

***Submitted via email to Lawyers Weekly 7/27/07  
April 2007: Mild Brain Injury / Construction: \$3.3 Million Dollar Settlement***

***Plaintiff's Background:***

The plaintiff in this case was a black male born in the mid-west in the mid 1950s. As an infant he was adopted by a family in the Somerville, North Cambridge, MA, area where he attended local public schools. In the early 1990s he started doing construction work. Eventually, he joined the miner's union and worked several jobs, including the one on which he was injured.

***The Incident:***

On the day of the incident, the plaintiff was working the graveyard shift for the general contractor on a large water supply tunnel project. That night it was the plaintiff's job to lower a large metal tube called a liner (about 15' in diameter and about 30-40 feet long) into a shaft which extended about 200 feet into the bedrock. These liners were to be used as reinforcements for the walls of the tunnel below.

Plaintiff alleged that the area where he was working was dark. The defendants alleged that it was well lit. He climbed a ladder in an attempt to connect the liners to the cables on the crane so they could be lowered into the shaft. Plaintiff claimed that as he ascended the ladder, his head was struck by a shackle on the crane's cable and he was knocked 10 feet to the ground.

***Medical Treatment:***

The plaintiff was taken by ambulance to a local hospital. A CT scan which was taken of his head was interpreted as being normal. He was admitted for observation and discharged the next day. Over the next several weeks, the plaintiff began to experience headaches and other minor neurological symptoms. He consulted with a neurologist who followed him but made no specific treatment recommendations. Finally, three months after the accident, he was referred for an MRI of the brain but this test also proved to be negative. The treating neurologist noted in his report that he felt there was a degree of exaggeration presented in this case. For the next two months, plaintiff did not treat. He subsequently complained of headaches and was referred to the Spaulding Rehabilitation Hospital.

The plaintiff's initial neuropsychological evaluation revealed many issues which were initially not thought to be related to his fall. For example, he was noted to have hypersensitivity to sound and light marked by sudden movements. He demonstrated some difficulty with word finding, memory and delicate mechanical movements of his hands. He was becoming forgetful. Eventually, the frequency of his visits to the Spaulding was reduced to once per month. The plaintiff was able to make modest gains in his ability to function.

Despite his purported disability, the plaintiff lived alone in a house for which he paid the mortgage, maintained and paid the bills. He managed to use and make payments on several credit cards. He maintained a checking and a savings account. He was able to arrange for transportation for himself, take care of his basic necessities, and participate in leisure activities. Furthermore, during the time that he was receiving treatment for his brain injury, he filed for divorce from his wife, filling out the papers on

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his own, acting pro-se. Finally, a review of the plaintiff's medical records revealed several references to criminal activity.

**Proving Liability (Lies & Inconsistencies):**

Defense counsel attacked this case on several fronts. First, they contested the allegation that it was dark at the work site on the night of the incident. They also contended that it was the plaintiff himself who foolishly tried to perform a dangerous task, on his own without a spotter. They also alleged that it was the responsibility of his employer to provide adequate lighting, not the owner of the property or their representatives on the job. Additionally, they argued that it was the negligence of the plaintiff's co-employee, the crane operator, who caused the shackle to strike the plaintiff in the head. Finally, they pointed out that if the plaintiff truly felt he was in danger, he had the right and obligation to refuse to do the work.

Plaintiff's counsel's strategy regarding the liability issues was to obtain as much information as possible before filing suit or deposing witnesses. Plaintiff obtained the permission of a state agency to review what amounted to a warehouse full of documents relating to this project. Counsel sent a team of investigators to review the documents. That review resulted in the revelation of information not known to the defendants until later in the case. Therefore, the plaintiff was already aware of critical information and had copies of many of the defendants' documents before discovery commenced.

Plaintiff obtained several admissions of the parties which directly contradicted the documents already obtained. A prime example was when one of the defendant's representatives testified that the area where the plaintiff was working was "lit up like Fenway Park" in a particular area where documents could establish darkness.

Additionally, counsel obtained numerous statements from the plaintiff's co-workers that also directly contradicted the official documents both in terms of the lighting conditions and the duties and responsibilities of the various defendants. In one instance, a defendant's representative stated that he personally observed the conditions just a couple of hours after the incident and all of the subject lights were working and on. He indicated that he made these observations with the shift foreman. In his statement, obtained by plaintiff's counsel, the shift foremen illustrated the defendant's willingness to lie by confirming that in fact most of the lights had been removed from the site by the time of the accident and that what was left was either not on or wholly inadequate to light the area in which the plaintiff was working. Further investigation and depositions revealed a cover-up among corporate officials to prevent public disclosure of the incident. In summary, the lies and cover-ups of the defendants were numerous and well-documented and in the end, overwhelming.

**Establishing Proof of Traumatic Brain Injury:**

Without documented evidence of skull fracture or a significant impact to same, a traumatic brain injury is exceedingly difficult to both diagnose and prove. When you add the question of patient exaggeration and a negative CT and MRI, the task becomes nearly impossible. Unable to rely upon these tests to document the nature of the plaintiff's injury, it became apparent that more sophisticated techniques to objectively

and graphically illustrate the subtle nature of the plaintiff's brain damage would be required.

Two tests have become prominent modalities utilized by the neurological and the neuropsychological community as objective and reliable. These tests can assist in the diagnosis and treatment of traumatic brain injury, especially where traditional methods prove inconclusive. One test is called Positron Emission Tomography, or PET, and it involves injecting the patient with glucose and a mildly radioactive dye. The test then measures and graphically illustrates the amount of brain activity by displaying which portions of the brain "absorb" the glucose dye and how quickly. The other test is called Quantitative Electroencephalograph, or QEEG. This test is conducted by using a series of sensors attached to the patient's skull which measure the amount of electrical activity generated by various sections of the brain. Again, the results of the test are displayed in a graphic form. These two tests became the hallmark of the plaintiff's proof of damages in this case.

The plaintiff's doctors at Spaulding recognized the potential benefit of both QEEG and PET, not only to confirm diagnosis but also to assist in focusing treatment. The objective QEEG data was interpreted by one of the country's foremost authorities in QEEG who wrote a report regarding his findings. He noted that EEG coherence and EEG phase were abnormal, especially in bilateral frontal regions. A graphical presentation was produced illustrating the areas of the brain which were affected. This corresponded to and validated the findings reached with the subjective neuropsychological testing at Spaulding.

Next, the plaintiff underwent a PET scan. This exam was performed at one of the less than a handful of facilities in the country that truly specializes in this technology as it relates to head injury. The PET scan confirmed that the plaintiff was suffering from diffuse axonal brain injury, supporting the diagnoses of all of Mr. Greene's treating physicians at Spaulding and confirming all of their subjective findings. Color films were generated which showed in acute and graphic detail the areas of the plaintiff's brain which were malfunctioning. When compared side by side to "normal films", the damage was apparent.

Plaintiff's experts were prepared to testify as to biomechanical evidence as well. Both the QEEG and the PET confirmed that the plaintiff was suffering from classic "right sided" losses which are found in cases where the trauma to the brain is from the left side – which is precisely the type of injury that the plaintiff suffered in this case. The experts were prepared to testify that the symptoms he was demonstrating, including the paranoia and recollection of fictional events (ie: involvement in non-existent criminal activity) can be found in these types of cases. Importantly, an apparent exaggeration of symptoms is something that one can expect to find in diffuse axonal injury of this sort.

Armed with these new objective findings, counsel for the plaintiff consulted with a neurologist and neuroradiologist who were provided with the plaintiff's original MRI as well as his QEEG and PET. The MRI films which were originally read as "normal", now were re-read in light of the additional objective evidence. Viewing the tests and all of the plaintiff's treatment notes in their totality, both experts concluded that the "white matter" found in the Flair Images of the MRI supported the early appearance of sheering and diffuse axonal injury.



A comprehensive life care plan was developed which described the expenses that the plaintiff could expect in terms of future medical needs and personal care, which were expected to increase as time went on. An economist was employed to prepare a report which detailed all the economic losses.

**The Settlement:**

Despite the fact that there was vigorous advocacy practiced on the part of both counsel for the plaintiff and the defendants, the parties were able to settle this case through direct negotiations without the assistance of a mediator. Following a series of focus groups, a settlement meeting was scheduled which was attended by all counsel and insurance representatives. Plaintiff's counsel presented a detailed PowerPoint presentation of the plaintiff's case. Additional elements were revealed as interval increases in the offer were tendered. After approximately 4 hours of negotiation, the case was settled for the sum of \$3,300,000.00 (half of which was paid in cash and the remainder went to fund a structured component with an expected payout nearly double the present value).

**Conclusion:**

Counsel for the plaintiff had a theory of both the liability and the damages in this case. All activity in the case was geared toward confirming these theories. This case demonstrates the benefit of intense and focused early development of a variety of different types of evidence regarding liability and a relentless pursuit of medical confirmation of subtle and often illusory damages through the use of state of the art modalities.

On a professional note, the successful resolution of this case can be attributed, at least in part, to an all too rare mutual respect and degree of gentle professionalism practiced by the litigators in this case. The handling of this case was reminiscent of a time when advocates could both zealously represent their clients without rancor and resolve matters without the need of outside assistance and without wasting precious court resources.

Douglas K. Sheff  
and  
Frank J. Federico, Jr.

*SHEFF LAW OFFICES*  
Counsel for the plaintiff