

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

Injury No.: 04-000991

Employee: Awolowo (Nicholas) Nsane
Employer: Prairie Farms Dairy, Inc.
Insurer: Old Republic Company Co.
c/o Crawford & Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: January 2, 2004
Place and County of Accident: St. Louis City

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 July 3, 2007. The award and decision of Administrative Law Judge John K. Ottenad, issued July 3, 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 3rd 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: Awolowo (Nicholas) Nsane

Injury No.: 04-000991

Dependents: N/A
Employer: Prairie Farms Dairy, Inc.
Additional Party: Second Injury Fund (previously Vol. Dis.)
Insurer: Old Republic Company Co. C/O Crawford & Co.
Hearing Date: March 6, 2007

Before the
Division of Workers'
Compensation
Department of Labor and
Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: JKO

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: January 2, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was a cooler-dock worker for Employer who injured his head, neck and body as a whole when he slipped and fell on a wet floor, striking his head on the concrete floor.
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 (Closed head injury), Neck and Body as a Whole
14. Nature and extent of any permanent disability: Permanent total disability against Employer/Insurer from the injury in this accident
15. Compensation paid to-date for temporary disability: \$11,850.30
16. Value necessary medical aid paid to date by employer/insurer? \$22,357.83

Employee: Awolowo (Nicholas) Nsane Injury No.: 04-000991

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$628.42
19. Weekly compensation rate: \$418.95 for TTD/ \$347.05 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

\$418.95 per week for Claimant's lifetime starting 7/19/04, subject to review and modification by law

22. Second Injury Fund liability:

Previously Voluntarily Dismissed

TOTAL; \$418.95 PER WEEK STARTING 7/19/04 WITH CONTINUING WEEKLY BENEFITS AS DESCRIBED

23. Future requirements awarded: As described in the award

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jennifer J. Finley.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Awolowo (Nicholas) Nsane	Injury No.: 04-000991
Dependents:	N/A	Before the
Employer:	Prairie Farms Dairy, Inc.	Division of Workers'
		Compensation
Additional Party:	Second Injury Fund (Previously Vol. Dis.)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Old Republic Company C/O Crawford & Co. Checked by: JKO	

On March 6, 2007, the employee, Awolowo (Nicholas) Nsane, appeared in person and by his attorney, Ms. Jennifer J. Finley, for a hearing for a final award on his claim against the employer, Prairie Farms Dairy, Inc., and its insurer, Old Republic Company C/O Crawford & Co. The employer, Prairie Farms Dairy, Inc., and its insurer, Old Republic Company C/O Crawford & Co., were represented at the hearing by their attorney, Mr. Steven Sharp. The Second Injury Fund was not a party to this case because they had previously been voluntarily dismissed by Claimant. Also present and participating in the hearing was Claimant's cousin, Noble Obanii-Nwibari. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about January 2, 2004, Awolowo (Nicholas) Nsane (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.
- 2) Claimant was an employee of Prairie Farms Dairy, Inc. (Employer).
- 3) Venue is proper in the City of St. Louis.

- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$628.42, resulting in applicable rates of compensation of \$418.95 for total disability benefits and \$347.05 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$11,850.30, representing a period of time from January 3, 2004 to July 18, 2004, or 28 2/7 weeks.
- 8) Employer paid medical benefits totaling \$22,357.83.

ISSUES:

- 1) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Jay Liss, M.D., with attachments, dated October 5, 2006
- B. Deposition of David T. Volarich, D.O., with attachments, dated October 9, 2006
- C. Certified medical treatment records of Barnes-Jewish Hospital
- D. Certified medical treatment records of BJC Home Care Services
- E. Medical status reports of Crawford Healthcare Management Services
- F. Certified medical treatment records of Washington University Pain Management Center (Dr. Robert A. Swarm)
- G. Certified medical treatment records of St. John's Mercy Medical Center, Neuropsychology (Dr. Michael V. Oliveri)
- H. Certified medical treatment records of Orthopedic & Sports Medicine, Inc. (Dr. Russell C. Cantrell)
- I. Certified medical treatment records of PRORehab
- J. Certified medical treatment records of St. John's Mercy Head Injury Resource Center
- K. Certified medical treatment records of Barnes-Jewish Hospital
- L. Medical treatment records of Pain Treatment Center, Inc. (Dr. John D. Graham)
- M. Walgreens Pharmacy Prescription Profile
- N. St. Louis Community College Official Transcript issued on June 24, 2005
- O. Photographs of Claimant's Residence
- P. Social Security Administration: Notice of Decision Fully Favorable
- Q. Records of Employer: Prairie Farms Dairy, Inc.
- R. Photograph of the Claimant's wife, Marti Nsane

Employer/Insurer Exhibits:

1. Deposition of Wayne Stillings, M.D., with attachments, dated October 25, 2006
2. Deposition of Russell C. Cantrell, M.D., with attachments, dated November 8, 2006
3. Deposition of James M. England, Jr., with attachments, dated November 28, 2006

Notes: 1) Exhibits A, B, I, 2, and 3 were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence. Specifically on the Seven Day Rule objections, the party making that objection did not then request a continuance to reconvene the deposition after having had a chance to review the new opinion, and thus that objection was effectively waived.

- 2) Any stray markings or writing on the Exhibits in evidence in this case were present on those Exhibits when they

were admitted into evidence on March 6, 2007. No additional markings have been made since their admission on that date.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinion and deposition, the medical records, and the testimony of the other witness, as well as my personal observations of Claimant and the other witness at hearing, I find:

- 1) Claimant is a 42-year-old, currently unemployed individual, who last worked for Prairie Farms Dairy, Inc. (Employer) as a cooler-dock worker on or about January 2, 2004. Claimant had worked for Employer from August 28, 2000 until the date of the accident, January 2, 2004. He did attempt to return to work on or about July 22, 2004, but he was unable to remain working thereafter because of his severe headaches from the light and noise.
- 2) Claimant's cousin, Noble Obanii-Nwibari testified on Claimant's behalf. He testified that Claimant was born in Nigeria and lived there from birth, October 11, 1964, until 1996, when Claimant fled from Nigeria because of political persecution. Claimant stayed at a refugee camp in The Benin Republic for three years before arriving in the United States at the end of the summer of 1999. Claimant is currently not a US citizen but an Alien Resident. In Nigeria, Claimant finished high school and attended 3 years of post-high school education. Claimant divorced his first wife and remarried Marti Nsane (Exhibit R). He has two children from the prior marriage: an 11-year-old son, Nwalu Nsane, and 9-year-old daughter, Lebutor Nsane, who both live with his current wife in Nigeria.
- 3) Mr. Obanii-Nwibari testified that Claimant's first job was working in a factory for LUCO Mop Co. Claimant eventually moved into his own apartment on Chippewa, and he obtained a driver's license and bought a car. Besides working, Claimant also attended classes at St. Louis Community College-Forest Park in computer science. Mr. Obanii-Nwibari testified that Claimant had no mental health problems prior to the accident. Claimant lived independently. He paid his bills on time, did his own laundry, shopped and cooked, and cared for his personal hygiene. Claimant enjoyed reading and working on his computer. Mr. Obanii-Nwibari testified that he and Claimant kept in close contact, and Claimant respected him as a father. In addition, Claimant also socialized with friends, and he was good at interacting and working with people.
- 4) According to the medical report from Barnes-Jewish Hospital (Exhibit C), on January 2, 2004, Claimant was dropped off by his manager at the hospital because Claimant slipped on a wet floor at work, fell, hit the back of his head on the floor, and had a lapse of consciousness. It was unknown as to the length of time Claimant was unconscious. Upon admission to the hospital, Claimant was awake, alert and oriented, and his vitals were normal. His major complaints were: a headache and neck pain, a decrease in hearing out of his left ear, and pain in his left TMJ. Claimant's headache and neck pain were treated with medication, and his neck and head were stabilized with a C-collar.
- 5) Claimant had a head CT taken on January 2, 2004, which showed no acute intracranial event. But on January 3, 2004, nine hours later, a CT of the maxillofacial region showed a nondisplaced longitudinal fracture of the left temporal bone which extends into the left carotid canal. The CT report also noted, "There is associated fluid in the left mastoid air cells with a small amount of soft tissue attenuation in the left external auditory canal consistent with hemotympanum on clinical examination." There was also a contrecoup right frontal lobe contusion with some intracranial hemorrhage. Claimant was transferred to the neurosurgical intensive care unit for further observation on January 3, 2004, and then transferred to the floor on January 5, 2004 when he became neurologically and hemodynamically stable. However, Claimant continued to complain of headaches and neck pain, which were treated with medication. The occupational therapist evaluation report, dated January 5, 2006, documented that Claimant's short delay recall was severely impaired with respect to his memory. A physical therapist evaluation report, also dated January 5, 2004, reported that Claimant's problems included: impaired safety with home mobility and with community mobility; decreased independence with mobility, with transfers, and with gait; instability with standing in home; and need for family instruction. Claimant was discharged on January 6, 2004 with the plan for physical and occupational therapy at home with home health.

- 6) The treatment records from BJC Home Care Services (Exhibit D) indicated that Claimant received physical therapy during the period of January 9, 2004 through March 8, 2004. During this period, the physical therapist noted Claimant's persisting severe headache and pain in the head, neck, and jaw. The therapist also noted that the headache increased with noise and light stimulus. The physical therapist consistently documented Claimant's memory loss, and intellect and problem solving deficits. Claimant's balance and gait, however, showed improvement. Claimant also received occupational therapy during this time. Throughout this period, Claimant was reported as having poor short term memory and requiring assistance out of the house. Both therapists requested a social work and skilled nurse assessment for Claimant. A social work assessment, dated January 19, 2004, indicated that Claimant was dependent on others for instrumental activities of daily living. It noted that Claimant was experiencing a decreased ability to manage activities of daily living, and was distressed by illness/disability. They concluded that it was unsafe for Claimant to be left alone.
- 7) Employer hired a nurse case manager to oversee Claimant's medical treatment for this injury. According to the status reports from the Crawford Healthcare Management Services (Exhibit E), Claimant saw his treating physician, Dr. Todd Stewart, a neurosurgeon, on January 22, 2004. Dr. Stewart diagnosed Claimant with a closed head injury, and he indicated that the Claimant's memory was most affected at that time. He also said it could take several months for his short term memory to return. Dr. Stewart reported that Claimant's neck pain and headaches were the result of severe neck stiffness from his injury. Dr. Stewart recommended a series of trigger point injections for pain from the Washington University Pain Clinic, and he decided to discontinue physical therapy but continue occupational therapy. The February 3, 2004 report noted that according to the Medical Disability Advisor, "Individuals with a cerebral contusion may have impaired balance, motor control deficits, and may present with cognitive deficits." The status reports also document that Claimant saw Dr. Stewart again on February 19, at which point Dr. Stewart indicated that Claimant's cervical x-rays were within normal limits, and he had no treatment to offer Claimant. Claimant's chief complaints were intermittent headaches. Dr. Stewart recommended further pain management, and a neuropsychiatry examination for a cognitive assessment to determine if there are any permanent damages, as well as if there is any treatment available to assist Claimant with his memory and cognitive issues. The reports from this nurse case manager also confirmed Claimant's repeated complaints of noise and light, his desire to get back to school and work, and his inability to read for an extended period or work on the computer.
- 8) Medical records from the Washington University Pain Management Center (Dr. Robert A. Swarm) (Exhibit F), document Claimant's initial visit was on February 3, 2004. Dr. Swarm's initial consultation note indicated that Claimant seemed alert and appeared to be "a good historian." Claimant complained of neck pain and headaches made worse by noise and light. Dr. Swarm's diagnoses included muscular/myofascial/tension headache, cervical spinal enthesopathy, and status post fall with closed head injury with left temporal bone fracture. Claimant received local anesthetic trigger point injections on that same day. Dr. Swarm saw Claimant again on March 2, 2004, at which point the doctor noted Claimant's improvement from one month ago. He felt the trigger point injections were effective for the neck pain/muscle stiffness. Claimant still complained of headaches, a feeling of water in his ear, and dizziness. Dr. Swarm's impressions were the same as from the previous visit, and he recommended physical therapy and medication. Despite the typed-written notes from Dr. Swarm indicating Claimant was "a good historian," the hand-written notes from each of those dates contained specific notations that Claimant suffered from "memory loss" since the accident.
- 9) The medical report from Dr. Michael V. Oliveri at St. John's Mercy Medical Center Department of Neuropsychology (Exhibit G), documents Claimant had a neuropsychological evaluation on March 15, 2004. Based on Dr. Oliveri's clinical review, Claimant indicated significant noise sensitivity and instability when standing. Claimant felt incapable of doing typical activities, including difficulty with basic reading. During the examination, Claimant complained that the volume of conversational speech was excessive to him. On the basis of the results of a number of neurocognitive tests, Dr. Oliveri reported that Claimant's cognitive skills and nonverbal concept information were limited, which was inconsistent with Claimant's educational background. He also raised the possibility of inconsistent or suboptimal effort because Claimant exhibited to him atypical findings on recognition

memory measure of digit sequences. Overall, Dr. Oliveri reported that Claimant's atypical neurocognitive and neurobehavioral presentation in all probability reflects an invalid representation of his current status, which meant there was a prospect of symptom magnification. However, the doctor also indicated that Claimant's pain status, including intractable headaches, could well be a mitigating factor, even though it does not otherwise explain the neurocognitive test findings. Finally, Dr. Oliveri's diagnosis was that Claimant was at risk for the early neurobehavioral consequences of traumatic brain injury, and the findings in this evaluation do not rule out residual brain-behavior dysfunction. Claimant was recommended for pain management and neurological consultation for further contributory effects of pain issues.

- 10) Claimant next came under the care of Dr. Russell Cantrell at Orthopedic and Sports Medicine (Exhibit H). Dr. Cantrell first examined Claimant on March 18, 2004, at which time Claimant was complaining of neck pain, headaches and memory loss. The note confirms that Claimant had a terry cloth pulled down on his forehead to minimize the light exposure to his eyes and he requested that the doctor lower the volume of his voice, since noise and light worsened his headaches. Dr. Cantrell diagnosed Claimant as status post a closed head injury with associated temporal bone fracture and frontal lobe contusion. He acknowledged that headaches and memory deficits were not uncommon for these diagnoses. He also found neck pain from a cervical strain that may be contributing to the headaches. Dr. Cantrell recommended medication and physical therapy.
- 11) On April 1, 2004, after reviewing Dr. Oliveri's report, Dr. Cantrell began to document apparent inconsistencies in Claimant's balance and sensitivity to light and sound, which he did not mention in the first report. He continued Claimant's physical therapy at PRORehab, instead of home therapy. In his report, dated April 14, 2004, Dr. Cantrell indicated that some of Claimant's headache complaints may be directly related to the blow to his head rather than from his neck, and he ordered medication for his pain and recommended physical therapy to continue. Claimant's complaints appeared to be improving with the physical therapy. By May 6, 2004, Claimant reported improved neck symptoms, but increased headache complaints. Dr. Cantrell continued the medication and physical therapy, and also ordered a driving evaluation.
- 12) Treatment records from PRORehab (Exhibit I) document the physical therapy that Claimant received from April 2, 2004 through May 26, 2004. Interestingly, the physical therapist noted on April 2, that the patient displayed some inconsistencies in gait patterning during treatment session because while there were no signs of loss of balance with informal assessment, there were reaching reactions and loss of balance to the left during formal assessment. In addition, although Claimant reported that bright light and loud noises increased his headaches and overall pain presentation (including covering his eyes with a hat and requesting reduced speech volume), Claimant was able to lie supine on a treatment table with a fluorescent light on and to ride the bicycle in the treatment gym with the constant noise of people talking. Despite the therapist initially characterizing these as inconsistent, throughout the period of physical therapy treatment, the Claimant's condition fluctuated between "good" days, when he was noted as being responsive to treatment and had improvements in his physical capacity, and "bad" days, when his performance decreased with poor concentration, poor gait and safety concerns. The bad days were usually noted in conjunction with Claimant's inability to sleep the previous night and an increase in the severity of his headaches. Despite the sporadic bad days, Claimant showed improvement in gait, which means he displayed normal stride and cadence with limited loss of balance or safety issues. The reports indicated that generally Claimant was "very motivated with the rehabilitation program, showing an eagerness to progress with strengthening, conditioning, and balance training activities." The report also indicated that Claimant recovered full cervical range of motion without subjective reports of discomfort, and full and symmetrical strength throughout the bilateral upper extremities in key muscle patterns.
- 13) The Driver Assessment Report from the St. John's Mercy Head Injury Resource Center (Exhibit J) documented that Claimant was assessed for his driving ability on May 28, 2004. Claimant reported memory difficulties, headaches, problems with the left ear, anxiety, and difficulty reading because of headaches. The driver performance test was discontinued due to "cognitive difficulties of decreased memory for instructions, speed of processing, increasing anxiety, and possible Right/Left

confusion.” With respect to the “on road evaluation,” almost all of the areas observed were noted as “needs improvement,” including attention, reaction time, and safety-judgment, to list a few. The evaluator noted Claimant’s display of anxiety throughout different parts of the assessment. The evaluator also noted that Claimant “would rub his forehead and wince his eyes as if experiencing headaches” to which Claimant confirmed that the intensity and headaches had increased while driving due to increase in concentration. In conclusion, the evaluator reported that it was not appropriate for Claimant to return to driving at this time due to a high level of anxiety, and the evaluator also recommended that Claimant see a physician specifically regarding issues of anxiety.

- 14) On June 2, 2004, after a review of the driving assessment, which indicated anxiety issues, Dr. Cantrell referred Claimant to see Dr. Stillings for neuropsychological testing to determine the degree to which his head injury has affected his overall cognitive status. Claimant continued to complain of headaches and sensitivity to loud noises, despite reporting that his musculoskeletal complaints had improved with therapy.
- 15) Claimant saw Dr. Wayne A. Stillings (Exhibit 1) for a neuropsychological evaluation on June 29, 2004. Dr. Stillings diagnosed Claimant with malingering and histrionic personality features based on an MMPI-2 test, as well as his clinical evaluation. Dr. Stillings believed he had recovered from his closed head injury. Dr. Stillings did not believe there were any neuropsychiatric illnesses, including any memory problems, caused by the January 2, 2004 injury. He believed Claimant was able to return to work without restrictions, and did not think any other treatment or testing was needed.
- 16) Claimant returned to Dr. Cantrell for a visit on July 13, 2004. (Exhibit H) On July 13, Dr. Cantrell provided Claimant with the suggestion that Claimant should “resume his regular duty activities” based on Dr. Stillings’ finding that Claimant had no neuro-psychiatric illness.
- 17) Medical records from Barnes-Jewish Hospital (Exhibit K), document that Claimant came to the emergency room on July 22, 2004 for complaints of headaches, which Claimant indicated have “been there since my accident and worse since Monday (3 days) when he started back to work.” Claimant was discharged after receiving medication treatment for headaches on the same day.
- 18) Claimant last saw Dr. Cantrell on July 27, 2004. (Exhibit H) Dr. Cantrell recommended a second opinion examination with Dr. Graham and believed he was “approaching maximum medical improvement.” Although Dr. Cantrell acknowledged Claimant’s continuous headache complaints and referred Claimant to Dr. Graham for pain management and possible adverse side effects to pain medication, he was still of the opinion that Claimant was capable of returning to his regular duty activities without any restrictions. Claimant continued to complain of headaches, and sensitivity to the volume of the Doctor’s voice. He also reported his failed attempt to go back to work because of his residual pain complaints.
- 19) Dr. John D. Graham (Exhibit L) evaluated Claimant on August 4, 2004 and again on September 27, 2004. Claimant primarily complained of headaches. Dr. Graham reports a number of alleged inconsistencies which he apparently discovered while extensively “questioning” Claimant on various specific parts of his case. In reality, it seemed as if Dr. Graham was cross-examining Claimant at times. For instance, Dr. Graham questioned him quite extensively about his complaints related to taking Neurontin. Claimant reported it made him feel “drunk.” Dr. Graham challenged that statement, and Claimant responded that he did not understand why Dr. Graham did not see his complaints about Neurontin in the records. Dr. Graham said he only saw where Dr. Cantrell reported a complaint of “drowsiness” from Darvocet. When presented with this, Claimant said the medication made him feel “strong and excited,” to which Dr. Graham responded that this was not the same thing as feeling “drunk.” [In reality, Dr. Cantrell’s July 27, 2004 report contains the exact same complaints from Claimant of Neurontin making him feel “drunk”, and then when asked to elaborate on that, “excited.”] It appears, therefore, that Dr. Graham’s cross-examination and search for conflicts was somewhat disingenuous in that he reports inconsistencies he manufactured by challenging Claimant on alleged inconsistencies in the record that quite simply were not there.
- 20) Overall, Dr. Graham found that Claimant was status post a head injury and he further noted that his

headache complaints could be post concussion. He allowed Claimant to continue taking Neurontin for pain because Claimant indicated that it worked. Dr. Graham remarked, "while the patient gets a complaint of headache that may be a post concussion headache, he certainly presents with behavior that is not consistent with any known physiologic process." Similar to Dr. Cantrell's recommendation, Dr. Graham also found that Claimant should be able to return to employment without restriction. Dr. Graham noted his suspicions about Claimant's signs of symptom magnification based on the fact that Claimant recited some facts more readily than others despite his alleged memory difficulties. Dr. Graham anticipated for Claimant to discontinue the pain medication within 6-12 weeks upon his follow-up visit.

- 21) Dr. Graham saw Claimant again on September 27, 2004. (Exhibit L) Although Claimant indicated to Dr. Graham that he is unable to function now due to his headaches, Dr. Graham's opinion was that there was a "non-physiologic and non-organic cause to his headaches." Dr. Graham questioned the credibility of Claimant's complaints because Claimant's behaviors and symptoms were inconsistent with his post-concussion status. Dr. Graham clarified that a patient like Claimant, who had an anti-inflammatory treatment for approximately 8-9 months out from injury date, would be able to function in a normal manner. Dr. Graham opined that Claimant has reached maximum medical improvement, and he can return to work without restriction. He did not believe any further treatment was needed. Dr. Graham referenced Drs. Stillings and Oliveri's reports to support his own opinion.
- 22) In connection with this injury, Employer paid \$22,357.83 in medical benefits. Employer also paid Claimant temporary total disability (TTD) benefits in the amount of \$11,850.30, representing a period of time from January 3, 2004 through July 18, 2004, or 28 2/7 weeks.
- 23) Records of the Social Security Administration, (Exhibit P) document that Claimant was entitled to disability commencing January 2, 2004, since Claimant has been unable to engage in any substantial gainful activity as of that time. The SSA's conclusion is that, "Based upon the claimant's residual functional capacity and vocational factors, there are no jobs existing in significant numbers that he can perform."
- 24) The deposition of Dr. Russell C. Cantrell was taken on November 8, 2006 by Employer to make his opinions in this case admissible at trial. (Exhibit 2) Dr. Cantrell is board certified in physical medicine and rehabilitation, and he works with Orthopedic and Sports Medicine, Inc. Dr. Cantrell examined and treated Claimant throughout the period of March 18, 2004 through July 27, 2004.
- 25) Dr. Cantrell testified that overall he noted some inconsistencies in Claimant's presentation of his complaints and problems. The doctor noted his perceived inconsistency regarding Claimant's request that his voice be lowered, as well as Claimant's indication that he could not read. Dr. Cantrell testified that he never got the impression that Claimant could not read because of the headaches, rather he just thought it was because he did not want to do it. Dr. Cantrell characterized the initial examination as unremarkable from an objective neurologic standpoint. Dr. Cantrell opined that he was unable to determine the severity of Claimant's head injury because of inconsistencies in Claimant's subjective complaints and his presentation of the symptoms. In his deposition, Dr. Cantrell acknowledged that headaches and memory deficits are not uncommonly seen after a closed head injury. He also noted patients could have gait pattern abnormalities, but he felt Claimant's were inconsistent. He opined that Claimant's memory loss seemed to be worsening over time, which was inconsistent with this type of injury. He agreed that sensitivity to light and sound could be the result of a closed head injury, although it is not very common. He agreed that short term memory deficits were the most common memory deficits from a closed head injury, but he further admitted that long term memory deficits were also a possibility, just less commonly seen. He confirmed that there are cases where patients never fully recover memory deficits.
- 26) Dr. Cantrell opined that Claimant sustained a 5% permanent partial disability of the person as a whole based on the diagnosis of a closed head injury with associated temporal bone fracture, and an additional 2% permanent partial disability of the person as a whole based on the diagnosis of a cervical strain.

- 27) The deposition of Dr. Wayne A. Stillings was taken on October 25, 2006 by Employer to make his opinions in this case admissible at trial. (Exhibit 1) Dr. Stillings is board certified in psychiatry and neurology. Dr. Stillings examined Claimant one time, on June 29, 2004, at the request of Employer, and provided no medical treatment.
- 28) Dr. Stillings took a history from Claimant, and indicated that he was trying to make himself seem like he had suffered from long-term memory loss because he was unable to remember historical facts such as any of the jobs he held in Nigeria. Dr. Stillings pointedly opined in his deposition that long-term memory loss is not an acquired brain injury. In fact, he said, "long-term memory is always preserved in head injuries." Dr. Stillings went on in his deposition to point out other inconsistencies in Claimant's responses, which included the mistaken name of the doctor who prescribed him pain medication, and the fact that Claimant demonstrated he was capable of providing historical information even though he attributed his confusion to memory loss.
- 29) Dr. Stillings opined that Claimant did not sustain any kind of an acquired brain injury as a result of this work injury because there was no abnormal finding about his cognitive function. Dr. Stillings supported his opinion with his findings based on the MMPI-2 test as well as some other tests that he administered. He believed the tests showed that Claimant had the tendency to overmagnify his physical and psychological distress. He opined Claimant was malingering or exaggerating his short-term memory deficits. Based upon the review of medical records, test results, and exam, Dr. Stillings diagnosed Claimant with malingering, histrionic personality features, status post closed head injury recovered, and functioning well with minimum symptoms. He opined Claimant could work without restriction, needed no treatment, and was at maximum medical improvement.
- 30) The deposition of Dr. David T. Volarich, D.O. was taken on October 9, 2006 by Claimant to make his opinions in this case admissible at trial. (Exhibit B). Dr. Volarich is board certified in occupational preventative medicine, as an independent medical examiner, in nuclear medicine and in nuclear cardiology. He examined Claimant for the purpose of an independent medical examination at the request of Claimant's attorney and he provided no treatment.
- 31) Dr. Volarich reviewed Claimant's history based in part from prior medical records and in part from Claimant. Claimant complained of ongoing headaches, neck pain, memory difficulties, and limited hearing in the left ear. He also complained of increased problems with light and sound, as well as being aggravated when too many questions are asked of him. Dr. Volarich found a problem with Claimant's inconsistent gait, which meant Claimant appeared to stagger and list to the right side. Dr. Volarich believed this problem was attributable to Claimant's central nervous system (balance) problems from this injury. He also found restricted range of motion in Claimant's cervical spine. Dr. Volarich diagnosed Claimant with a closed head trauma including a left temporal bone skull fracture through the mastoid air cells and left external auditory canal with hemotympanum with associated disequilibrium syndrome. He also diagnosed a brain contusion of the bilateral frontal lobes, right worse than left with associated headaches, aggravation of cervical spine degenerative joint disease at C5-6, neurocognitive defects and psychiatric illness. He opined that the work accident on January 2, 2004 was the substantial contributing factor causing these injuries, and the associated difficulties with memory and headaches. He found that Claimant had reached maximum medical improvement, and placed physical restrictions on Claimant's ability to work. He provided a rating of 20% permanent partial disability of the body as a whole rated at the central nervous system due to the closed head trauma, and a 10% permanent partial disability of the body as a whole rated at the cervical spine due to the aggravation of degenerative joint disease at C5-6, which accounts for his myofascial pain and lost motion. Finally, Dr. Volarich gave the opinion that the combination of Claimant's disability creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added. He deferred providing any disability rating or further recommendations regarding the neurocognitive deficits or psychiatric illness from this injury.
- 32) The deposition of Dr. Jay L. Liss was taken on October 5, 2006 by Claimant to make his opinions in this case admissible at trial. (Exhibit A) Dr. Liss is a psychiatrist, board certified in psychiatry and neurology since 1974. Dr. Liss examined Claimant on July 16, 2005 for any psychiatric consequences

from the work accident on January 2, 2004. Dr. Liss acknowledged at his deposition that Claimant was accompanied by Mr. Obanii-Nwibari. Dr. Liss said that Claimant needed his companion's assistance to complete the questionnaire given by the doctor.

- 33) Dr. Liss reviewed Claimant's medical records, and he acknowledged that Claimant suffered a closed head injury, which included a fracture on the left and brain damage and bleeding on the right side, as a result of his fall on January 2, 2004. Dr. Liss administered the Beck Depressive Inventory, the Short Michigan Alcohol Screening Test, the Beck Anxiety Inventory, and the Post Trauma Stress Disorder Questionnaire, which he indicated in his deposition are routine tests for identifying psychiatric symptoms and extrapolating a clinical diagnosis. These test results showed that Claimant was seriously depressed, also with severe anxiety, and intense psychological stress exposure to internal or external cues of the traumatic event. Dr. Liss acknowledged in his deposition also that these tests are administered through questionnaires. Dr. Liss diagnosed Claimant with post-closed head injury and postconcussion syndrome complicated by cognitive dysfunction and complications of head injury. He explained that Claimant is incapable of processing information at a reasonable level.
- 34) Additionally, Dr. Liss diagnosed no personality disorder, but there was major stress in Claimant's life as a result of his disability. Overall, Dr. Liss gave Claimant a GAF number of 50, which is a severe level denoting neurological disability, meaning a person may need intensive treatment or there is no treatment available. Dr. Liss opined that the accident on January 2, 2004 was the substantial contributing factor causing Claimant to sustain a permanent injury which causes him to be 100% permanently totally disabled. Finally, Dr. Liss opined that Claimant would not be able to hold a job in the open labor market based on his closed head injury and its subsequent consequences of cognitive dysfunction.
- 35) In his report and deposition, Dr. Liss refuted the opinions of Drs. Oliveri and Stillings. Dr. Liss acknowledged that psychological tests evaluating brain function are naïve, primitive and subjective as well. Thus, Dr. Liss refuted Dr. Oliveri's finding that Claimant's complaints had no organic basis by pointing out that many diagnoses of diseases once thought to be just mental, now have a physical and neurological basis, including posttraumatic stress disorder. Additionally, Dr. Liss pointed out that Dr. Stillings' diagnosis of Claimant's malingering is inaccurate because "true diagnosis of malingering can only be used when there is a background personality related to antisocial or litigious personalities," none of which are shown in Claimant.
- 36) The deposition of James M. England, Jr., was taken on November 28, 2006 by Employer to make his opinions in this case admissible at trial. (Exhibit 3) Mr. England is a certified rehabilitation counselor who evaluates whether people are employable and assists people with obtaining employment that fits within the restrictions based on their impairments. He evaluated Claimant on October 20, 2006 to determine whether Claimant was able to return to work.
- 37) Mr. England reported that his evaluation of Claimant was "probably one of the strangest evaluations" he had ever seen in his 33 years of doing evaluations, because Claimant kept answering, 'I don't know,' to almost every question. Claimant reported sensitivity to light and sound, and kept a ball cap pulled down over his eyes for much of the meeting. Mr. England tried to give Claimant the Wide-Range Achievement Test, which included a word recognition test. Claimant, however, was only able to read the letters of the alphabet. Mr. England stopped the test because Claimant was unable to read the basic words. Mr. England concluded that he seemed to have no interest in applying himself.
- 38) After his review of Claimant's medical reports, Mr. England commented on the "dichotomy" of the opinions, ranging from Dr. Stillings' opinion that Claimant could return to work without any restrictions, to Dr. Volarich's opinion that Claimant had certain restrictions, and to Dr. Liss' opinion that Claimant was 100% disabled. Mr. England interestingly distinguished between the different medical opinions by noting that although there was no restriction from the neuropsychiatric standpoint per Dr. Stillings, there were restrictions from the physical standpoint per Dr. Volarich. Thus, Mr. England opined that based on Dr. Stillings and the treating doctors, he could essentially go back to the same job he was doing before this injury. Based on Dr. Volarich's restrictions, Claimant would not be able to return to his prior work which required heavy lifting, but he would be able to obtain "sedentary to light service employment." However,

Mr. England acknowledged that based on Dr. Liss' findings, Claimant would be totally disabled.

- 39) During cross-examination, when Mr. England was asked if Claimant would be employable in any capacity based on his presentation at the meeting, he admitted that Claimant would not be employable in any sense based on his presentation, behavior, and inability to answer simple questions.
- 40) Mr. Obanii-Nwibari described the differences in Claimant from before the injury and at the present time. Before the injury, he described Claimant as a neat person, who paid all of his bills on time. He said Claimant had furnishings, a television, gym, and a computer, scanner and printer that he used. He said Claimant took care of himself, shopping, cooking and doing his own laundry. He had friends and socialized. He had a driver's license and owned an automobile. He had a job and went to school. Now, since the injury, "he cannot do anything." Mr. Obanii-Nwibari said Claimant cannot watch television, and friends cannot talk to him because he thinks they are shouting at him. He cannot carry on normal conversations anymore. He cannot cook because Mr. Obanii-Nwibari witnessed him burning food on a stove due to lack of attention. He does not use his computer and cannot take care of his housework. Mr. Obanii-Nwibari, and his family and friends, check in on Claimant, bring him food, and generally take care of him. Claimant does no shopping or cleaning. He is absent-minded, not coordinated, and unorganized. Mr. Obanii-Nwibari even said he is careless with dressing. He confirmed that Claimant now has problems reading, writing and with his balance.
- 41) As further evidence to bolster his testimony regarding Claimant's current abilities, Mr. Obanii-Nwibari identified the photographs of Claimant's apartment (Exhibit O) as having been taken 2 to 4 months ago. They show tables and counters piled with items and trash lying all over the floor. Papers, books, pill bottles and clothes are strewn all over the floor, on chairs, and on the weight bench. Essentially, they show what Mr. Obanii-Nwibari was describing in terms of Claimant's inability to care for himself, like he used to be able to do.
- 42) Claimant's presentation at hearing was quite memorable. From the time he entered the courtroom until the time he left, he presented a consistent and credible picture of someone who was in pain and had serious residual problems from this injury at work. He walked slowly and deliberately as he moved into his seat and around the room. When sitting at the counsel table, he kept his head down and eyes covered the whole time. In the witness chair, he kept his baseball hat pulled down over his eyes indicating that the bright lights bothered him. He also regularly had a finger in one of his ears as if to cut down on the noise. He appeared nervous, pulling on his pocket or his pants repeatedly while being questioned. Consistent with the prior indications in the medical records that people asking him a lot of questions bothered him, I observed him banging his foot rather obviously on the floor as he became more agitated with more questions. He was also visibly crying or sobbing at times as he was questioned on the things he cannot do anymore because of the injury.
- 43) Claimant testified that he did not know his age or date of birth, but he knew he was born in Nigeria and knew he lived on Spring. He said he worked at Pevely and used to have a car, but he has not driven in the past year or two. He did not remember injuring himself, and thinks he was healthy before. He said Noble brings him food. He testified he has no friends, and "everybody comes to laugh at him." He does not like the sun or noise. He said he has pain everywhere, and he does not do a lot of things, which is why people don't like him. He said he does not read now. He does not use the computer because the screen is too bright. He said that if not for Noble, he does not know what would have happened to him, because Noble gives him food, money and clothes.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the testimony of the other witness, the expert medical opinions, the vocational opinion, and the medical records, as well as my personal observations of Claimant and the other witness at hearing, and based upon the applicable laws of the State of Missouri, I find: As a result of the January 2, 2004 accident, which arose out of and in the course of his employment, Claimant sustained a compensable injury to his head (closed head injury), neck and body as a whole. As a result of the

injuries to his head (closed head injury), neck and body as a whole, adequately described in the records and reports of Dr. Cantrell, Dr. Swarm, Dr. Oliveri, Dr. Volarich and Dr. Liss, Claimant continued to have pain, headaches, increased sensitivity to light and sound, cognitive (memory) deficits, and some limited motion in the neck.

Issue 1: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo.App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Under **Mo. Rev. Stat. § 287.020.7 (2000)**, “total disability” is defined as “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.” The test for permanent total disability is claimant’s ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. ***Searcy v. McDonnell Douglas Aircraft Co.***, 894 S.W.2d 173 (Mo.App.E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). A claimant is deemed to have lost all of his marketable skills and is entitled to total disability if the claimant “can only do rudimentary tasks with reduced coordination for limited periods, possesses only borderline intelligence, and has significant problems communicating.” ***Petar Grgic v. P&G Construction***, 904 S.W.2d 464, 467 (Mo.App.E.D. 1995).

In reviewing and weighing the evidence in this case, it is important to remember that according to **Mo. Rev. Stat. § 287.800 (2000)**, “All of the provisions of this chapter shall be liberally construed with a view to the public welfare...” All reasonable doubts as to an employee’s right to compensation should be resolved in favor of the employee. ***Wolfgeher v. Wagner Cartage Service, Inc.***, 646 S.W.2d 781, 783 (Mo. 1983). Additionally, the Court in ***Kelley v. Banta & Stude Construction Co., Inc.***, 1S.W.3d 43 (Mo.App. E.D. 1999) noted, “where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.”

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant and the other witness at hearing, I find that Claimant is permanently and totally disabled under the statute against Employer as a result of the January 2, 2004 injury.

In arriving at this conclusion it is necessary to make findings, not only on the credibility of Claimant and the other witness, but also to weigh the medical evidence and the expert opinions to determine who among them provided the most competent and persuasive evidence regarding the nature and extent of Claimant’s disability from this injury.

There is very little dispute in the records and doctors’ opinions about the actual diagnosis of Claimant’s physical condition following this injury on January 2, 2004. I find that Dr. Cantrell, Dr. Swarm, and Dr. Volarich all essentially agree that Claimant sustained a closed head trauma including a left temporal bone skull fracture through the mastoid air cells and left external auditory canal with hemotympanum. He also suffered a brain contusion of the bilateral frontal lobes, right worse than left with associated headaches, and aggravation of cervical spine degenerative joint disease at C5-6. The real issue becomes the effect these injuries have had on his ability to function and whether his continuing complaints and problems are related to this injury and these diagnoses.

Upon first glance at the evidence, I was struck by the vast dichotomy of opinions from the doctors and experts regarding Claimant’s condition and continuing complaints. On one side there appeared to be Drs. Stillings, Cantrell, Graham, and Oliveri, all essentially concluding that Claimant was faking his complaints (malingering) and he was essentially able to go back to work without any restrictions. On the other side then were Drs. Liss and Volarich indicating that Claimant was truthful with his presentation, had real continued problems and was essentially unable to work in his present condition related to this injury on January 2, 2004. A detailed review of these opinions in conjunction with the medical treatment records, and a comparison of Claimant’s testimony against the histories and complaints provided to the various medical providers cleared up the issue and provided direction for the decision in this case.

Whether or not Claimant is able to function and work in the open labor market in this case, is determined primarily by whether or not I find he has a neurocognitive dysfunction with memory deficits and psychiatric illness related to this injury. In that respect, there were two psychiatric experts’ deposition opinions submitted into evidence: Dr. Liss for Claimant and Dr. Stillings for Employer. Dr. Liss opined Claimant was totally disabled based on his injury and cognitive

dysfunction. Dr. Stillings concluded Claimant was malingering and able to work without restrictions in the open labor market. Based on all of the evidence presented, including Claimant's testimony and the medical treatment records, I find Dr. Liss' opinion more competent, credible and persuasive than that of Dr. Stillings.

The opinions offered by Dr. Stillings, as well as the reported findings from his examination and testing, quite frankly are inconsistent with the findings in the medical treatment records and even the opinions of other physicians who testified on behalf of Employer. Dr. Stillings' opinion that Claimant has no neuropsychiatric illness or memory problems is in contradiction with other medical reports, which indicated some type of neurological complications. All the previous doctors recommended neurological assessment because they acknowledged the neurological problems, and they also recognized decreased cognitive function, which required both physical and occupational therapy. The reports from the physical and occupational therapists all indicate issues with memory loss and anxiety. Thus, I do not find Dr. Stillings' report to be credible because it contradicts the rest of the medical reports which consistently indicated some type of brain injury resulting in Claimant's decreased cognitive function.

Additionally, Dr. Stillings opined, quite pointedly, in his deposition and report that long-term memory loss is not an acquired brain injury. In fact, he said, "long-term memory is always preserved in head injuries." He used this opinion to support his contention that Claimant was a malingerer because he was indicating an inability to remember historical facts about his past. Dr. Stillings' opinion in this regard was directly contradicted by Dr. Cantrell, who opined in his deposition that short term memory deficits were the most common memory deficits from a closed head injury, but he further admitted that long term memory deficits were also a possibility, just less commonly seen.

On the other hand, the findings and opinions of Dr. Liss are consistent with Claimant's credible presentation at hearing, with the credible testimony of Mr. Obanii-Nwibari, and more importantly with the medical treatment records, including the physical and occupational therapists' notes. The complaints and problems Claimant presented to Dr. Liss, and which are recorded in his report, are consistent with his presentation at numerous prior examinations, as well as consistent with the way he presented at hearing. They are likewise consistent with the description of Mr. Obanii-Nwibari of Claimant's ability to function at the current time. I was also persuaded by Dr. Liss' discussion of why Dr. Stillings' diagnosis of malingering was inaccurate in this case. Dr. Liss pointed out that Dr. Stillings' diagnosis of Claimant's malingering is inaccurate because "true diagnosis of malingering can only be used when there is a background personality related to antisocial or litigious personalities." Claimant did not show any prior tendency toward malingering. Before his injury, he was a hard worker who also was going to school to better himself. Taken as a whole with the testimony and medical evidence, the opinion of Dr. Liss was more competent, credible and persuasive than that of Dr. Stillings.

Even setting aside the opinion of Dr. Stillings, it is true that there were other physicians who also had similar opinions that Claimant was a malingerer. Dr. Graham, for instance, was very strong in his opinion that "while the patient gets a complaint of headache that may be a post concussion headache, he certainly presents with behavior that is not consistent with any known physiologic process." He apparently arrived at this conclusion after extensively "questioning" Claimant on various specific parts of his case. In reality, it seemed as if Dr. Graham was cross-examining Claimant at times. For instance, Dr. Graham questioned him quite extensively about his complaints related to taking Neurontin. Claimant reported it made him feel "drunk." Dr. Graham challenged that statement, and Claimant responded that he did not understand why Dr. Graham did not see his complaints about Neurontin in the records. Dr. Graham said he only saw where Dr. Cantrell reported a complaint of "drowsiness" from Darvocet. When presented with this, Claimant said the medication made him feel "strong and excited," to which Dr. Graham responded that this was not the same thing as feeling "drunk." [In reality, Dr. Cantrell's July 27, 2004 report contains the exact same complaints from Claimant of Neurontin making him feel "drunk", and then when asked to elaborate on that, "excited."]

It appears, therefore, that Dr. Graham's cross-examination and search for inconsistencies was somewhat disingenuous in that he reports conflicts he manufactured by challenging Claimant on inconsistencies in the record that quite simply were not there. When the major focus of the doctor's examination seems to be the discovery of alleged inconsistencies that at least in this one instance were manufactured by the doctor's mischaracterization of other doctor's records, I find that Dr. Graham's report and conclusions are not credible.

Additionally, Employer points to Dr. Oliveri's opinion to support the proposition that Claimant was malingering or feigning complaints related to this injury. However, I do not find Dr. Oliveri's opinions necessarily support Employer's proposition in that regard. Overall, Dr. Oliveri reported that Claimant's atypical neurocognitive and neurobehavioral presentation in all probability reflects an invalid representation of his current status, which meant there was a prospect of symptom magnification. However, the doctor also indicated that Claimant's pain status, including intractable headaches, could well be a mitigating factor, even though it does not otherwise explain the neurocognitive test findings. Essentially, he questioned the possibility of symptom magnification, but agreed that the intractable headaches could be a mitigating factor for the results he found. In that respect, he did not simply write off Claimant as a malingerer.

Dr. Oliveri also clearly found that Claimant was at risk for the early neurobehavioral consequences of traumatic brain injury, and said the findings in this evaluation do not rule out residual brain-behavior dysfunction. Finally, and most importantly, he recommended Claimant for pain management and neurological consultation for further contributory effects of the pain issues. If Dr. Oliveri had only concluded Claimant was a malingerer, he would not have left open the possibility that Claimant suffered from the early neurobehavioral consequences of traumatic brain injury, and he would not have

recommended additional treatment for his complaints. Therefore, I do not find that Dr. Oliveri's opinion supports Employer's position that Claimant was a malingerer. Instead I find that, while Dr. Oliveri questioned the possibility of malingering, ultimately he diagnosed a condition and recommended more treatment related to this injury at work.

Finally, there is the report and deposition testimony of Dr. Cantrell. Like the other Employer experts, Dr. Cantrell also seems preoccupied with alleged inconsistencies in Claimant's presentation. While he does admit that headaches and memory deficits are not uncommonly seen after a closed head injury, and while he agreed that sensitivity to light and sound could be the result of a closed head injury, he relies on the reports and opinions of Dr. Stillings and Dr. Graham to support his own contention that Claimant was exaggerating his complaints and problems from this injury. To the extent that Dr. Cantrell relied on the previously discredited opinions of Dr. Stillings and Dr. Graham, Dr. Cantrell's conclusions in this case are thus fatally flawed as well.

Additionally, some of the inconsistencies enumerated by Dr. Cantrell are quite simply not inconsistencies at all when comparing Claimant's complaints to those found in the medical record as a whole. Dr. Cantrell cites an apparent inconsistency with Claimant asking him to speak with a lowered voice because of his sound sensitivity. However, that complaint about sound sensitivity from Claimant is found throughout the medical treatment records all the way back to his treatment from BJC Home Care Services. He also consistently complained about that sensitivity, as well as his sensitivity to light, to just about every physician who examined him. Likewise, Dr. Cantrell finds that Claimant's memory loss seemed to be worsening over time, which he alleged was another inconsistency. However, Claimant consistently complained about problems with memory from the very beginning of his treatment all the way through all of the medical examinations he attended.

Further, I find Dr. Cantrell's release for Claimant to return to work inconsistent with his concern for Claimant's pain issues and adverse side effects to the medication. On one hand he recommends additional evaluation and treatment, but on the other hand says he can go back to work without restrictions. This just is not consistent.

Although Dr. Cantrell at least acknowledged that many of Claimant's problems and complaints could be related to a closed head injury, and although he regularly recommended additional treatment and evaluation, he seemed intent to highlight the alleged inconsistencies once he started getting the reports from Drs. Oliveri, Stillings and Graham. He seemed to want to jump on the malingering bandwagon with these other physicians despite his agreement that the complaints, which Claimant described, could all be related to a closed head injury. Since Dr. Cantrell relied on incredible opinions from Dr. Stillings and Dr. Graham in formulating his own opinions in this case, and since he relied on alleged inconsistencies that simply were not there, his opinion in that regard is fatally flawed and not credible or persuasive.

Regardless of the medical opinions and findings in this case, Claimant would not be able to prevail in this matter if he did not present as a credible witness with complaints and problems consistent with the medical treatment records. I find Claimant did present as a credible witness, and I further find that he presented with complaints and problems consistently documented in the medical treatment records. Similar to Claimant's dramatic presentation at hearing with his hat pulled down over his eyes, and with demonstrated difficulty answering questions, the medical treatment records document Claimant also presented in much that same way to medical providers essentially since the beginning of his treatment for this injury. All of the complaints described by Claimant and Mr. Obanii-Nwibari, are also found in various treatment notes from doctors, physical therapists, or at the hospital. Unlike the suggestions made by some of Employer's experts, I did not find that Claimant's complaints changed or worsened over time. I find that he had a number of significant complaints right from the beginning of his treatment, and although the complaints may have waxed and waned, depending on the type of treatment he was receiving, they were nonetheless there the whole time.

I further find that the testimony of Mr. Obanii-Nwibari was credible and only served to bolster Claimant's presentation of his complaints and problems following this injury at work. He clearly testified about his first-hand observation of Claimant's abilities since this injury and the continued significant problems he has as a result of it. He provided uncontradicted testimony about the striking difference in Claimant's abilities and temperament both before and after this injury at work.

It is also important to note that while Employer did question Claimant's credibility through the medical evidence they presented, Employer presented absolutely no evidence to contradict Claimant's testimony regarding his current abilities and his functional capabilities. There was no evidence in the record to show that Claimant was actually able to do more than he said he could, nor any evidence to show that he acted in excess of his stated abilities since this injury at work.

Finally, there was one vocational expert who testified by deposition in this matter. Mr. England acknowledged that based on Dr. Liss' findings, Claimant would be totally disabled. Mr. England further agreed that based on Claimant's presentation at the time of their meeting, Claimant would not be employable in any sense because of his presentation, behavior, and inability to answer simple questions. Therefore, since I have already found Claimant's presentation credible, and since I have also found Dr. Liss more credible and persuasive than the other experts in this case, Mr. England's vocational assessment based on those factors supports a finding that Claimant is permanently and totally disabled as a result of this injury on January 2, 2004.

Based upon the credible testimony of Claimant and his witness, as well as based upon the medical treatment records,

the credible and persuasive opinion of Dr. Liss, and the vocational opinion of Mr. England, I find that Claimant is incapable of returning to any employment, and is unable to compete in the open labor market. I find that no reasonable employer in the usual course of business could reasonably be expected to employ Claimant in his present physical condition. Therefore, he is permanently and totally disabled under the statute.

I find that Employer terminated temporary total disability benefits on July 18, 2004. According to the terms of this award, I find that Claimant became permanently and totally disabled as of July 19, 2004. Since the permanent total disability is solely attributable to the January 2, 2004 injury, for which Employer has liability, I find that Employer is liable for the payment of those permanent total disability benefits to Claimant.

Accordingly, Employer is responsible for the payment of \$418.95 per week for Claimant's lifetime beginning on July 19, 2004, subject to review and modification as provided by law.

CONCLUSION:

Claimant had a compensable injury to the head (closed head injury), neck and body as a whole on January 2, 2004. As a result of that injury, Claimant continued to have pain, headaches, increased sensitivity to light and sound, cognitive (memory) deficits, and some limited motion in the neck. Claimant has successfully proven that he is permanently and totally disabled as a result of the effects of this January 2, 2004 injury, based on his own credible testimony, the credible testimony of Mr. Obanii-Nwibari, the medical treatment records, the credible and persuasive opinion of Dr. Liss and the vocational opinion of Mr. England. Employer is responsible for the payment of \$418.95 per week for Claimant's lifetime beginning on July 19, 2004, subject to review and modification as provided by law. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Jennifer J. Finley, for necessary legal services.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Lucas Boling
Acting Director
Division of Workers' Compensation