. Stillings (attached to his deposition) reflect that Mr. Jester missed answering many questions. Dr. Stillings did not explain the significance of the missed items on the test analysis.

Dr. Stillings examined Mr. Jester a second time and likewise testified a second time by deposition. He concluded that Mr. Jester was either malingering or seeking secondary gain. He based these conclusions, in part, upon a self report questionnaire that Mr. Jester answered, which consisted of sixteen questions. Upon cross-examination, he became defensive of his methods used to determine malingering.

Dr. Jeff Woodward

Dr. Jeff Woodward is a Springfield physiatrist, who examined Mr. Jester once on October 3, 2001. He believed that the history provided by Mr. Jester was consistent with a mild electric exposure. He focused upon the lack of burns on the skin, and concluded that there were no significant physical injuries from electric exposure. He did not consider the potential for a head or ear injury. However, when questioned about the nature and severity of Mr. Jester's injury, he did not significantly disagree with the findings and conclusions of either Dr. Hain or Dr. Halfaker. In addition, he admitted that the extent of electrical injury would depend on the six factors acknowledged by Dr. Kopp. He believed that Mr. Jester had a permanent impairment of 5 percent to the body as a whole. His medical research focused upon electrical injuries, and not inner ear injuries, head injuries, or mental disorders.

Dr. Shelby Kopp

Dr. Kopp reviewed medical records at the referral of a Federated case manager, Jenny Dutot. Dr. Kopp did not personally examine Mr. Jester. He issued a report dated October 1, 2002, and testified by deposition. He was skeptical of Mr. Jester's story, and believes that most of the current subjective symptoms were not related to electricity. He testified that Mr. Jester experienced a variety of delayed symptoms, and that some would be related to electrical shock and some would not.

Dr. Kopp did not have all treatment records. The only records that Federated sent him were those of Dr. Sharlin, Dr. Williams, Dr. Mothersead, Dr. Stillings, Dr. Hain, and Aurora Community Hospital. He did not have records from Dr. Halfaker, Dr. Caputo, Dr. Sreepada, or Dr. Neal.

Dr. Kopp admitted the following with respect to his lack of an examination of Mr. Jester. He admitted he would not either start or stop treatment based only upon a record review. He acknowledged that a history is always more beneficial when one listens to the patient. He admitted this would be key to a solution of a medical problem. It is often enlightening to develop an appreciation of the patient's own perception of an illness. He also acknowledged that an examination was important in order to verify objective marks of a disease. He noted that he had not received any information concerning the electrical cord or circumstances of the accident.

Finally, Dr. Kopp acknowledged there were six (6) factors which would have an effect upon the severity of an electrical injury. The six factors include: (1) the type of current (alternating v. direct); (2) the source of current; (3) the quantity of current; (4) the potential of current (voltage); (5) body resistance; (6) pathway of current; and (7) duration of contact. He acknowledged that some body systems could be more likely damaged than others and that the condition of the skin may not necessarily reflect the extent of internal tissue damage. He also acknowledged that central nervous system damage could be acute or delayed.

Notably, the depositions of Drs. Woodward and Kopp suggests a focus by the parties upon the issue of whether Mr. Jester suffered an electrical injury on July 30, 2000, and not whether he hit his head and suffered a closed head injury upon falling to the ground.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident occurring on July 30, 2000, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on July 30, 2000, which is substantive in nature, and not procedural, governs the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo. App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo. App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo. App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the employee's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the employee need not establish the elements of the case based on absolute certainty. It is sufficient if the employee shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation the employee has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo. App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

I. Accident / Medical Causation

The parties readily acknowledge that on July 30, 2000 Mr. Jester sustained a work-related accident in the nature of an electrical shock. The parties, however, dispute whether Mr. Jester suffered a fall, which resulted in him hitting his head on the floor. The parties further differ on whether this incident resulted in Mr. Jester suffering a brain injury (central nervous system injury), an inner ear injury (BPPV -- benign paroxysmal positional vertigo) mild neuro-cognitive disorder with documented difficulties in concentration and attention, and an adjustment disorder characterized by depression and anxiety.

Surprisingly, the issue of whether Mr. Jester suffered a fall and hit his head on the floor, received little, if any, attention by the parties at the hardship hearing as Mr. Jester did not appear for the hardship hearing, and did not offer any evidence of hitting his head when he suffered the electrical shock on July 30, 2007. Notably, at the time of this hardship hearing, the employee did not produce any witnesses offering testimony of any specific occurrence of a fall and the suffering of blunt head trauma by Mr. Jester. In this context, while finding in the issuance of her Temporary or Partial Award that Mr. Jester suffered a work-related accident in the nature of an electrical shock, Judge Holden rejected the opinions of Dr. Hain and the occurrence of head trauma, stating that, "there is no evidence of this actually happening."

Yet, while problematic, the lack of evidence presented at the earlier hearing and the issuance of the Temporary or Partial Award is not prejudicial to the employee. Although, subsequent to experiencing the electrical shock, Mr. Jester suffered lost of consciousness and memory loss, and is unable to state that he fell and hit his head, he presented evidence sufficient to identify the circumstances of the electrical shock, including evidence of him suffering a fall and hitting his head on the floor. In particular, at the final hearing a co-worker, John Bunt, testified that he saw Mr. Jester suffer an electrocution and fall backwards, and then hit his head and become "dazed." The employer and insurer do not present any evidence to the contrary.

After consideration and review of the evidence, and taking into consideration the understanding that the applicable law requires a liberal interpretation in favor of coverage and affords to the claimant the benefit of the doubt, I resolve in favor of Mr. Jester the issue of whether he, upon suffering the electrical shock, fell and hit his head on the floor. Viewing the evidence as a whole, and without any contradictory evidence, I find and conclude that, on July 30, 2000, Mr. Jester attempted to correct a computer malfunction, which involved a tire-balancing machine. In doing so, he experienced an electrical shock, which lasted approximately one and half minutes. Additionally, upon suffering the electrical shock, Mr. Jester fell backwards, hitting his head on the floor.

Notwithstanding, an issue remains – whether this July 30, 2000 incident, which involved a closed head trauma, resulted in Mr. Jester suffering a brain injury (central nervous system injury), an inner ear injury (BPPV - benign paroxysmal positional vertigo), mild neuro-cognitive disorder with documented difficulties in concentration and attention, and an adjustment disorder characterized by depression and anxiety. The parties offer competing and differing expert medical opinions.

In the context of this issue, I am persuaded that the evidence is supportive of a finding that the July 30, 2000 incident, which involved both an electrical shock and a fall that caused Mr. Jester to suffer trauma to his head, caused Mr. Jester to suffer a brain injury (central nervous system injury), an inner ear injury (BPPV -- benign paroxysmal positional vertigo), mild neuro-cognitive disorder with documented difficulties in concentration and attention, and an adjustment disorder characterized by depression and anxiety. To the extent, there are differences in expert opinion, I find in favor of the employee and the testimonies of Dr. Hain and Dr. Halfaker, who I find to be credible.

Dr. Hain, who is a neurologist uniquely trained in otoneurology, and who is affiliated with Northwestern University in Chicago and formerly affiliated with Johns Hopkins University, opined that the July 30, 2000 incident caused Mr. Jester to sustain an injury in the nature of a brain injury and an inner ear injury / disorder (BPPV). Dr. Hain renders his opinion based on objective findings supported by evidentiary findings, including testing not performed by other physicians who previously evaluated Mr. Jester. This testing included the video ENG and Dix-Hallpike test. No other physician had the background, or performed the testing, to detect these findings and be able to reach this diagnosis. He was also able to explain how calcium deposits roll within the inner ear in this disorder. No other physician contests Dr. Hain's conclusions.

In addition, Mr. Jester's injury caused him to be dazed and nauseated, which Dr. Halfaker said was consistent with a head injury. Additionally, Dr. Halfaker found numerous significant and positive findings to indicate a neurocognitive disorder and adjustment disorder.

In contrast, Dr. Wayne Stillings contradicts Dr. Halfaker's findings and opinions, and states that Mr. Jester is malingering, seeking secondary gain, and the authorities should investigate Mr. Jester for fraudulently pursuing this claim. Yet, in attempting to place a diagnosis of malingering and secondary gain, Dr. Stillings bases his opinion solely upon a self-report examination of 16 questions. And, when questioned about the lack of objective testing that he conducted upon this issue, he exhibited a defensive attitude, marked by vague and non-responsive answers. Further, Mr. Jester indicates that he lacked opportunity to understand Dr. Stillings' instructions during Dr. Stillings' second examination of him.

Viewing Dr. Stillings' testimony as a whole, he appears to be more of an advocate, and not that of an unbiased expert called upon to give a professional medical opinion. In the end, he was unable to substantiate his position in attempting to contradict Dr. Halfaker. Further, he did not conduct sufficient methods to determine if Mr. Jester was either malingering or seeking secondary gain. Accordingly, I do not find Dr. Stillings credible, particularly when compared to the analysis detailed by Dr. Halfaker.

The testimonies of Mr. Jester and Mr. Bunt describe the circumstances of the July 30, 2000 accident. And, Mr. Bunt establishes the occurrence of a fall and the hitting of Mr. Jester's head on the floor, which resulted in Mr. Jester suffering head trauma and presenting immediate symptoms supportive of him having suffered head trauma. Similarly, Mrs. Jester verifies that Mr. Jester did not arrive home for several hours and appeared confused. This testimony, taken individually and collectively, confirms the beliefs of Drs. Hain, Halfaker and Koprivica that, after touching an electrical wire, receiving a shock, and then falling backwards and hitting his head, Mr. Jester suffered a head injury, inner ear injury and emotional and mental disorders.

It is reasonably apparent, upon all the circumstances, when comparing the testimony of Mr. and Mrs. Jester, John Bunt, and the believable medical expert, that the accident was the substantial factor in leading to these mental disorders. These disorders can be fairly traced to the accident as a proximate cause. Further, and perhaps most importantly, there is no evidence to suggest, and the employer and insurer do not so suggest, that these disorders could have resulted from an environment that Mr. Jester was exposed to outside of and unrelated to his normal non-employment life.

This medical evidence, and the accompanying lay testimony, satisfies the definition of injury, especially when one compares the medical evidence here with that of the following opinions: *Cahall v. Cahall*, 963 SW2d 368 (MoApp E.D. 1998); *Bloss v. Plastic Enterprises, Inc.*, 32 SW3d 666, 671 (MoApp W.D. 2000); *Sanderson v. Portofab*, 989 SW2d 599, 601 (MoApp E.D. 1999); *Goerlich v. TPF, Inc.*, 85 SW3d 724, 730 (MoApp E.D. 2002); *Elking v. Deaconess Hospital*, 996 SW2d 712, 718 (MoApp E.D. 1999); *Thorsen v. Sachs Electric Company*, 52 SW3d 611 (Mo. App. W.D. 2001); *Chatmon v. St. Charles County Ambulance District*, 55 SW3d 451 (Mo. App. E.D. 2001).

Accordingly, after consideration and review of the evidence, I find and conclude that, on or about July 30, 2000, the employee sustained an injury by accident, which arose out of and in the course of his employment with the employer, Miltenberger Oil Company. The accident involved an electrical shock and a subsequent fall, which caused Mr. Jester to hit his head on the floor. Further, this accident caused Mr. Jester to suffer a brain injury (central nervous system injury), an inner ear injury (BPPV -- benign paroxysmal positional vertigo), mild neuro-cognitive disorder with documented difficulties in concentration and attention, and an adjustment disorder characterized by depression and anxiety.

II.

Future Medical Care

The right to medical treatment is a component of the benefits due to an injured worker under Chapter 287, RSMo. Section 287.140, RSMo entitles the worker to medical treatment as may reasonably be required to cure and relieve from the effects of the injury. The courts have construed this statute to encompass treatment, "which gives comfort [relieves] even through restoration to soundness [cure] is beyond avail." *Mathia vs. CFI*, 929 SW 2d 271, 276-278 (Mo. App. S.D. 1996, quoting, *Williams v. A.B. Chance Co.*, 676 S.W.2d 1,4 (Mo.App. W.D. 1984).

The appropriate standard of proof for allowing future medical care is whether there is a reasonable probability of the need for such treatment. All doubts are resolved in the claimant's favor. The award must be based upon reason and experience and can be supported by expert testimony, records and the claimant's testimony. The claimant is not required to present evidence of specific medical treatment or procedures that would be necessary in the future in order to be awarded future medical care. *Dean vs. St. Luke's Hospital*, 936 SW 2d 601, 603-606 (Mo.App. W.D. 1997; *Bradshaw vs. Brown Shoe Co.*, 660 SW 2d 390, 394 (Mo.App. S.D. 1983). Future medical care should not be denied, simply because the employee had reached maximum medical improvement, or the care had not been prescribed as of the hearing date. *Mathia vs. CFI*, 929 SW 2d at 276-278.

An award for future medical care does not require the court to award a pre-determined amount, but is sufficient if the order provides for "medical required in the future". *Polavarro vs. G.M.*, 897 SW 2d 63, 65-66

(Mo.App. E.D. 1995). An order which imposes on the employer-insurer the cost of "future medical treatment for the injuries sustained by [the employee] in the [work accident]" and for nursing care expenses "causally related" is not vague, indefinite or unauthorized by law. *P.M. vs. Metromedia Steakhouse Co. Inc.*, 931 SW 2d 846, 850 (Mo.App. E.D. 1996). An award for future medical is permitted when such future treatment may reasonably be required to cure and relieve from the effects of the injury which has been construed to mean treatment which gives comfort even though restoration to soundness is not likely. *Mathia*, 929 SW 2d at 277, cites omitted; Section 287.140.1 RSMo (cum. Supp. 1999). An award stating that the employer-insurer would be liable for any medical treatment in the future to relieve the effects of the injuries is sufficiently definite. *Polavarapu vs. G.M.*, 897 SW 2d at 66, *P.M. vs. Metromedia*, 931 SW 2d at 850.

After consideration and review of the evidence, I find and conclude that, as a consequence of the accident of July 30, 2000, Mr. Jester is in need of future medical care for treatment, relative to the aforementioned injuries he sustained. Notably, Mr. Jester has not received the treatment originally recommended by Drs. Hain and Halfaker, and his condition has not improved. Objective testing indicates the disorders suffered by Mr. Jester, and there is no medical evidence, which, based upon objective or diagnostic testing would contradict these disorders.

Therefore, the employer and insurer are ordered to provide Mr. Jester with treatment for his multiple injuries (brain injury, inner ear injury, mild neuro-cognitive disorder, and adjustment disorder characterized by depression and anxiety), and which is causally related to his accident of July 30, 2000. This medical treatment shall include, but not be limited to, speech therapy, BPPV rehabilitation therapy, psychological counseling, psychiatric consultations, medication regimen review, and a referral to the Department of Health for occupational therapy. Dr. Hain, Dr. Koprivica or Dr. Woodward shall direct the medical treatment, and Dr. Halfaker shall direct the psychological treatment.

III.

Permanent Disability Compensation

The parties, relying on different medical opinion, offer differing positions on the nature and extent of permanent disability suffered by Mr. Jester because of the July 30, 2000 accident. In resolving this issue, I find Mr. Jester to be credible and accept as true his complaints of pain, discomfort, and other difficulties, which include spasms, dizziness, ringing in the ears, short term memory loss, depression and inability to reason. In addition, I accept as true the restrictions and limitations that Dr. Hain, Dr. Koprivica, and Dr. Halfaker impose upon Mr. Jester.

The term "total disability" is defined under The Missouri Workers' Compensation Law as follows:

The term 'total disability' as used in this chapter shall mean inability to return to any employment, and not merely inability to return to the employment in which the employee was engaged at the time of the accident. *Section 287.020.6 RSMo 2000.*

Further, the courts in Missouri have given meaning to this term through the enunciation of several familiar principles. In *Reeves v. Kindell's Mercantile Co, Inc.*, 793 SW2d 917 (Mo. App. S. D. 1990) the court offered the following guidance,

Decisions interpreting the statutes state that "inability to return to any employment" means that the employee is unable to perform the usual duties of the employment after consideration in the manner that such duties are customarily performed by the average person engaged in such employment." [Citing authority]. "Any employment" means any reasonable or normal employment or occupation, and it is not necessary that the employee be completely inactive or inert. [Citing authority.] The central question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that physical condition.

In the present case, there is no objective basis to believe any employer would hire Mr. Jester. He has worked primarily in mechanical and farm working during his employment history. He attempted a return to work in agriculture and mechanical work with Kiman Kingsley, which was unsuccessful. Mr. Kingsley confirmed, as medical testimony from Dr. Hain and Dr. Halfaker indicated that Mr. Jester became dizzy and was unable to reason through his work process. According to Mr. Kingsley, prior to the July 30, 2000 accident Mr. Jester was an excellent worker. However, subsequent to the July 30, 2000 accident Mr. Jester was a "basket case", lacking

mentally the ability to reason and concentrate upon two things at once, and physically the ability to perform his assignments in the farming operation. In Mr. Kinglsey's view, Mr. Jester cannot now work.

Mr. Jester's difficulties generally impacted his overall sense of health, which, in turn, prevented him from adjusting to his limitations and diminishing his self worth. If he "constantly reinvents the wheel", as Dr. Halfaker states, he would expend considerable energy in merely tending to ordinary daily tasks, much less work. There is no objective evidence to indicate otherwise.

By contrast, the only evidence, which disputes the extent of disability, is that of Dr. Stillings and that of Dr. Jeff Woodward. Dr. Stillings, for reasons previously stated, lacks credibility and did not objectively qualify his diagnosis of malingering. And, while I find Dr. Woodward to be credible, he did not consider the closed head injury or mental disorders when considering Mr. Jester's employability, and the extent of Mr. Jester's permanent disability. He only considered potential electrical injuries, and these findings are incomplete, insofar as Mr. Jester hit his head, which would account for the findings by Drs. Hain, Halfaker, and Koprivica. It is therefore concluded that the considerable weight of the evidence indicates that Mr. Jester is totally disabled. See, also, *Birdsong v. Race Management*, 147 SW3d 132 (Mo. App. S.D. 2003); *Pavia v. Smitty's Supermarket*, 118 SW3d 228 (Mo. App. S.D. 2003).

Accordingly, after consideration and review of the evidence, I find and conclude that, as a consequence of the July 30, 2000 accident, considered alone, the employee is permanently and totally disabled. Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee John Jester the sum of \$202.54 per week for the employee's lifetime. The payment of permanent total disability compensation by the employer and insurer is effective as of July 6, 2004, when Dr. Koprivica examined Mr. Jester and determined implicitly that Mr. Jester had reached maximum medical improvement. (The evidentiary record does not readily identify when Mr. Jester reached maximum medical improvement. However, on July 6, 2004 Mr. Jester presented to Dr. Koprivica for examination and, without opining as to a specific date Mr. Jester reached maximum medical improvement, Dr. Koprivica determined Mr. Jester to be permanently and totally disabled, referable to the July 30, 2000 incident, considered alone. In the absence of a more definitive date, I find and conclude that Mr. Jester reached maximum medical improvement on July 6, 2004.)

In addition, in light of the aforementioned ruling, the Claim for Compensation, as filed against the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is denied.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable. The award is subject to modifications as provided by law.

Date: ___September 25, 2007_____

Made by: ___/s/ L. Timothy Wilson___

L. Timothy Wilson

*Chief Administrative Law Judge
Division of Workers' Compensation
Signed September 20, 2007*

A true copy: Attest:

___/s/ Jeffrey W. Buker_____

Jeffrey W. Buker

Director

Division of Workers' Compensation