STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Mark Bollhardt

v.

Mace Security International, Inc.

Opinion No. 51-04WC

By: Margaret A. Mangan
Hearing Officer

For: Laura Kilmer Collins
Commissioner

State File No. K-24388

Pretrial conference on September 8, 2003
Hearing held in Bennington on May 4, in Montpelier on May 5 and 10, 2004 and by phone on June 17, 2004
Record closed on August 9, 2004.

APPEARANCES:

Beth Robinson, Esq., for the Claimant
Stephen D. Ellis, Esq., and Gregory A. Bullman, Esq., for the Defendant

ISSUES:

1. *Is claimant entitled to permanent total disability benefits?*

2. *If not, to what permanent partial disability benefits, if any, is claimant entitled?*

3. *What past and future medical and/or psychological treatment is reasonable?*

4. *What temporary total disability benefits were due claimant?*

EXHIBITS:

Joint Exhibits:

I: Medical and Vocational Rehabilitation Records (3 volumes)
II: Videotapes
III: Social Security Records

Claimant's Exhibits:

1. *Curriculum vitae of Mark Kloman, M.D.*
2. *Employee Evaluation Record*
3. *Curriculum vitae of Paul Solomon, M.D.*
4. *Dr. Solomon's charts*
5. *Curriculum vitae of Jeffrey Winseman, M.D.*
6. *Curriculum vitae of Jay Spiegel*
7. *Curriculum vitae of Greg LeRoy*
8. *Mr. LeRoy's vocational rehabilitation assessment*
9. *Rubber Baton*
10. *Mace Catalog*
11. *Schedule of Sales 1997*
12. *Accident Report*
13. *Average Sales 1993*
14. *Dr. Shattuck's Report*
15. *Curriculum vitae of Dr. Shattuck*

Defendant's Exhibits:

A. *Letter from Cleary to Spiegel*
B. *Letter from Cleary to Winseman & Solomon*
C. *Letter from Cleary to Solomon 2/4/99*
D. *Letter from Dr. Solomon to Cleary 2/17/99*
E. *Letter t from Cleary to Solomon 8/20/99 enclosing letter form the Hartford*
F. *Memo and emails from Grimes to Bollhardt*
G. *Curriculum vitae of Nancy Hebben, Ph.D.*
H. *Dr. Hebben's Comparison of Evaluations*
I. *Hebben Corrections Table*
J. *Excerpt from Neuropsychology for Health Care Professionals and Attorneys*
K. *Definition of Neuropsychologist*
Z. *Curriculum vitae of Dr. Levine*
ZZ: *Dr. Levin's letter*

STIPULATIONS:

1. *At the time of his work injury, Mark Bollhardt was an employee of Mace Security International (Mace) within the meaning of the workers' compensation laws.*

2. *At the time of his injury, Mace was an employer within the meaning of the workers' compensation laws.*

3. *The Hartford Insurance Company is the workers' compensation carrier for this claim.*

4. *Claimant average weekly wage at the time of his injury, based on his earnings during the 12 weeks immediately preceding the injury date was $1040.14.*

5. *Claimant's weekly net income at the time of his injury was $795.57.*

6. *Claimant's average weekly wage during the 12 weeks immediately preceding his last day of work was $784.50.*

7. *Claimant's weekly net income for the 12 weeks immediately preceding his last day of work was $640.15.*

8. *The carrier paid Mr. Bollhardt temporary total disability (TTD) benefits in the amount of $694.00 ($20.00 for his two minor dependents and $674.00 representing the maximum compensation rate in effect on the date of his initial injury) from February 1998 until its Form 27 took effect on February 11, 2003.*

9. *Counsel for the claimant raised the TTD arrearage issue with counsel for the carrier by letter dated April 21, 2003.*

10. *Counsel for the claimant requested an interim order regarding TTD arrearages on June 9, 2003.*

11. *In July 2003, the carrier made an arrearage payment of $17,670.39. In arriving at this figure, the carrier used Mr. Bollhardt's average weekly wage as of the time of his June 10, 1997 injury and did not apply any COLA or increase in the maximum weekly benefits for July 1, 1997. It applied annual COLAs for subsequent years, until his weekly benefit rose to the level of his weekly net income.*

FINDINGS OF FACT:

The Job

1. *Claimant worked in sales at Mace from 1990 or 1991 until February of 1998. He arrived with twenty years of sales experience.*

2. *Mace produces security products, including pepper spray and weapons. Claimant was a factory representative, selling Mace*

products as well as products produced by a related company, Gould & Goodrich.

3. *Claimant's job at Mace included calling on law enforcement and correctional officers in New England and New York. He gave a "dog and pony show" with the Mace and Gould Products. His customers were training officers, correctional wardens, and law enforcement officers. Travel was essential because it helped him see his customers and develop personal contacts. He put on demonstrations for departments and worked at developing new customers.*

4. *Attendance at shows and conferences around the country was also part of claimant's work. He could interact with people in the law enforcement community, answer questions and staff a booth with Mace products. Socializing with distributors and others at the end of a conference day was also part of what claimant did for his work. He was known as the last to retire at the end of the day.*

5. *Claimant also scheduled and filled training classes for customers around the region, where a Mace trainer would teach about the use of products to law enforcement personnel. At such classes, claimant regularly volunteered to be shot with pepper spray to demonstrate that it was not deadly.*

6. *Claimant traveled for his job mid-week, but tried to be in his office on Mondays and Fridays. Conferences were often on the weekends.*

7. *Claimant received positive evaluation for customer service, energy and dedication, although paperwork, including expense reports, was a long-standing problem for him.*

8. *Office co-workers knew claimant as a "walking index" with a remarkable memory for names, dates and times. He liked to tell stories and was attentive to customers. Although demanding and aggressive, he was a hard worker who was easy to get along with. One result of his hard work was securing a bid with the State of New York.*

<u>The injury and immediate sequelae</u>

9. *The injury at issue occurred on June 10, 1997 during a demonstration of projectiles launched from a grenade launcher before a group of law enforcement officers. Claimant agreed to serve as a human shield. He suited up in a protective padded suit, helmet and facemask. He*

was instructed to run towards a designated line at which time Dave Young would fire the projectile towards him.

10. The first projectiles Dave Young fired were beanbag rounds from a grenade launcher that hit claimant in the torso without incident.

11. Next, Mr. Young launched a rubber baton, 5.5 inches long, 1.5 inches in diameter, and 100 grams in weight. It is typically used in riot control and is designed to be skipfired from a minimum distance of 50 yards toward a person's knee. The Mace Product Catalog warns, "Do not direct fire as serious injury or death may occur."

12. As claimant ran forward, the baton hit him directly in the forehead, shattering the plastic face shield on impact. A television station filmed the incident and the footage is part of the evidence in this case (Joint II). The videotape shows the baton striking the claimant's forehead. He then bent over at the waist, grabbed his knees, staggered to his left and called for help. Dawn Flynn, who observed the incident, described him as "stunned." The baton had been launched from a distance 20 yards from where it hit the claimant, 30 yards closer than recommended.

13. Once hit, claimant "saw stars." People helped him move away from the training area by holding him under each arm. He then sat at the end of a van waiting for the ambulance that took him to the hospital.

14. While he was waiting, a reporter asked how he was feeling, to which he answered "all right." To the next question, "so, you ever gonna do that again?" Claimant seemed to chuckle and said "after you." Dawn Flynn, a coworker who observed the accident, noted that he did not seem coherent even though he said he was fine.

15. Claimant's memory of the event is vague. He remembers sitting on the edge of the van, remembers little of the ambulance ride and then remembers being in the emergency room at the hospital. Generally, he felt "foggy."

16. Claimant was taken to the Southwestern Vermont Medical Center (SVMC) emergency department by ambulance where it was reported that he had lost consciousness for 30 seconds, although the ambulance record states there was no loss of consciousness. Claimant had a scalp hematoma, but the CT scan was negative for an intracranial bleed. He was diagnosed with a "moderate closed head injury with facial contusions and abrasions," then sent home with his wife and instructions to report any breathing difficulty, severe headaches, slurred speech, drainage from nose or ear, excessive vomiting, mental confusion, restlessness, personality changes.

17. Claimant stayed at home for the next few days, feeling terrible. His head hurt, he had two black eyes, a big nose, no energy and was scared.

18. One week later, on June 17, claimant was seen at the SVMC Occupational Health Department with complaints of headache, blurred vision and tinnitus. Dr. Silberstein diagnosed post-concussion syndrome and soft tissue injury. He released claimant to return to work with lifting restrictions, instructions not to travel out of town and to avoid strenuous activity.

19. When he returned to work less than a week after the injury, claimant still had a headache and felt "woozy." He hoped to "shake it off and keep going." However, he was only able to work half days, light duty, making only a few calls. His productivity dropped.

20. At work, co-workers started to avoid him. He got angry easily. Others had to take on his customers because he often dropped the ball.

21. Inexplicable behavior caught the claimant and his wife off guard. Once, on an errand to a store 2 miles from home, he drove to a town 12 miles away. On another occasion he seemed "befuddled"

to his wife after losing his wallet and having no idea what to do, behavior out of character with how he would have handled such a situation before his injury.

22. *At a visit to Dr. Silberstein on June 24, claimant reported headaches, ringing in the ears and fatigue after a day's work that had been primarily at his desk. Dr. Silberstein released claimant to work on a modified four-hour day, with instructions to avoid excess travel and referred him to a neurologist, Dr. Kloman.*

23. At work claimant had a hard time remembering information about people, often forgetting names. He felt uncomfortable, not willing to see or talk with people, a sharp contrast with his behavior before the injury. Ringing in his ears and headaches, absent before the injury, became chronic.

24. Dr. Kloman at Green Mountain Neurology saw claimant on July 1. He recorded claimant's complaints of fatigue, confusion, poor concentration, short temperedness, tinnitus and headache. Dr. Kloman noted that claimant was working part-time and not traveling, as he normally would have.

25. Dr. Kloman diagnosed a closed head injury or post-concussion syndrome that he cautioned could be a "very disabling injury." He explained to claimant that recovery could be erratic and could take a year or two. While Dr. Kloman thought it valuable for claimant to work, he cautioned him against multi-tasking and significant travel. He supported claimant's working part-time and working up to full time work over the following three to six months.

26. On August 13, 1997 claimant saw Dr. Ghosh, called the "company doctor" by some, who recorded complaints of "extreme tiredness, sleepiness, forgetfulness, and lack of concentration." On September, 4, 1997, Dr. Ghosh noted that claimant was doing normal activity at work, though he still did not feel well, was tired, weak and forgetful.

27. On August 20 Claimant saw his primary care doctor, Dr. Hearst, who noted claimant's complaints of intermittent ear ringing since the head injury, difficulty concentrating, and reports from others that he had been lethargic and forgetful. Dr. Hearst recorded his own observation that claimant was "quieter, less effusive than in the past."

28. In follow-up visits with Dr. Kloman, it was noted that claimant's problems with memory, short temper, forgetfulness, and frustrations with failure to improve persisted. In one note, Dr. Kloman wrote that claimant was in denial about the severity of the injury. On August 29 Dr. Kloman diagnosed claimant with post-concussive syndrome and probably new superimposed reactive depression. He noted that claimant tried to put on a "good face to try to seem like he was going well" but was worried that he was not.

29. At work, claimant continued to visit customers and attended conferences away from home. However, he curtailed his own driving and sometimes found himself losing the way even over previously familiar routes.

30. In the fall of 1997, claimant attended two out of state conferences with his team. At one of the conferences, he stayed in a booth where protective glasses were displayed, left at 4:00 in the afternoon and skipped the evening activities, not his normal behavior. At the second, he was embarrassed by his inability to remember names of important people.

31. A supervisor in North Carolina noted claimant's declining performance and asked why he was not on the road.

32. On September 25, Dr. Ghosh documented "forgetfulness particularly short term memory and attentiveness and lack of concentration." He affirmed the diagnosis of post concussion syndrome, noted a question of depression and maintained the restriction on prolonged driving.

33. Claimant's supervisor, Jon Goodrich, pressured claimant to resume full duties, including travel. He told claimant to just get out there, that the problem was all in his head.

34. Mr. Goodrich testified that he observed no changes in the claimant's performance, testimony credibly contradicted by co-workers and claimant's declining income levels. Sales per month dropped in half. Mr. Goodrich painted a picture of the claimant pre-injury as disorganized and quick to anger. He was also displeased with claimant's inability to snap back to pre-injury sales volume. He thought claimant was exaggerating his disability, a belief credibly challenged by treating physicians.

35. To avoid what he feared would be a downward trend, Dr. Kloman referred claimant to the memory clinic.

36. Although claimant continued to work at Mace, he was being pressured to return to his previous workload, sales and travel.

37. Claimant had his first visit to the Memory Disorders Clinic in October of 1997. In the report following the initial evaluation, Dr. Solomon noted claimant's difficulties with recent memories, forgetting details of conversations, business dealings and home life, misplacing items, handling even a single task, disorientation while driving,

difficulty with judgment and organization, declining job performance and forgetting to return phone calls. The neuropsychological evaluation was consistent with a closed head injury.

38. *In a follow-up visit to SVMC Occupational Health on November 18, 2004, Dr. Silberstein noted that claimant had ringing in both ears, fatigue and memory loss. He diagnosed post-concussion syndrome and probable depression.*

39. *At the memory clinic, claimant also saw Beth Parker-O'Brien, clinical social worker. In a note or November 18, Ms. O'Brien noted claimant's difficulties remembering phone conversations and names of new acquaintances.*

40. *Claimant continued to lose ground as he and the insurer battled over the compensability of psychiatric care recommended by his physicians.*

41. *In December 1997 claimant first saw Jeffrey Winseman, M.D., a psychiatrist, on referral from the Memory Clinic and Dr. Kloman. Dr. Winseman noted symptoms consistent with a cognitive dysfunction expected after an injury to the frontal lobe of the brain. At that time, claimant also exhibited symptoms of PTSD, a depressive disorder and a "marked" sleep disturbance. Dr. Winseman recommended continued employment. In fact, at that time both he and the claimant expected that claimant would return to full employment.*

42. *With regard to his diagnosis of major depressive disorder, Dr. Winseman noted that claimant had lost his appetite, had lost weight, was experiencing sleep problems, reported suicidal ideation, had begun to lose interest in things, and was beginning to realize that something was terribly wrong.*

43. *Dr. Winseman observed that claimant seemed to be in denial about his psychological injury and the degree of disruption to his life. He was desperate to keep working. In fact, Dr. Winseman thought it perplexing that claimant tried to go forward as if nothing had happened.*

44. *Claimant's boss, John Goodrich, expressed concern that he would have to replace claimant if he could not work at his previous level.*

45. Claimant received cognitive and supportive therapy at the Memory Center and medication and supportive psychotherapy from Dr. Winseman.

46. Claimant continued to struggle with organization.

47. The relationship between claimant and his supervisor deteriorated and often resulted in arguments. Mr. Goodrich suggested that claimant should quit his job if he could not do it. Claimant learned he was fired from his job in February 1998 when he returned home to an answering machine message stating that he was not permitted to enter the Mace building and was to return his keys and van. Another message told him that he was to take a bus to Boston for the second opinion.

48. On request for a second opinion, a neurologist in Boston, Seth Finkelstein, M.D., saw claimant on February 23, 1998. He described claimant as one with a "classic post-concussive syndrome." Dr. Finkelstein explained to the claimant that the problem was a well-recognized neurological problem that could take a year to two to resolve, that it "is not psychological in origin." He advised claimant to continued the treatment he had been receiving.

49. On March 3, 1998, claimant went on disability status from work.

50. Claimant continued to treat at the Memory Clinic and with Dr. Winseman. Treatment focused on treating anxiety, depression, organization and memory loss with strategies to help him record appointments, shop and prepare meals.

51. In April 1998 claimant saw Dr. Kloman with complaints of vertigo, which claimant and his wife thought stemmed from the work-injury, but which Dr. Kloman opined was unrelated.

52. Claimant's memory problems continued. For example, he failed to get his sons to their games in April as prearranged. He became more and more discouraged, believing he should have improved faster.

53. In a repeat evaluation in June, Dr. Solomon noted that claimant's depression had worsened. Signs of marital stress became evident. Claimant became argumentative and short tempered. Mrs. Bollhardt began to work more to make up for reduced income, leaving claimant to do household chores and drive their children to

various events. Claimant forgot the simplest things, such as when to pick up his wife or boys or whether to pick them up at all. His family stopped counting on him.

54. *At first Dr. Winseman was a consulting psychiatrist, prescribing medications as needed and seeing claimant occasionally. However, by August 1998 he became claimant's primary therapist.*

55. *At the insurance carrier's request, claimant saw neurologist Sanford Auerbach, M.D., on August 15, 1998. Dr. Auerbach diagnosed post concussion syndrome with a superimposed post-traumatic stress disorder or depression. He found no clear documentation of a brain injury. And he opined that claimant had not yet reached medical end result.*

56. *Dr. Kloman disagreed with Dr. Auerbach on the question of a brain injury because, "[t]he evidence for injury could not be clearer. The very type of injury, documented loss of consciousness and subsequent symptoms are evidence enough that the injury occurred. Even in more profound cases, it is atypical to find or document abnormal neurological examination or radiologic/electroencephalogic abnormalities. The literature on post-concussion syndrome and closed head injury documents these facts repeatedly."*

57. *In a note for an August 27 visit, Dr. Ghosh opined that claimant had a post concussion syndrome with a "left over syndrome with some depressive behavior." He advised claimant to continue with treatment at the memory clinic. And he opined that claimant was "unable to do any work on a regular basis." He reiterated the opinions on diagnosis and work capacity when he saw claimant again in December, noting specifically that claimant had "post concussion syndrome with memory disorder, tinnitus."*

58. *In September of 1998, Faith Bollhardt completed an application for claimant to receive social security disability benefits.*

59. *In a report dated November 16, 1998, Dr. Kloman wrote that claimant was partially disabled and had reached medical end result. He noted that claimant was functioning at a level far below his pre-injury level, and was not likely to improve over time given limitations with attention span, concentration, memory, and following orders.*

60. *When Dr. Kloman also saw claimant in December 1998 he noted claimant's persistent headaches and reaffirmed his diagnosis of post concussion syndrome and secondary depression.*

61. In the fall of 1998 dates Dr. Winseman began meeting with claimant more frequently, often weekly in sessions dealing with denial mechanisms, feelings of embarrassment and frustration around cognitive limitations, loss of work, and marital conflicts. Dr. Winseman also monitored claimant's medications. Throughout the treatment, Dr. Winseman focused on providing claimant with stability and a way of managing his difficulties.

62. On January 29, 1999, claimant was awarded social security benefits for his disability described as "closed head injury with cognitive dysfunction, depression and post concussive syndrome." Based on the medical evidence, the examiner found that he was "markedly limited" in "his ability to maintain attention and concentration for extended periods…." and could not do "the basic components of unskilled work."

63. In the summer of 1999, claimant's primary care physician, Dr. Hearst, noted that claimant had bilateral tinnitus, headaches and erectile dysfunction, all problems the doctor related to the head injury by ruling out other explanations.

64. After the injury claimant did not drink alcohol, although beforehand he had socially. However, sometime in 2000, he returned to drinking when even a few drinks affected him. He was stopped for DUI.

65. Claimant's marriage continues to be challenged and the Bollhardts have discussed divorce. Mrs. Bollhardt likened her experiences to living with one with Alzheimer's, although in her husband's case the onset was sudden. She has decided to stay in the marriage because of her vows and because she does not believe claimant can function on his own.

66. Because of the tinnitus, in December of 2000 claimant was referred to an ear, nose and throat expert, Dr. Shattuck, who performed tests that revealed a hearing loss. He recommended hearing aids.

67. In February 2003, Dr. Winseman supported claimant's application for social security benefits by writing that claimant could not concentrate, remember, or interact with others at a level commensurate with employment. He noted further that claimant's deficits prevented him from smoothly doing even simple tasks, that he often forgot why he drove somewhere, that he was easily

panicked and uncertain, that his impairment was permanent and would require life-long outpatient care.

68. *In June 2003, Dr. Solomon revaluated the claimant with tests that he concluded were consistent with claimant's "subjective complaints and the closed head injury he sustained." Testing showed no exaggeration or malingering.*

69. Based on neuropsychological testing, claimant's history and the clinical evaluation, Dr. Solomon concluded that claimant's accident caused a brain injury that in turn caused cognitive deficits. Although claimant's depression contributed to claimant's cognitive deficits, in Dr. Solomon's opinion depression alone is not severe enough to cause the deficits claimant has, leading him to conclude that the primary component of those deficits is the brain injury itself.

70. Dr. Solomon determined that claimant had reached medical end result with a 29% impairment rating, based on Table 14-1 of the AMA Guides.

<u>Vocational rehabilitation efforts</u>

71. After claimant lost his job at Mace, he tried volunteering at a landfill helping people sort recyclable items. He found the work confusing and could not keep the recyclables straight.

72. On October 6, 1998, Jay Spiegel was assigned as claimant's vocational rehabilitation counselor. Mr. Spiegel is experienced in the VR field and in the area of integrating people with cognitive disabilities into the community. He began by exploring with Mace modified return to work options for the claimant, but they identified none.

73. In November 1998, Mr. Speigel also met with the claimant and reviewed notes he had written which Spiegel described as "relatively concrete and almost tangential," focusing not on the content of a conversation, for example, but on its length. Spiegel's assessment of claimant's work history was that it was a solid history in sales and sales management since 1972.

74. After conducting a vocational profile and rejecting jobs that were inappropriate because of cognitive and temperament requirements, Mr. Spiegel concluded that claimant had the physical ability but not the organizational skills to return to suitable employment. In his opinion, successful rehabilitation would require coordinated cognitive, medical and functional rehabilitative efforts. Consequently, Mr. Spiegel found that claimant was entitled to vocational rehabilitation efforts.

75. In January 1999 Dr. Winseman addressed an IWRP proposed by Jay Spiegel by suggesting that volunteer efforts be tried first in areas where his existing talents and skills could be bolstered.

76. The next month, February 1999, Dr. Solomon wrote a letter in which he expressed concern about a VR plan for volunteer placement with transitioning to work as "well intended" but unlikely to succeed because of the "significant head injury" and persistent cognitive deficits. Dr. Solomon recommended intensive inpatient cognitive rehabilitation before implementing a VR plan.

77. An Individual Written Rehabilitation Plan (IWRP) was developed with input from Attorney Cleary, claimant's attorney at the time; claimant; the carrier and Mr. Speigel. Based on party agreement, this Department approved the plan on February 22, 1999. The stated goal of the plan was to work progressively through volunteer jobs with the expectation that job goal development and placement would follow.

78. Following acceptance of the IWRP, claimant first offered to volunteer at a local homeless shelter, but the shelter withdrew the opportunity. Next, claimant volunteered at a clean up day for a museum where the staff found him helpful and diligent.

79. In May 1999, claimant worked as a flagger during sidewalk installation, after doing the required training. After about three hours on the job, he lost concentration and focus.

80. Mr. Spiegel determined that claimant remained highly motivated during the VR process, finding placements on his own and taking advantage of ones others found for him. Yet, he faced personal barriers that discouraged him.

81. The personal barriers included difficulty handling stress, which took a toll on his relationships with his wife and teenage boys. The teenage accusation that he was a "retard" was particularly discouraging for him.

82. Next, in July of 1999, Mr. Spiegel identified a potential volunteer position at a museum library performing organizational tasks that were more than menial. This was at a time when claimant had expressed concern about continuing with VR given the personal stress in his life, made worse during the school summer vacation.

83. Although claimant arrived at the museum job dressed professionally and upbeat, he was overwhelmed by the expectation that he process information requests and know where materials were located. He was overwhelmed by the amount of written work required.

84. During the time he was undergoing orientation at the museum job, claimant was also exploring a volunteer job at the Park-McCullough House that was less cognitively focused and more relaxed.

85. Claimant terminated the museum job because it was difficult for him cognitively.

86. After a short stint at the Park-McCullough house, claimant left that job because he was uncomfortable with the damp, dusty setting and did not want to associate himself with a coworker he thought was gay.

87. In November of 1999, after conferring with the claimant and the carrier, Mr. Spiegel closed the vocational rehabilitation file. He had determined that claimant was not making any consistent progress. Lack of progress was not caused by lack of motivation, as claimant remained motivated throughout the process, although he was frustrated by his own limitations.

88. Mr. Spiegel concluded that claimant had made a good-faith effort to participate in VR, but the nature of his injury prevented him from returning to suitable work.

Post Accident Limitations

89. After the accident, claimant became forgetful and drove to the wrong place. He has found that a computer is too fast for him, is distracted by the script at the bottom of the television screen during news shows, has lost garden tools, makes illogical decisions, such as hand carry several blocks in several trips instead of using a wheel barrow. Claimant has become jumpy and has a hard time being around weapons.

90. Claimant misses appointments and makes mistakes. One occasion, he forgot how to use his ATM card. He lacks organization with the simplest tasks. When he took a driver's test after his license had expired, he took it four times before passing.

91. Claimant's condition has not improved.

92. During the hearing, claimant presented as outgoing and friendly. During his testimony, he was lucid yet struggled for simple words at times.

Other health issues

93. In December 2000, claimant was diagnosed with squamous cell carcinoma of the neck that was treated with radical neck surgery, chemotherapy and radiation over the next several months.

94. Although the cancer has not recurred, claimant continues to have difficulty swallowing and remains on a liquid diet.

95. In the summer of 2001, claimant was treated for a frozen shoulder with physical therapy and surgery. The problem, unrelated to the work injury, resolved by January 2002.

96. Faith Bollhardt attended all her husband's appointments and helped him manage his care around the cancer treatment. He was not able to remember what needed to be done or keep appointments without her help.

Expert Medical Opinions

97. Alec Klomam, M.D. is a board certified neurologist who treated the claimant after his Mace injury and who referred claimant to Dr. Solomon. Dr. Kloman's specialty training and experience have made him an expert in the diagnosis and treatment of those who suffered brain injuries.

98. Dr. Kloman noted that the terms "post concussion syndrome," "closed head injury," and "traumatic brain injury" are often used interchangeably. A closed head injury means a head injury that causes neurological symptoms without opening the vault of the skull. A post concussion syndrome describes a fairly consistent set of symptoms. A post concussion syndrome and closed head injury are traumatic brain injuries (TBI), although TBI also includes more serious injuries.

99. Dr. Kloman opined, and I find, that the term "post concussion syndrome" refers to a set of symptoms following a head injury significant enough to alter one's consciousness, from a feeling of being dazed to actually losing consciousness. However, loss of consciousness is not a prerequisite for the diagnosis. Common symptoms include headache, confusion, poor concentration, feeling off balance, moodiness and irritability. Objective tests, e.g. neurological examination and CT scan are normal. Otherwise, a different diagnosis, such as a cerebral hemorrhage or contusion, among others, would be made.

100. Dr. Kloman determined that claimant had a post concussion syndrome based on the type of injury he incurred. When the rubber baton hit claimant's forehead, the head extended back then reflexively came forward, causing rapid acceleration and deceleration of the brain. With enough speed, there is a shearing action to the nerve cells that rupture. Because the damage is at the cellular level, the damage is not picked up on CT scan or MRI. The symptoms claimant had reflected the injury.

101. Dr. Kloman opined that claimant had a severe post concussion syndrome and superimposed reactive depression. He noted that those with post concussion syndrome often have negative objective tests. Because claimant's condition has declined over time, not a usual post concussion course, Dr. Kloman attributes claimant's current cognitive difficulties to a reactive depression. He ruled out other possible causes, including medication side effects, electrolyte abnormalities and malingering. In Dr. Kloman's opinion, the depression was clearly related to the injury and resulting symptoms.

102. Dr. Kloman considers a carrier's reliance on a report from an IME doctor to terminate benefits as "tantamount to abandonment of fiduciary responsibility," a statement the defense cites as evidence of bias. However, I find no bias in the doctor's opinion, especially considering that he was not willing to accept as suggestion from the

claimant and his wife that dizziness was related to the work related injury.

103. Paul Solomon, Ph.D. is a neuropsychologist who began seeing the claimant at the Memory Clinic on referral from Dr. Kloman. Under Dr. Solomn's supervision, claimant had neuropsychological testing at the clinic. Dr. Solomon, a college professor and Memory Clinic psychologist, did his postdoctoral work in research neuropsychology.

104. Based on the testing performed, Dr. Solomon concluded that claimant had post concussion syndrome. He also noted that claimant's cognitive deficits had declined over time, a finding not consistent with a head injury, but likely due to depression.

105. The testing on which Dr. Solomon's opinion is based demonstrated that claimant was literally within the wide range of "normal" on intelligence testing since all those from the 16th to 84th percentile fall in that category. However, Dr. Solomon considered claimant's intelligence as impaired because it was below the 50th percentile, when pre-injury performance would have been higher.

106. Dr. Solomon rated claimant's impairment at 29% whole person based on a combination of tables in chapter 13 and 14 of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. Chapter 13 is The Central and Peripheral Nervous System chapter and chapter 14 deals with Mental and Behavioral Disorders.

107. Areas of functioning identified in Table 14-1 are: activities of daily living, social functioning, concentration, and adaptation. Classes are identified as 1, with no impairment up to 5 for extreme impairment. Although Table 14-1 does not assign a numerical rating for each category, Dr. Solomon applied the numerical rating system from Table 13-8 that rates impairment due to emotional or behavioral disorders related to neurologic conditions. Class 1 carries a 0% to 14% whole person impairment (WPI) when there is "mild limitation of activities of daily living and interpersonal functioning." Class 2 has a 15% to 29% WPI for "moderate limitation of some activities of daily living and some daily social and interpersonal functioning. Class 3 carries a 30% to 69% WPI for "severe limitation in performing most activities of daily living, impeding useful action in most daily social and interpersonal functioning." Finally, a Class 4 impairment carries a 70 to 90% WPI when one has "severe limitation of all daily activities, requiring total dependence on another person." Guides at 325.

108. Dr. Solomon's rating, therefore, falls in the highest level of class 2 in table 13-8, "moderate limitations…."

109. Defendant argues that if the same methodology were applied to Dr. Weiner's rating, the WPI would be 14%, because claimant would fall in the highest level of class one with moderate impairment of activities of daily living. However, table 13-8 places one with moderate impairment of activities of daily living in class 2 (15%-29%).

110. Jeffrey Winseman, M.D., is a psychiatrist who has treated claimant since December of 1997. He diagnosed claimant with post-concussive syndrome following a closed head injury and depression. Aware that claimant had treatment for cancer and had experienced family stresses, Dr. Winsemen held to the opinion that the work related injury

accounts for the claimant's current disability, noting that the other events followed by years the injury and post injury downward spiral.

111. Dr. Winseman noted that claimant had persisting symptoms of "cognitive dysfunction of a type expected following injury to the frontal lobe of the brain," "post traumatic stress disorder, acute type," and "major depressive disorder, single episode, moderate, with marked sleep disturbance."

112. At the request of the insurance carrier, Dr. Weiner, a board certified psychiatrist, evaluated the claimant in January of 2003, concluding that claimant did not have a traumatic brain injury or PTSD. While he agreed that claimant had an emotional reaction to the injury with anxiety and depression, he opined that medical end result for those problems had been reached. Dr. Weiner rejected the diagnosis of TBI because claimant did not have a significant period of unconsciousness after the accident or post-traumatic amnesia. Further, he noted that claimant's neurological examinations and CT scans were normal.

113. Dr. Weiner rejected Dr. Solomon's diagnosis of a reactive depression because, without a TBI, there was nothing to react against and because of the volatile events in claimant's personal life, including a DUI, cancer, anger with his supervisors and feeling unappreciated at home.

114. Dr. Nancy Hebben is a clinical neuropsychologist board certified in Professional Psychology and Clinical Neuropsychology who performed an evaluation of the claimant for the defense. She concluded that claimant did not sustain a traumatic brain injury in the accident at Mace. That opinion is based on the following factors: no substantial loss of consciousness, no significant retrograde amnesia, no confusion after the accident, a normal CT scan, normal neurological examinations and normal Glasgow coma scale.

115. Although Dr. Hebben and Dr. Solomon worked with similar test results, their final conclusions differed. Dr. Hebben concluded that claimant was malingering; Dr. Solomon ruled out malingering.

116. Dr. Hebben's graduate work was in clinical psychology; Dr. Solomon's in research psychology. Dr. Hebben holds board certifications; Dr. Solomon does not. However, Dr. Solomon has lectured and worked in the area of memory loss and entered the field before board certifications were the norm. The difference in their credentials, therefore, is not enough for me to consider one more qualified than the other.

<u>Tinnitus and Hearing Aid</u>

117. Ringing in the ears, called tinnitus, is a symptom associated with post-concussion syndrome, a symptom claimant complained about a week after the head injury, and several times since.

118. With the persistence of the symptom, claimant ultimately was referred to an Ear Nose and Throat Specialist, Dr. Theodore Shattuck, who treated the claimant on September 7, 1999. At that time, Dr. Shattuck diagnosed "noise induced" tinnitus that he later concluded was work related because of the temporal relationship between the head injury and onset of symptoms.

119. On testing, Dr. Shattuck found that claimant's hearing loss was minimal, but he recommended hearing aids for amplification and to mask the disturbing tinnitus.

120. Dr. Robert Levine, a neurologist, reviewed the claimant's medical records to assess this issue for the defense. He was not able to find a work connection because claimant had not treated for tinnitus for two years after the incident and because he found no work source for the noise. Further, Dr. Levine observed that the audiogram results were virtually normal, rendering a hearing aid unnecessary and not reasonable. Dr. Levine suggested that the tinnitus might have predated claimant's injury without his noticing it.

Attorney fees and costs

121. Claimant has submitted a claim for attorney fees and costs, an issue that is deferred by agreement of the parties.

CONCLUSIONS OF LAW:

1. *In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, 123 Vt. 161 (1963). He must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Egbert v. Book Press, 144 Vt. 367 (1984).*

2. *There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).*

Causation

3. *As in all cases with conflicting medical opinions, the department makes a choice by considering the following factors: 1) the nature of treatment and length of time there has been a patient-provider relationship; 2) whether the expert examined all pertinent records; 3) the clarity, thoroughness and objective support underlying the opinion; 4) the comprehensiveness of the evaluation; and 5) the qualifications of the experts, including training and experience. See Geiger v. Hawk Mountain Inn, Op. No. 27-99WC (1999).*

4. *Crucial to the claimant's case is his contention that the injury at Mace injured his brain. He posits that the injury then led to a post concussion syndrome that did not resolve as it does in most patients or in the manner claimant and his physicians expected it would. With persistent symptoms claimant became depressed, the symptoms worsened further and he reached a baseline incompatible with work.*

5. *Contrarily, defendant characterizes the original injury as too mild to have caused such an injury and attributes claimant's worsening problems to matters totally unrelated to his work injury and to malingering.*

6. *In support of causation are records from Dr. Ghosh and Dr. Silberstein as well as records and testimony from Dr. Kloman, Dr. Winseman, and Dr. Solomon. Opposing such a conclusion are opinions from Dr. Hebben and Dr. Weiner.*

7. *On the issue of a head injury, Dr. Kloman has an advantage over all other experts because he is the only neurologist who offered an opinion. With that specialty comes expertise in the diagnosis and treatment of those who suffered trauma to the head. As a neurologist Dr. Kloman has observed not only how most patients respond to a head injury, but also those in the minority who did not respond as expected and do much worse. He is aware of the injury to this claimant, observed his progress personally, recommended treatment and made referrals. Although clearly an advocate for this claimant, his advocacy has not detracted from the objectivity and logic in his opinions.*

8. *As the physician expert who treated the claimant during the most active treatment period, a doctor who has the particular and necessary expertise, one who has reviewed relevant records and provided a logical, convincing analysis, Dr. Kloman's opinion that claimant suffered a concussion when he was hit in the forehead with a rubber baton shot from a projectile and, as a result, suffered a post concussion syndrome supports a conclusion that the injury at Mace caused a head injury.*

9. *Although the defense expert, Dr. Hebben, offered a thorough well researched challenge to the claimant's case, one day of her testing cannot refute years of observations and testing by objective treating providers. Defense expert Dr. Weiner certainly has expertise in psychiatry but not in the crucial area of neurology.*

10. Next is the question whether claimant suffered a psychological injury as a result of his head injury. Beth Parker-O'Brien and Dr. Winseman both diagnosed PTSD following the injury. An expert hired by the defense, Dr. Auerbach, found that claimant had a disabling emotional injury.

11. All those who have treated the claimant, Beth Parker-O'Brien, Dr. Kloman, Dr. Winseman and Dr. Solomon have all diagnosed claimant with depression. The clear contrast between claimant's pre-injury behavior, as objective co-workers described, and his post injury performance, well documented by objective observations, dramatic drop in sales and inability to perform basic tasks, supports the clinicians' views that the injury resulted in depression. While it is clear that Dr. Winseman noted marital difficulties when treating his depression, those difficulties did not precede the injury and were most likely part of the injury sequelae.

12. The defense argues that claimant is malingering, but to accept such a theory is to discount the opinions of all who have treated him in favor of the interpretation of a test performed by Dr. Hebben. In fact, the early defense consultant, Dr. Auerbach, ruled out malingering.

13. Claimant had been successful and happy in his work prior to the injury. Defendant's position is that he gave up a lucrative career to accept workers' compensation benefits. That would mean that he deliberately let his sales fall after he returned to work. Deliberately ignored or scolded co-workers with whom he had had a pleasant, cooperative working relationship prior to the injury. Deliberately loses his way when driving. Deliberately embarrasses himself in front of his children and the community in which he lives. Such a theory is not tenable for this man who worked in sales for 20 years, had a successful career at Mace and who tried unsuccessfully to return to the work he enjoyed before the injury.

14. I reject as untenable the defense of malingering, in favor of the well-supported diagnosis of work related depression. The treatment for that condition is compensable.

<u>Permanent Total Disability</u>

15. Whether the post concussion syndrome and resultant depression has rendered the claimant permanently and totally disabled is the primary issue in this case.

16. Claimant is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 644, (total and permanent loss of sight in both eyes; loss of both feet; loss of both hands; loss of one hand and one foot; injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; injury to the skull resulting in incurable imbecility or insanity) or, without considering individual employability factors such as age and experience (because this injury predates the 2000 odd lot amendment to the statute), the medical evidence indicates that his injury has as severe an impact on earning capacity as one of the scheduled injuries, see Bishop v. Town of Barre, 140 Vt. 565 (1982), that he is totally disabled from gainful employment. Fleury v. Kessel/Duff Constr. Co. 148 Vt. 415 (1987).

17. The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."

18. Regular employment is "work that is not casual and sporadic." Gainful employment means that one earns wages; it is not charitable work. Rider v. Orange East Supervisory Union, et. al. Opinion No. 14-03WC (2003).

19. Clearly, claimant has no impairment to his physical strength, dexterity and mobility. Yet, he has not succeeded in any vocational rehabilitation efforts. This lack of success the defense attributes to self-limitation, lack of motivation, claimant's receipt of social security disability benefits, a civil lawsuit. The defense further argues that claimant left VR job placements for trivial reasons, such as "looking up stuff about dead people," and homophobic prejudices.

20. Based on their conclusions that claimant did not suffer a brain injury, Dr. Hebben and Dr. Weiner both concluded that claimant is capable of employment.

21. Additionally, the defense argues that claimant's reported limitations are inconsistent with known abilities, including driving a car, using at ATM card, traveling, reading, purchasing a car and withstanding cross-examination. Finally, the defense argues that any disability from which claimant now suffers is not due to the injury at Mace, but rather to the myriad other problems, including the cancer diagnosis and treatment.

22. In support of the claim that claimant is permanently and totally disabled are the opinions of Dr. Winseman and Dr. Solomon, who opined that a return to work was an aspiration, not a realistic goal. Mr. Spiegel opined that the volunteer work claimant had tried—genealogical research, flagging, and museum volunteer work—had been too taxing for the claimant cognitively and psychologically.

23. In August of 1998, Dr. Ghosh described claimant as "totally incapacitated." In October of 1998, Dr. Silberstein agreed. In November of 1998, Dr. Kloman noted that claimant's cognitive abilities were restricted by a limited attention span, poor ability to concentrate, poor memory and inability to follow orders and perform tasks. Dr. Kloman determined that claimant is cognitively disabled. Dr. Solomon determined that is was unlikely that claimant could function in the competitive work place.

24. From a vocational perspective, Greg LeRoy concurred that claimant is permanently and totally disabled when he compared the universe of potential jobs and claimant's cognitive limitations.

25. Importantly, claimant's treating doctors and VR counselor made the determination of medical end result and permanent total disability before any diagnosis of cancer was made, before claimant had

marital problems, before he returned to drinking. Defenses based on those factors, therefore, are unavailing.

26. Unlike the claimant in Carpenter v. Bell Atlantic, Op. No. 03-03WC (2004) who was denied benefits when her actual abilities far exceeded those claimed, this claimant has cognitive deficits that have been objectively confirmed, deficits that have adversely impacted every area of his life, and which have been observed by disinterested observers, including former coworkers and Dr. Winseman. Unlike the claimant in Kreuzer v. Ben & Jerry's Homemade, Inc., Op. No., 15-03WC, who was denied permanent total disability benefits when he failed to pursue VR, this claimant made a sincere and sustained, albeit unsuccessful, attempt to return to his old job and made several unsuccessful attempts at VR.

27. It must be noted, too, that the return to work efforts in this case were volunteer placements. Claimant had difficulty organizing information and could not competently perform work in the several categories. That claimant chose face saving reasons to leave those jobs, even one based on bias, cannot obscure the fact that he was not capable of doing the work.

28. Claimant has proven with the evidence from those who have observed him before and after the injury and with sound, objective medical evidence, that he is not capable of gainful employment.

<u>Tinnitus and Hearing Aid</u>

29. A temporal relationship alone, the theory on which Dr. Shattuck bases his opinion regarding the cause of tinnitus, is insufficient to prove legal causation. See Norse v. Melsur Corp., 143 Vt. 241, 244 (1983).

30. Therefore, claimant has not met his burden of proving that the hearing aids prescribed by Dr. Shattuck are reasonable and causally related to the work related head injury. 21 V.S.A. § 640(a); Burton 112 Vt.

<u>Compensation Rate</u>

31. Finally is the question of the correct calculation of claimant's compensation rate. Claimant's wage at the time of the injury was higher than what it was at the time he left Mace in February 1998. The carrier maintains that the correct rate was what he was earning at the time he left work, but the statute provides otherwise:

32. When temporary disability, either total or partial, does not occur in a continuous period but occurs in separate intervals each resulting from the original injury, compensation shall be adjusted for each recurrence of disability to reflect any increase in wages or benefits prevailing at that time. 21 V.S.A. § 650(c). (emphasis added).

33. The plain meaning of the statute is that a compensation rate adjustment is to be made with separate periods of disability only when there is an increase in wages. In a case such as this, when the wage is lower at the time of the second period of disability, no adjustment for a diminution in wages can be made. In fact, this case provides a fine example for why the statute was framed in this way. When a work related injury accounts for a reduction in earnings, it would be unfair to penalize a claimant for trying to return to work even though he was not able to function at the pre-injury level.

COLA

34. Because there is an annual cost of living adjustment each July 1, claimant argues that the July 1997 adjustment must be added to the wage he was earning at the time of his injury "so that such compensation continues to bear the same percentage relationship to the average weekly wage in the state." 21 V.S.A. § 650(d).

35. Defendant argues that claimant is not entitled to the July 1, 1997 COLA because he was working at the time. In fact, WC Rule 16.2000 provides that the July 1 adjustments apply to those "receiving temporary total. …compensation…." (emphasis added). Such language controls this question. Because claimant was not receiving benefits in July 1997, the COLA for that year does not apply. However, the COLAs apply in the subsequent years when he was receiving TTD.

Weekly Net Income

36. A further limit on TTD benefits must also be considered because the Act clearly provides that an employer shall pay "a weekly compensation equal to two-thirds of the employee's average weekly wage, but not more than the maximum nor less than the minimum weekly compensation, provided that the weekly compensation shall not be greater than the injured employee's weekly net income." 21 V.S.A. § 642. Rule 15.2000 reiterates those limits. Although the

quoted language was repealed in the 2004 legislative session, it was in effect at the time of claimant's injury.

37. *In 1993 and 1994, a workers' compensation advisory commission recommended several changes to the Vermont Act. One specific recommendation was that claimant's temporary total disability compensation benefit be "capped" at the claimant's weekly net income. The council believed that if a worker was able to collect more in untaxed workers' compensation each week than he or she received in "take home pay," than the workers' incentive to return to work as quickly as possible was reduced. The legislature enacted this recommendation in 1994. When it did so, the department believed the intent of the provision was to limit temporary total benefits (wage replacement) and encourage prompt return to the workforce. The department adopted Workers' Compensation Rules 15.200 and 16.200 to apply this interpretation. See Dickinson v. T. J. Maxx , Opinion No. 13-03WC (2003)*

38. *Claimant's compensation rate has been limited by the statutory maximum and, because he has received benefits for almost four years, his compensation rate will be limited further if the weekly net income applies.*

39. *"Weekly net income" means "the average weekly wage as computed under section 650 of this title [average weekly wage], less the amount of state and federal income tax and FICA which the employee would pay or have withheld…" 21 V.S.A. § 601(21).*

40. *The § 650 provision for cost of living adjustments must be read in the context of a clear prohibition against weekly benefits that exceed the weekly net in § 643 and Rule 15.2000. Consequently, TTD payments may not exceed the weekly net. See also Patch v. H.P. Cummings Construction, Op. No. 49-02WC (2003).*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, Mace or its insurer is ORDERED:

1. *To adjust this permanent total disability claim;*
2. *Pay for reasonable medical care causally related to the injury;*
3. *Pay any arrearages due based on an AWW for the 12 weeks before June 1997.*

The claim for cost of living increases over the weekly net income is DENIED.

The issue of attorney fees and costs is deferred.

Dated at Montpelier, Vermont this 17th day of December 2004.

_____

Laura Kilmer Collins
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.