

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

Injury No.: 98-144602

Employee: James Babcock

Employer: MB Roofing

Insurer: Missouri Employers Mutual Insurance Co.

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: December 30, 1998

Place and County of Accident: Kansas City, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 chief 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 chief administrative law judge dated July 12, 2004. The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued July 12, 2004, is attached and incorporated by this reference.

The Commission further approves and affirms the chief 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 14th day of February 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

VACANT
Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: James Babcock

Injury No. 98-144602

Dependents: N/A
Employer: MB Roofing
Insurer: Missouri Employers Mutual Insurance Co.

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: May 26, 2004 Checked by: KJC/lh

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: December 30, 1998
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of his employment as a roofer for his employer, MB Roofing, sustained an injury when he fell from the roof and landed on the ground below.
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: low back and left leg and ankle
14. Nature and extent of any permanent disability: compression fractures at L1, L2 and pillion fracture of the left tibia.
15. Compensation paid to-date for temporary disability: \$5,423.74
16. Value necessary medical aid paid to date by employer/insurer? \$34,986.29
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$384.55
19. Weekly compensation rate: \$256.37
20. Method wages computation: 287.250

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None

19 2/7 weeks of temporary total disability (or temporary partial disability) @ \$256.37 = \$4,905.65 (\$5,423.74 previously paid, resulting in an overpayment of \$518.09)

196 weeks of permanent partial disability from Employer @\$256.37 = \$50,248.52.

NA weeks of disfigurement from Employer

NA Permanent total disability benefits from Employer beginning _____, for Claimant's lifetime

22. Second Injury Fund liability: None.

_____ weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:

_____ weekly differential payable by SIF for _____ weeks beginning _____ and, thereafter, for Claimant's lifetime

TOTAL: 49,730.43

23. Future requirements awarded: None

Said payments to begin as to date of the award and to be payable and be subject to modification and review as provided by law.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Babcock

Injury No: 98-144602

Dependents: N/A

Employer: MB Roofing

Insurer: Missouri Employers Mutual Insurance Co.

Additional Party: Missouri State Treasurer, as Custodian of the Second Injury Fund

Hearing Date: Mary 26, 2004

Checked by: KJC/lh

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- 1) The nature and extent of the disability sustained by the Employee;
- 2) Liability of the employer and insurer for past chiropractic bills in the amount of \$3,805;
- 3) Liability of the employer and insurer for future medical treatment including both physical and psychiatric;
- 4) Liability of the State Treasurer as Custodian of the Second Injury Fund for compensation;
- 5) The wage and compensation rate; and,
- 6) Whether there was an overpayment of temporary total disability benefits.

At the hearing, Mr. James Babcock (hereinafter referred to as Claimant) testified that he was born on December 14, 1966. He stated that he sustained an injury at work on December 30, 1998, when he fell while on a roof and slid onto the chimney. He stated that he was knocked unconscious.

Claimant testified that while on the roof he remembered gaining consciousness and then falling to the ground about 10 feet below. He indicated that he was again knocked unconscious. He stated that upon awakening he met a postal worker who drove him to McDonald's. He stated that he called his mother, sister and boss from the restaurant and that his mother and sister drove him the hospital.

Claimant testified that Dr. James Reardon performed surgery on his left leg. He stated that the doctor placed pins in it. He also indicated, however, that he concluded that the doctor was not looking after his best interest and that he, therefore, requested a referral to a different physician. He stated that the insurance company refused to do so. He stated that he then went to St. Joseph Chiropractic on his own hoping to improve his mobility.

Claimant testified, however, that he was "hot-headed" and that he had problems in getting along with Dr. Reardon. He admitted to problems in getting along with the physical therapist.

Next, Claimant testified that he had only worked for MB Roofing for two weeks prior to the accident. He acknowledged that he had stated in his claim for compensation that his average weekly wages were \$500 per week. He stated that he "figured" that he would make that amount. He stated that it was "an around-about figure." He stated that his actual wages were based on the amount of squares put on a roof. He stated that the pay was greater for working on steeper roofs. He also admitted that the wage statement contained two advanced payments made to him by his employer.

Claimant stated that he had alleged in the claim for compensation injuries to his neck, back, hip, leg and ankle in the accident. He stated that his left ankle, left hip and low back continued to throb. He stated that he still experienced pain in his mid back and neck. He indicated that he was experiencing such pain on the day of the hearing. He stated that his pain had gotten worse over the last two years.

Claimant complained of problems in walking, standing and sitting. He stated that his back was throbbing at the hearing. He stated that it was difficult to walk on uneven surfaces and up and down stairs. He admitted that he did not always use a cane to walk.

Claimant admitted that Dr. Reardon released him to light duty. He stated he did not go back to roofing because his employer would not take him back. He stated that he could not sit for eight hours and do a job.

Claimant testified that subsequent to the accident he sought treatment at the Family Guidance Center due to suicidal thoughts. He stated that he also thought someone was out to kill him. He stated that he was paranoid and stressed out. He complained of being depressed due to a lack of money and his inability to work.

Claimant admitted, however, that during the period in which he received treatment at the Family Guidance Center he was using alcohol and smoking marijuana. He stated that he was an addict. He stated that he used the alcohol and drugs to relieve his arthritic pain and stress and anxiety.

Later, Claimant admitted that prior to the accident at work he had used both alcohol and marijuana. He denied using either to the same extent as after the accident. He stated that subsequent to the accident at work he was placed in several 96-hour holds due to his mental problems. He stated that the 96-hour holds were for individuals who were dangerous to themselves or others. He stated that eventually he was placed in treatment for 60 days for his drug and alcohol problems. He stated that he had been "clean and sober" for seven or eight months.

Claimant testified that he was on medication for his arthritis and mental problems. He also alleged some psychological problems, which preexisted the December 1998 accident at work. He stated that after falling from the roof he became suicidal and thought that people were out to kill him. He stated that prior to the fall he had experienced emotional problems and received counseling in elementary school. He stated that he had trouble with discipline in school. He stated that he had trouble with discipline, authority and relating to people in the workforce. He stated that he was honorably discharged from the military after six weeks due to an inability to get along with the drill instructors.

Claimant testified that his father was an alcoholic and abusive. He stated that he was a poor student in school. He stated that he had trouble with reading and math. He stated that he repeated the ninth and tenth grades. He stated that he later obtained a GED.

Claimant testified that he had worked on a number of jobs for short periods but quit due to an inability to get along with his supervisors. He stated that the jobs were in restaurants, construction, roofing and general maintenance. He stated that on one occasion he owned a roofing company, but quit the business after he began experiencing problems in his marriage.

Claimant alleged that subsequent to the accident at work he began to experience panic attacks. He stated that pressure caused stress. He alleged sleep problems. He stated that medication helped with the panic attacks and sleep problems.

On cross-examination by his employer, Claimant testified that he had been diagnosed with paranoid schizophrenia and depression. He stated that he believed that the psychiatric problems and not the physical impairments prevented him from working.

Claimant admitted that he was actively abusing marijuana at the time of each of his multiple involuntary holds at the

Heartland Psychiatric Hospital. He admitted that he was using alcohol at the time of some of the involuntary holds. He stated that despite being afraid of people, he would approach individuals in bars and stores in an effort to find out where he could purchase marijuana and to get them to smoke it with him. He stated that he usually smoked it by himself. He admitted that no doctor had ever prescribed marijuana for medical reasons.

Claimant admitted that in March 1999 he was jailed for possession of marijuana. He stated that he was probably using it for pain at the time and that he believed that he had heard on television that marijuana helped with pain.

Nevertheless, Claimant admitted that he had been smoking marijuana since the age of 13 to 15. He admitted that he was not in pain at age 15. He acknowledged that the notes from the Family Guidance Center stated that he lost his marriage due to marijuana use. He stated at the hearing, however, that the notes were incorrect and that his marriage ended because his wife was "cheating on him."

Claimant acknowledged that Dr. Pro in his September 10, 2002, report noted that Claimant had indicated that he was smoking two to three "joints" per day. Claimant denied making such a statement to the doctor. He stated that he might have told the doctor that he was smoking marijuana one to two times per week.

Claimant alleged problems with balance and coordination. He stated that he had seen shadows move. He stated that he had problems with delusions. He stated that he was depressed. He stated that he had high levels of anxiety. He stated that he was not aware that each of those symptoms were associated with marijuana abuse. He admitted, however, that he had noticed improvement in his condition over the last seven months since he allegedly stopped using marijuana.

Claimant acknowledged that Dr. Pro's records from September 2002 later indicated that he, Claimant was no longer using alcohol or marijuana. He admitted that records from Heartland Hospital from November 2002 contradicted Dr. Pro's records. He admitted that the Heartland records showed that he told the doctors that he was still using alcohol and marijuana. He admitted that the November 2002 Heartland records showed that he told the doctors that he got "high" all day two times a week for the past two or three months. He stated at the hearing that he was not being truthful about his marijuana use when he conveyed the information to the doctors at Heartland Hospital.

Claimant also acknowledged that the November 2002 records showed that he had advised his doctors that he had stopped using Oxycontin due to sexual side effects. He admitted that earlier he had testified that he had not dated since December 1998.

Claimant acknowledged that he had not attempted to find work since the December 1998 accident. He admitted that he had obtained his GED since the December 1998 accident. He stated that he could not read very well, but admitted that he read the Bible everyday. He stated that he could write.

Claimant admitted that he could care for his personal hygiene. He stated that he did not have a guardian to handle his finances. He admitted that the Social Security Administration did not require him to have a guardian or conservator for his social security benefits.

Claimant testified that he did not know how many times he had been convicted of crimes. He admitted that in 1990 he was convicted for receiving stolen property. He admitted that in 1999 he was convicted for possession of marijuana. He admitted that he had two DUI convictions.

Claimant admitted that one of his disputes with Dr. Reardon was over prescription medications. He stated that he believed Dr. Reardon was not prescribing enough pain medications for him. He acknowledged that Dr. Reardon's records showed that the doctor had prescribed Vicodin for him on March 19, 1999, and that he had returned to the doctor's office four days later seeking more Vicodin. He acknowledged that the doctor's records stated that he had launched into a profanity-laced tirade after Dr. Reardon refused to prescribe any more Vicodin for him. He further admitted that he could not get along with his physical therapist.

Claimant admitted that he worked two full weeks for MB Roofing. He admitted that one paycheck was for \$291 and the other for \$281. He admitted that he never told his employer that he was going to a chiropractor for treatment. He admitted that Dr. Reardon, the authorized treating doctor, did not prescribe the chiropractic treatments.

On cross-examination by the Second Injury Fund, Claimant admitted that he had not sought psychiatric or psychological care until November 2000. He admitted that he had not received any such treatment prior to the December 1998 accident at work. He admitted that he had never been hospitalized for such problems prior to November 2000. He admitted that no doctor had told him prior to December 1998 that he could not work due to a psychiatric or psychological impairment.

Claimant admitted that the one time he saw a counselor in elementary school was because he left classes early. He admitted that no doctor told him that he was depressed prior to December 1998. He admitted that no doctor told him that he suffered from paranoia prior to December 1998. He stated that his marijuana and alcohol use became more frequent after December 1998. He stated that his alleged paranoia and panic attacks became more frequent after December 1998.

On redirect examination, Claimant admitted that he had not seen a psychiatrist or psychologist prior to December 1998. He indicated, however, that he did not understand the nature of his psychiatric or psychological problems until after December 1998. Thus, he indicated that he did not understand that he needed psychiatric or psychological treatment prior to December 1998. He stated that he increased his alcohol and marijuana use after the accident due to pain and depression.

Claimant mother, Ms. Evelyn McKinney, and his brother, Mr. Lawrence Babcock, testified at the hearing on Claimant's behalf and provided corroborating testimony. Ms. McKinney testified that Claimant's father was verbally abusive towards the children. She stated that Claimant's brother Raymond and his sister had been diagnosed with mental problems. She stated that Raymond was diagnosed as being psychotic with manic depression and his sister with manic depression.

On cross-examination by Claimant's employer, Ms. McKinney admitted that she did not believe that her husband at the time of Claimant's birth was Claimant's biological father. She admitted that three of her four children had been treated for mental illnesses.

Mr. Babcock testified that he was Claimant's oldest brother. He stated that he lived in Columbia, Missouri, where he owned an insurance agency. He also stated that he had observed changes in Claimant's ability to sit, stand and walk since the December 1998 accident. In addition, he related an incident in 2002, wherein he stated that Claimant chased him with a poker from a fireplace and caused his wife and children to no longer wanted to be around Claimant.

On cross-examination by Claimant's employer, Mr. Babcock admitted that Claimant had briefly sold insurance with him. He admitted that he had no idea about Claimant's day- to- day activities. He admitted that he knew of Claimant's marijuana use prior to December 1998, but not the alcohol problem. He stated that he was not aware of their father verbally abusing Claimant.

On cross-examination by the Second Injury Fund, Mr. Babcock indicated that he had observed Claimant suffer a panic attack in 1996 or 1997 when their father was in the hospital and dying. He stated that he saw Claimant a couple of times per year.

Claimant offered into evidence three medical depositions, a deposition of a vocational expert, and numerous other medical reports and exhibits. Claimant's Exhibit O was the deposition testimony of John D. Pro, M.D., a board certified general and geriatric psychiatrist.

Dr. Pro testified that Claimant had a long history of pre-morbid psychiatric problems including paranoid thoughts, history of alcohol and marijuana abuse, and chronic depression. He stated that Claimant was a difficult patient with a strong substance abuse history, which made a precise psychiatric diagnosis difficult. He stated that he had prepared two reports, one on September 10, 2002, after the initial evaluation and the other subsequent to when Claimant was evaluated by Dr. Sheba Khalid.

Dr. Pro testified that Claimant gave a history of psychiatric problems in grade school, untreated feelings of depression and anger and alcohol problems. He stated that Claimant complained of problems in relating to his supervisors at work and in maintaining employment. He stated that Claimant mentioned convictions for DUIs, receiving stolen property, and possession of marijuana as well as marriage difficulties. He stated that Claimant told him that he had been using marijuana since the 6th grade.

Dr. Pro also testified that Claimant provided a family history, which was significant for mental problems and abuse by his father. Dr. Pro's diagnosis for the December 1998 accident was chronic pain syndrome and abusive pain medication pattern. He stated that he could not conclude to a reasonable degree of medical certainty that Claimant's hospitalizations for mental problems or psychoses subsequent to the December 1998 were caused by the accident. He admitted that there were a number of factors, which could have caused the admissions including marijuana, depression and chronic pain. He stated that Claimant's dysthymia was substantially aggravated by the fall at work.

Dr. Pro also concluded that Claimant's paranoid personality disorder, although not caused by the fall at work was affected by it. He stated that Claimant became more paranoid after the fall. He stated that Claimant's paranoid personality probably formed while Claimant was in high school. He stated that stress, depression and alcohol or marijuana use could cause a worsening of a paranoid personality disorder.

Dr. Pro concluded that Claimant's paranoid personality disorder, which allegedly preexisted the December 1998 accident at work, had resulted in an 18 percent impairment. He stated that the preexisting paranoid personality disorder had affected Claimant's relationship with coworkers and supervisors. He rated Claimant's overall impairment at 58 percent, with 40 percent related to the December 1998 accident at work.

Dr. Pro admitted that in his original report he had concluded that a combination of Claimant's personality disorder, depression and drug abuse were responsible for the impairment. He stated that Claimant's impairment was closer to a Class 4 than Class 3. He stated that a Class 4 impairment was severe and that a Class 3 was moderate.

Dr. Pro further testified that Claimant could not function at work on an eight-hour basis five days per week. He stated that Claimant would need ongoing psychiatric care. He stated that Claimant was at maximum medical improvement as of September 2002.

In addition, Dr. Pro concluded that Claimant's prior psychiatric problems combined with the back injury and the other "psychiatric consequences" to render Claimant more disabled than he was from each of the conditions considered in separation. He stated that Claimant was not employable due to the combination of all the factors, including his premorbid problems.

Finally, Dr. Pro admitted that it was unclear as to the proper diagnosis for Claimant's condition. He stated that Claimant's premorbid functioning was quite good, other than frequent losses of jobs and the divorce. He admitted that substance abuse had to be considered in evaluating Claimant's case. He also indicated that he did not believe that Claimant was a paranoid schizophrenic or that a diagnosis of schizo-affective disorder was appropriate.

On cross-examination by Claimant's employer, Dr. Pro admitted that Claimant was not totally disabled based on the orthopedic injuries alone and Claimant's age, education, and experience. He admitted that Claimant's drug abuse might have contributed to the worsening of Claimant's paranoid personality disorder. He admitted that rating psychiatric disabilities was not an exact science. He admitted that although the American Medical Association had published a 5th edition of the AMA Guidelines for the Evaluation of Impairments, he had relied on the 2nd edition in rendering his rating.

Dr. Pro admitted that Claimant's marijuana use had made Claimant's functioning worse. He admitted that he would not have prescribed marijuana use for Claimant. He stated that Claimant's major problem was chronic pain. He stated that Claimant's drug use had probably made the chronic pain worse. He admitted that Claimant's marijuana use made Claimant's global functioning worse.

Dr. Pro admitted that Claimant's orthopedic injuries did not cause Claimant's paranoid personality. He admitted that he believed that the paranoid personality disorder pre-existed the fall at work. He stated that the preexisting psychiatric problems were more of a problem in Claimant maintaining employment than finding a job.

On cross-examination by the Second Injury Fund, Dr. Pro admitted that he had not reviewed Claimant's employment records, which predated the injury at work. He stated that he did not recall reviewing any psychiatric records for treatment prior to the December 30, 1998 injury. He stated that he did not review any treatment records of Claimant's for alcohol or substance abuse prior to December 30, 1998. He admitted that the information he relied upon regarding any alleged pre-existing psychiatric disorder was based entirely upon the information relayed to him by Claimant.

Dr. Pro's supplemental deposition was taken on March 31, 2004. Dr. Pro indicated that Claimant needed additional treatment. He stated that Claimant needed muscle relaxants, non-steroidal anti-inflammatory drugs, anti psychotic medications and anti-depressants. He stated that Claimant's dysthymia or depression was substantially aggravated by the December 1998 fall at work and that Claimant needed treatment with a psychiatrist for it. He also stated that Claimant needed continued treatment for the long-standing personality disorder, which was substantially aggravated by the fall.

On cross-examination by Claimant's employer, Dr. Pro again admitted that Claimant's marijuana abuse could have affected Claimant's paranoid personality disorder. He admitted that paranoia could be a side effect of marijuana use. He admitted that Claimant's paranoid personality disorder could have been aggravated by the marijuana abuse. He admitted that Claimant's marijuana abuse made it more difficult to treat the underlying psychiatric problems.

Dr. Pro admitted that Claimant's longstanding marijuana use could have interfered with the effects of the prescription drugs. He admitted that marijuana use could make prescription drugs less effective. He admitted that when he made the recommendations for future treatment, he was assuming that Claimant would be compliant. He admitted that Claimant was not being compliant with the treatment by mixing the illegal drug use in with the prescribed medical treatment.

Edward J. Prostic, M.D., an orthopedic surgeon, testified by deposition on Claimant's behalf. He stated that the medical records showed that Claimant had sustained a compression fracture of L-1 and L-2 and a pillion fracture of the left tibia in the December 30, 1998 accident at work. He defined a pillion fracture as one through the weight-bearing articular surface of the tibia. He stated that it usually implied significant damage to the articular cartilage of the distal tibia or the dome of the calcaneus.

Dr. Prostic stated that the treatment Claimant received for his ankle injury was excellent. He noted Claimant's compression fractures. He concluded that Claimant's orthopedic injuries had resulted in a disability of 20 percent to the body as a whole on a functional basis. He also recommended further anti-inflammatory medicines by mouth and indicated that there was a psychological component to Claimant's injuries. He noted that Claimant's complaints were out of proportion to the x-ray findings. He stated that Claimant's MMPI results were clearly abnormal and indicative of substantial psychological difficulties. His testimony was provided on May 6, 2003.

On cross-examination by Claimant's employer, Dr. Prostic agreed that Claimant magnified his physical symptoms. He admitted that due to Claimant's symptom magnification he discounted some of Claimant's complaints. He denied any knowledge of any doctor prescribing a cane for Claimant. He stated that absent the psychological factors, Claimant could be rehabilitated to return to work in the open labor market.

On cross-examination by the Second Injury Fund, Dr. Prostic admitted that he ordered the MMPI because Claimant's x-ray findings did not explain why Claimant needed a cane or was doing as poorly as alleged. He admitted that Claimant's two spinal fractures did not appear to be such as to prevent a person from working for several years. He admitted that Claimant's ankle fractures had done "very, very well" for the severity of the fractures.

Ms. Sheba Khalid, M.D., a board certified psychiatrist, testified by deposition for Claimant's employer on June 16, 2003. She stated that she evaluated Claimant on December 31, 2002. She also stated that Claimant was very evasive and guarded during the evaluation.

Dr. Khalid stated that Claimant's records revealed a history of depression, chronic feelings of paranoia and substance abuse prior to December 30, 1998. She noted that because a person did not have a record of psychiatric treatment prior to a certain date did not mean that the person did not have the illness. She also noted Claimant's family history of bipolar illness, alcoholism and abuse. She stated that the family history was important because many psychiatric illnesses were genetic in nature.

Dr. Khalid testified that during the evaluation Claimant covered his head and eyes with his hat most of the time. He stated that he generally refused to make eye contact. She stated that he was visibly agitated when she attempted to clarify his history and that she did not want to provoke him.

Dr. Khalid testified that on mental status evaluation Claimant was alert and oriented to time, person and place. She noted that Claimant's concentration and short-term memory were intact. She also noted his very unpredictable moods, ranging from depression and dysphoria to laughing inappropriately. She concluded that some paranoia was definitely present. She concluded that although the fall at work had not caused Claimant's psychiatric illness; it had exacerbated it.

Dr. Khalid rated Claimant's total psychiatric impairment at 60 percent, with 30 percent pre-morbid or pre-existing the December 30, 1998 accident. She indicated that the remaining 30 percent was caused by the December 1998 accident at work.

On cross-examination by Claimant, Dr. Khalid related that the records indicated that Claimant's anger problems became worse after the fall from the roof. She stated that it was difficult to make a diagnosis of bi-polar disorder because Claimant did not fit the criteria. She stated that the records did not show any manic episodes by Claimant. She stated that he did fit certain other criteria for a bi-polar diagnosis such as substance abuse, irritability, reckless driving, paranoia and family problems. She stated that it was difficult to make a definitive diagnosis in Claimant's case due to his substance abuse history.

On cross-examination by the Second Injury Fund, Dr. Khalid admitted that Claimant was not cognitively impaired. She admitted that Claimant had not sustained a head injury in the December 1998 accident with resulting memory loss problems. She admitted that she had not reviewed any of Claimant's educational or employment records. She admitted that Claimant's statement to her about abstaining from alcoholic beverages since the December 1998 accident; conflicted with the information contained in the medical records about his alcohol use.

The numerous medical reports and records admitted into evidence were essentially cumulative of the other testimony. On May 5, 1999, however, Mr. John Gillaspie, a physical therapist at HealthSouth Sports Medicine and Rehabilitation Center, noted that Claimant had missed some time in therapy due to being incarcerated. He also noted that Claimant had made "absolutely no progress" in the therapy sessions. He stated that Claimant's only concern seemed to be getting stronger pain medication.

On May 12, 1999, Mr. Gillaspie indicated that he had observed Claimant moving quite freely without an antalgic gait or the use of crutches. He stated, however, that when he questioned Claimant about the injury, Claimant complained of an inability to put any weight on his foot secondary to pain.

Claimant's Exhibit E were the Heartland Health Psychiatric records from November 17, 2000 through December 16, 2000. It was noted that Claimant was discharged on November 21, 2000 with a diagnosis of delusional disorder, persecutory type and cannabis abuse, with consideration of substance-induced psychosis. It was noted that prior to the most recent admission Claimant had admitted to amphetamines use. It was noted that Claimant was reluctant to provide urine samples for a drug screening.

On a later admission, a chemical dependence counselor concluded that Claimant was substance dependent on marijuana and alcohol. Mental status examination revealed that Claimant was oriented. His memory was intact. His mood was irritated. His affect was broad and within the normal ranges of emotional responses. His speech was clear and his thought process goal direct with no homicidal or suicidal thoughts.

Claimant advised the doctor that he had been using marijuana since the 6th grade. He stated that his use of marijuana was sporadic until the age of 19 when he began smoking marijuana once per day. He stated that it later progressed to two or more times per day and continued to progress. Claimant told the doctor that he had attempted to stop smoking marijuana since being put on probation. He stated that he had been caught with marijuana in his possession on one or two occasions since being placed on probation.

Claimant indicated that he had used cocaine on two occasions. He stated that he had used cocaine once with his brother four years ago and crack-cocaine once with his sister. He indicated that he had tried LSD on one occasion. He indicated that he had tried psilocybin mushrooms and not liked them. He admitted that he had used amphetamines known as "black beauties" in high school on two occasions.

Claimant's Exhibit F contained the November 9, 2002, to July 21, 2003 records from Heartland Health. On November 9, 2002, Claimant was admitted and stated that he had been using "extra alcohol, predominantly beer and maybe marijuana lately." He denied using any opiates since his last admission. During the February 25, 2003, admission Claimant refused a drug screening. He admitted to marijuana use. The doctor's impression was alcohol and drug dependence.

Ms. Mary Titterington, a vocational rehabilitation consultant, testified by deposition on Claimant's behalf. She indicated that Claimant was fairly unresponsive to questions and presented with a very flat affect and very little emotion. She stated that he had "kind of a slowness". She stated that the slowness involved everything including his speech and movement.

Ms. Titterington testified that Claimant rotated between sitting and standing on a fairly frequent basis about every 15 to 20 minutes. She stated that her evaluation lasted about 3 hours and 50 minutes.

She noted Claimant's complaints and daily activities. She stated that he advised her that he was in special education classes in reading and math. She stated that he gave a history of poor grades in high school. She stated that his employment history was one of multiple unskilled jobs, most of which involved a heavy range of exertion. She stated that his work history did not result in skills, which he could transfer to lighter work.

Ms. Titterington testified that Claimant's IQ test results placed him in the borderline range. She stated that on the Wide Range Achievement and Adult Basic Learning Examination tests Claimant's reading comprehension was at approximately the 6th grade level. She stated that his vocabulary skills were superior to his reading comprehension skills. She related that the discrepancy indicated that at one time he probably functioned at a different level.

Ms. Titterington testified that due to Claimant's slow psychomotor movements she only administered one dexterity test. She stated that Claimant's scores on the Purdue Pegboard Test placed him in the 2nd percentile. She stated that Claimant's scores indicated that he had no strengths and that he could not be retrained.

Ms. Titterington concluded that Claimant could not do any of his past jobs. She listed his past jobs as roofer, kitchen helper, food prep worker, fry cook, cleaner, maintenance worker, and day laborer. She stated that although his maintenance job provided transferable skills, there were no jobs that Claimant could do where he could use the skills. She concluded that there were no jobs in the competitive market that Claimant could do on a full-time basis.

She also concluded that there were no jobs Claimant could do on a full-time basis due to a combination of his alleged severe psychiatric and physical impairments. She stated that his psychiatric impairment prevented him from focusing and concentrating and included problems with relating to people. She stated that he did not have the psychomotor skills or dexterity to do any sedentary unskilled work. She stated that claimant's lack of a high school education was a further factor in his inability to perform sedentary jobs. She stated that Claimant would not be an asset to any employer. She stated that he could not do any unaccommodated job.

On cross-examination by Claimant's employer, Ms. Titterington admitted that Claimant had passed the GED test, or high school equivalency. She admitted that the physical restrictions contained in the medical records in isolation would not prevent Claimant from competing for employment in the open labor market. She testified, however, that Dr. Khalid's and Dr. Pro's psychiatric restrictions and assessment considered alone would take Claimant out of the open labor market.

Ms. Titterington testified that Claimant had a preexisting mental disability, which impacted on his vocational assessment. She stated that the preexisting mental disability was demonstrated by the short-term nature of his jobs, and the multiple firings and resignations from employment. She stated that vocationally Claimant's preexisting mental disability was a hindrance or obstacle to his employment or reemployment.

Ms. Titterington testified that she questioned the veracity of Claimant's allegation that he was "kicked out" of the military because he had an extra bone in his ankle. She stated that she had done some work with veterans and the military. She stated that long-term drug abuse was often manifested by a loss of the ability to focus and a loss of general learning ability. She stated that

frequent drug abuse could result in paranoia.

On cross-examination by the Second Injury Fund, Ms. Titterington admitted that no records were furnished to her showing that Claimant had received psychiatric or psychological treatment prior to December 30, 1998. She admitted that no records showed that Claimant had any work restrictions for either a physical or psychiatric impairment prior to December 1998. She admitted that there were no records of any panic attacks prior to December 1998. She admitted that an individual without a psychiatric impairment could hold multiple jobs all lasting a short period of time. She admitted that the multiple jobs could be due to either quitting or being fired. She admitted that she evaluated Claimant more than five years after the December 30, 1998 accident.

LAW

After considering all the evidence, including the testimony at the hearing, the doctors' depositions, the medical reports and records, the other exhibits, and observing Claimant's appearance and demeanor, I find and believe that Claimant did not meet his burden of proving that he was rendered permanently and totally disabled under the Workers' Compensation Act. Thus, he failed to prove either his employer's or the Second Injury Fund's liability for such benefits.

Claimant did, however, prove that he sustained a permanent partial disability of 49 percent to the body as a whole as result of the injuries he sustained in the December 1998 accident at work. The evidence showed that the proper compensation rate was \$256.37 per week. Thus, at a rate of \$256.37 per week, for 196 weeks, Claimant's employer is liable for \$50,248.52 in permanent partial disability benefits.

I find that Claimant did not prove his employer's liability for any additional medical benefits, past or future. I find that there was an overpayment of temporary total disability benefits in the amount of \$518.09. I also find that Claimant did not prove that he had sustained any permanent partial disability, which was a hindrance or obstacle to his employment or reemployment and which preexisted the December 1998 accident at work. Thus, he did not prove the Second Injury Fund's liability for any compensation.

First, Claimant did not make a credible witness. The medical records and testimony were replete with examples of Claimant providing contradictory statements regarding his drug use. On one occasion he would admit to using certain drugs and deny it at a later date. On some occasions he admitted to using marijuana several times per day and later denied that he was using the drug or at least to the same extent. He would subsequently indicate that his prior statements were incorrect and that he only used the drug two or three times per week.

Claimant's own testifying physician, Dr. Prostic, an orthopedic surgeon, admitted that Claimant magnified his symptoms. Dr. Prostic admitted that Claimant's subjective complaints were out of proportion to the objective and physical findings. Dr. Prostic admitted that because Claimant's subjective complaints were so out of proportion to the objective evidence, that he ordered an MMPI test. He admitted that the results from the MMPI were clearly abnormal. He admitted that based on the physical injuries, Claimant could clearly return to work. He admitted that due to Claimant's symptom magnification, he had to discount some of Claimant's subjective complaints.

Claimant also admitted to a conviction for receiving stolen property. He admitted to convictions for DUIs. He admitted to convictions for possession of marijuana.

Claimant's testimony at the hearing was similarly filled with examples of inconsistent statements, particularly as pertaining to his drug use. He acknowledged at the hearing that the medical records showed that he became upset with his treating doctor because the doctor would not prescribe pain medications to the extent Claimant sought. Dr. Reardon's records showed that on March 19, 1999, Claimant was prescribed Vicodin. The records showed that Claimant returned to the doctor's office four days later and launched into a profanity-laced tirade after the doctor refused to prescribe any additional Vicodin. Claimant then requested a referral to a different physician, which his employer refused.

In addition, the evidence showed that Dr. Reardon had referred Claimant for physical therapy. The physical therapist also questioned Claimant's veracity. The physical therapist indicated that Claimant seemed more interested in getting prescription drugs than participating in the scheduled activities. The physical therapist noted that on general observation Claimant moved freely, but on questioning complained of an inability to put any weight on his foot secondary to pain.

Thus, Claimant's lack of credibility detracted from the weight given to both his testimony and subjective complaints. His lack of credibility combined with the other evidence clearly showed that Claimant failed to meet his burden of proving that he was rendered permanently and totally disabled.

The applicable statute defines “total disability” as an 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. §287.020 (7) RSMo. 1993. Thus, Claimant’s inability to return to his last job as a roofer does not mean that he is permanently and totally disabled under the Act.

The terms “any employment “ as defined in the Act means “any reasonable or normal employment or occupation. Fletcher v. Second Injury Fund, 922 SW2d 402 (Mo.App.1966); Crum v. Sachs Electric, 768 SW2d 131 (Mo.App. 1989); Kowalski v. M-G Metals & Sales, Inc., 631 SW2d 919, 921 (Mo. App. 1982); Groce v. Pyle, 315 SW2d 482 (Mo.App. 1958). To prove his entitlement to permanent total disability benefits, the employee must prove that he is unable to compete in the open labor market. See Fletcher; Cearcy v. McDonald Douglas Aircraft, 894 SW2d 173 (Mo.App. 1995); Reiner v. Treasurer, 837 SW2d 363 (Mo.App.1992); Brown v. Treasurer, 795 SW2d 478 (Mo.App.1990).

Courts have also held that various factors must be considered in determining whether the employee is permanently and totally disabled. Those factors include the employee’s physical and mental condition, age, education, and job experience and skills. Tiller v.166 Auto Auction, 941 SW2d 863 (Mo.App.1997); Olds v. Treasurer, 864 SW2d 406 (Mo.App.1993); Brown v. Treasurer, 795 SW2d 439 (Mo.App.1990); Patchin v. National Supermarkets, Inc., 738 SW2d 166 (Mo.App. 1987); Laturno v. Carnahan, 640 SW 2d 470 (Mo.App.1982).

The evidence showed that Claimant was only 37 years old. He obtained his GED in 2001. Not all of his prior jobs involved heavy manual labor. Claimant admitted that he once owned a roofing company. He worked in restaurants as a cook and dishwasher. His brother admitted that Claimant once sold insurance for him. There was no evidence that Claimant quit any of the jobs due to a physical or mental impairment. In fact, Claimant testified that he got out of the roofing business because he was experiencing marital problems.

In addition, the evidence showed that the only injury sustained by Claimant in the December 1998 accident, which required surgery or extensive treatment was the lower leg fracture. There was simply no credible evidence which showed that the injuries Claimant sustained in the December 1998 accident rendered him permanently and totally disabled.

Claimant’s own testifying orthopedic surgeon, Dr. Prostic, indicated that the treatment Claimant received for the injuries was excellent and that the physical injuries did not prevent Claimant from working. Dr. Prostic concluded that Claimant had sustained a permanent partial disability of 20 percent to the body as a whole. Dr. Reardon, the treating orthopedic surgeon, concluded that Claimant had sustained a permanent partial disability of 8 percent to the body as a whole. Neither rating supported Claimant’s allegation of permanent total disability.

Claimant, however, also alleged a psychiatric or psychological component to his injuries. Again, the most credible, competent medical evidence did not support Claimant’s allegation that the physical and psychiatric injuries combined to render him permanently and totally disabled

First, the most credible evidence clearly showed that not all of Claimant’s alleged psychiatric problems resulted from the December 1998 accident at work. Neither Dr. Pro nor Dr. Khalid, the two psychiatrists who testified in the case, concluded that Claimant’s alleged paranoid personality disorder or paranoid schizophrenia were caused by the fall from the roof. Neither diagnosed a physical injury to the brain in the accident. Neither diagnosed any organic brain injury in the accident. At most, both doctors believed that Claimant had aggravated a preexisting condition and suffered from depression as a result of the injuries Claimant sustained in the December 1998 accident.

Dr. Pro, who testified on Claimant’s behalf, concluded that due to the depression and aggravation of the preexisting conditions, that Claimant had sustained a permanent partial impairment of 40 percent to the body as a whole as a result of the December 1998 accident. Dr. Khalid concluded that due to the aggravation, Claimant had sustained a permanent partial impairment of 30 percent to the body as a whole.

Both Drs. Pro and Khalid admitted that Claimant’s drug abuse complicated the treatment for Claimant’s alleged psychiatric impairments. Both admitted that it was difficult to render a proper diagnosis in Claimant’s case due to Claimant’s drug abuse. Both admitted that the symptoms for drug abuse were similar to those raised by Claimant. Both admitted that a person who abused drugs might suffer from depression. Both admitted that a person who abused drugs might raise paranoid schizophrenic type complaints. Both admitted that a person who abused drugs might suffer from delusions and hallucinations. Both admitted that a person who abused drugs might suffer from anxiety.

Claimant, as noted above told some doctors that he was using marijuana on a daily basis. He told some doctors

that he was always “high”. He told some doctors that he had been using marijuana since the 6th grade. He admitted to arrest records for driving while intoxicated and possession of marijuana. He admitted mixing the marijuana use with alcohol and other drugs.

Thus, the most credible evidence clearly showed that Claimant abused drugs. The most credible evidence clearly showed that each time Claimant sought admission to a psychiatric hospital with paranoid complaints or complaints of possibly injuring himself, he was abusing drugs at the time. Based on the most credible evidence, it must be found that Claimant’s substance abuse aggravated his alleged complaints and as the two psychiatrists noted it was difficult to distinguish the symptoms resulting from the substance abuse from the alleged psychiatric difficulties. Claimant had the burden of proof. He did not meet his burden of proof on that issue.

Moreover, none of the doctors who testified in the case concluded that the injuries Claimant sustained in the December 1998 accident considered alone rendered Claimant permanently and totally disabled. Thus, Claimant failed to prove his employer’s liability for permanent total disability benefits. Based on the most credible competent evidence, he proved that he sustained a permanent partial disability of 14 percent to the body as a whole due to his physical injuries from the December 30, 1998 accident at work. As noted earlier, Dr. Prostic concluded that Claimant had sustained a permanent partial disability of 20 percent due to the physical injuries and Dr. Reardon, the treating physician, concluded that Claimant had sustained a permanent partial disability of 8 percent.

Claimant also proved that he sustained a permanent partial disability of 35 percent to the body as a whole due to the alleged psychiatric or psychological problems either caused or aggravated by the December 1998 accident. As noted earlier, Dr. Pro concluded that as a result of the psychiatric problems either caused or aggravated by the December 1998 accident that Claimant had sustained a permanent partial impairment of 40 percent. Dr. Khalid’s rating for the same impairments was 30 percent.

Claimant offered no credible evidence that the physical injuries he sustained in the December 1998 accident combined with the psychiatric injuries to result in a greater disability to his body as a whole than the simple sum of the injuries considered individually. Therefore, I find that he sustained a permanent partial disability of 49 percent to the body as a whole as a result of the physical and psychiatric injuries either caused or aggravated by the December 1998 accident at work. (14 percent body as a whole for physical injuries and 35 percent body as a whole for psychiatric injuries)

The applicable statute pertaining to the compensation rate provides as follows:

287.250. 1. Except as otherwise provided for in this chapter, the method of computing an injured employee’s average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

- (1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
- (2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;
- (3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;
- (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;
- (5) If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee’s weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee’s average weekly wage;

- (6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;
- (7) In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor...
- (4) If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage....

Claimant was not paid a fixed weekly, monthly, or yearly salary. He had not worked thirteen weeks prior to the injury. No competent evidence was offered as to the salary of a comparably situated employee. While a wage statement for another employee was admitted into evidence, the wage statement clearly stated that all wages were based on commissions. That does not constitute a reasonable basis to determine the proper wages of another employee. Pay based on commissions contains too many variables to be considered a reasonable basis for determining the wages of another employee. An employee paid on commission may not be a diligent worker. That employee's wages would reflect his lack of diligence. To base another employee's wages on such a worker would not be fair or reasonable. Thus, it would not be fair to base Claimant's wages on those of another employee of the company who was paid on commission and in some weeks earned as little as \$55.33.

The applicable statute at subsection 4 also provides that if the prior sections do not provide a fair and just formula for determining the average weekly wages, a manner deemed fair based upon the facts presented may be used to determine such wages. That section of the statute must be applied to determine Claimant's average weekly wages.

Claimant admitted that although he alleged a weekly wage of \$500 per week in the claim for compensation; that no basis existed for the allegation. He stated that he "figured" he would make that amount. He stated that it was "an around-about figure." He admitted that he was never paid that amount. Thus, claimant's allegation in the claim for compensation did not constitute competent evidence. It did not constitute the best evidence.

The wage statement provided by Claimant's employer showed that Claimant only worked two full weeks for his employer. Claimant admitted that the wage statement was correct on that issue. He testified that he began working for his employer on December 16, 1998 and sustained the injury on December 30, 1998. He also admitted that his employer made two advanced payments against future wages in the amounts of \$31.00 and \$36.50.

Neither Claimant nor his employer explained what weeks or pay periods were represented by the advance payments. The wage statement itself, which was handwritten and copied and difficult to read, appears to show a payment of \$31.00 but not \$36.50. The wage statement also appears to reflect some type of payment to Claimant on December 18 in the amount of \$165.60.

The wage statement clearly stated that Claimant worked 2 weeks and that because Claimant had no money he was paid every few days to help him. The wage statement showed payments of \$165.60 on December 18, \$31.00 on December 20, \$291 on December 24 and \$281.50 on December 31. Total earnings were not provided as requested in the wage statement. No explanation was provided as to what was represented by the alleged advanced payments.

Thus, based on the most credible evidence it must be found that Claimant's wages for the two weeks he worked were the total amount of money paid to him as reflected in the wage statement. The total amount of money paid to Claimant as reflected in the wage statement was \$769.10 for the two weeks he worked. Therefore, his average weekly wages would be \$384.55. Two-thirds of that amount would be \$256.37. That constitutes Claimant's compensation rate for temporary total and permanent partial disability benefits.

As noted above, Claimant proved that he sustained a permanent partial disability of 49 percent to the body as a whole as a result of his injuries from the December 30, 1998 accident at work. At a rate of \$256.37 per week, for 196 weeks, that yields \$50,248.52. Claimant's employer is ordered to pay that amount to Claimant.

Claimant's employer alleged that there was an overpayment of temporary total disability benefits. Claimant's employer argued that the temporary total disability benefits were paid at the rate of \$283.33 per week and that the proper rate was a lower amount per week. As noted above, based on the most credible, competent evidence, Claimant's average weekly wages were \$384.55 per week. That yielded a compensation rate of \$256.37 per week. That means that there was an overpayment of temporary total disability benefits in the amount of \$26.96 per week.

Claimant's employer paid 19 2/7 weeks of temporary total disability benefits representing the period December 31, 1998 through May 13, 1999. No credible evidence was offered which showed that Claimant was temporarily and totally disabled beyond the 19 2/7 weeks. Thus, the overpayment of temporary total disability benefits equaled \$518.09. ($\$26.96 \times 19 \frac{2}{7} \text{ weeks} = \518.09). The \$518.09 shall be deducted from the amount owed by the employer for permanent partial disability benefits.

Claimant also argued that his employer was liable for past and future medical benefits. He did not meet his burden of proof. The past medical benefits sought by Claimant represented the chiropractic bills from St. Joseph Chiropractic. Claimant admitted that he sought treatment on his own from the chiropractor. He admitted that his employer did not refer him to the chiropractor. He admitted that Dr. Reardon, an orthopedic surgeon and the authorized treating physician, did not refer him to the chiropractor for treatment.

Claimant further admitted that he went to the chiropractor for treatment after he concluded that Dr. Reardon was not looking after his "best interest." The most credible evidence and as reflected in Dr. Reardon's records showed that Claimant became upset with Dr. Reardon because the doctor would not prescribe narcotic pain medication for Claimant when Claimant wanted it. Dr. Reardon's records showed that he prescribed Vicodin on March 19, 1999 for Claimant. Dr. Reardon's records showed that Claimant returned to the doctor's office four days later and launched into a profanity-laced tirade because the doctor would not prescribe additional Vicodin. Claimant then decided to seek treatment on his own from the chiropractor.

The applicable statute provides that the employer has the right to direct the medical treatment. See §287.140 RSMo (1993). Claimant's employer chose that option and provided appropriate treatment with an orthopedic surgeon. Claimant's own testifying orthopedic surgeon, Dr. Prostic, admitted that the treatment provided by Dr. Reardon was excellent.

The applicable statute also provides that the employee may choose to direct his own treatment, but at his own expense. *Id.* Claimant chose that option when he sought treatment with the chiropractor. As such, the treatment was at his own expense and his employer is not liable for it.

Claimant also failed to prove his employer's liability for future medical treatment. Dr. Pro testified that Claimant needed treatment for the physical and psychiatric impairments Claimant allegedly sustained as a result of the December 1998 accident. First, as noted above, Claimant's employer provided treatment with an orthopedic surgeon for the physical injuries until Claimant elected to direct his own treatment. Claimant's own testifying physician agreed that the treatment provided to Claimant was excellent. Furthermore, Claimant's symptom magnification and lack of credibility essentially rendered it impossible to determine the validity of any remaining residual orthopedic problems or complaints.

Moreover, Dr. Pro is not an orthopedic surgeon. His opinion is entitled to less weight than those of the orthopedic surgeons on the need for treatment for the orthopedic injuries. There was no credible evidence that Claimant needed any additional treatment for the physical injuries he sustained in a 1998 accident.

Claimant also failed to prove his employer's liability for future psychiatric treatment. Dr. Pro admitted that Claimant's substance abuse had hindered the treatment for the psychiatric impairments. He admitted that substance abuse could cause depression and aggravate a paranoid personality disorder. As noted earlier, each time Claimant sought treatment at a mental hospital with paranoid complaints or because his mother thought he might harm himself, the doctors noted Claimant's substance abuse as a factor in the complaints. Dr. Pro even admitted that it was difficult to properly diagnose Claimant's condition due to the substance abuse.

Thus, the evidence clearly showed that due to Claimant's substance abuse, which caused problems virtually identical to those allegedly due to his alleged psychiatric impairment, it was impossible to determine the source of his complaints. Dr. Pro even admitted that he could not to a reasonable degree of medical certainty conclude that Claimant's hospitalizations for mental problems were caused by the December 1998 accident. He admitted that Claimant's abuse of marijuana could have been the cause of the admissions. Based on the evidence, it would be pure speculation, conjecture

and surmise to conclude that any treatment Claimant needs for depression or any alleged mental problem was related in anyway to the December 1998 accident as opposed to his alleged underlying psychiatric impairment or the substance abuse, which both psychiatrists who testified admitted had aggravated Claimant's alleged psychiatric impairments.

Finally, Claimant also argued that the Second Injury Fund was liable for permanent total disability benefits. In order to establish Second Injury Fund liability for permanent partial or permanent total disability benefits, Claimant must prove the following:

(1) That he or she has permanent disability resulting from a compensable work-related injury. See §287.220.1 RSMo. 1994; and

(2) That he or she has permanent disability predating the work-related injury which is of seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment and which combines with the disability from the compensable work-related injury to create a greater overall disability to the employee's body as a whole than the simple sum of the disability from the work-related injury and the preexisting disability considered individually: §287.220.1 RSMo. 1994; Garribay v. Treasurer, 930 SW 2d 57 (Mo.App.1996); Rose v. Treasurer, 895 SW 2d 591 (Mo.App.1995); Wuebbeling v. West County Drywall, 898 SW 2d 615 (Mo.App. 1995); Luetzinger v. Treasurer of Missouri, Custodian of Second Injury Fund, 895 SW2d 591 (Mo.App. 1995).

To establish entitlement to permanent total disability benefits, Claimant must prove a third factor:

(3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained resulted in permanent total disability. Boring v. Treasurer, 947 SW 2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 SW2d 152 (Mo.App. 1994).

Claimant met the first step as set out in the sequential above. As noted earlier, he proved that he sustained permanent disability as a result of the December 30, 1998 accident at work. He did not, however, meet the second step in the sequential. Claimant did not prove that he had permanent disability predating the work-related injury, which was of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment.

Missouri cases have held that Second Injury Fund liability is only triggered by a finding of the presence of an actual and measurable disability in existence at the time the work-related injury is sustained. Luetzinger; Garcia v. St. Louis County, 916 SW2d 263 (Mo.App. 1995). Claimant argued that he had a psychiatric disability at the time of the December 1998 accident at work. No doctor, however, had diagnosed Claimant with a psychiatric impairment prior to December 30, 1998. Claimant had not received any medical or psychological treatment for the alleged impairment prior to December 1998. Claimant had never been admitted to a mental hospital for treatment prior to December 1998. Claimant was not on any medication for the alleged impairment prior to December 1998. Claimant offered no evidence of any mental or emotional breakdowns or any episodes, which would remotely support his allegation that he had a psychiatric impairment or disability prior to December 1998 or that he had an actual and measurable disability in existence at the time of the work-related injury.

Instead, Claimant attempted to extrapolate a psychiatric impairment and disability, which preexisted the December 1998 accident out of a sporadic work history and his educational background. Neither was probative on the issue. Claimant argued that he quit 8 to 10 jobs prior to December 1998. He argued that he quit the jobs because he could not get along with his supervisors or accept discipline.

That was the primary basis for Claimant's allegation that he had a psychiatric disability, which predated the December 1998 accident at work. That allegation was without merit and lacked probative value. Claimant offered no credible, or objective evidence, which showed that he quit any job due to a psychiatric impairment or disability. He offered no evidence that quitting 8 to 10 jobs of the nature of those he held was unusual for a 31-year old person. He was 31 years old in December 1998. In addition, he admitted that several of the jobs were in the fast food industry and one was as a day laborer. There was simply no credible evidence that quitting 8 to 10 jobs in more than a decade of employment as a young man constituted any evidence of a psychiatric disability, which was a hindrance or obstacle to employment or reemployment.

Moreover, Claimant offered no evidence that any of the jobs he quit were high paying jobs. He offered no evidence that any of the jobs were considered career type positions. He offered no evidence that any of the jobs provided retirement or any other type of benefits, which might encourage long-term employment. He offered no evidence that most of the jobs were more than just essentially transitory type positions. He was also abusing drugs and using

alcohol during the time he worked on each of the jobs. One could as easily speculate that his drug and alcohol abuse as much as an alleged psychiatric disability caused him to quit the jobs.

Similarly, Claimant argued that he was not a good student and that in elementary school he received counseling on one occasion. He admitted, however, on cross-examination by the Second Injury Fund that the counseling he received in elementary school was due to leaving classes early. That constituted no competent or credible evidence of a psychiatric impairment or disability, which predated the December 1998 accident at work. Also, that he was not a good student does not equate to a psychiatric disability, particularly when he offered no evidence showing a relationship between the two.

In addition, Claimant argued that prior to December 1998, he was discharged from the military after a few weeks because he could not get along with the drill instructors. He told the vocational expert, however, that he was discharged from the military after a few weeks because he had an extra bone in his ankle.

Claimant offered no objective evidence that he was discharged from the military due to a psychiatric impairment. He did not offer his discharge papers into evidence. He offered no medical records from his time in the military supporting his allegation of a psychiatric impairment. In fact, as noted earlier he admitted that he had never been treated or seen by a physician or psychologist for psychiatric problems prior to December 1998. That certainly mitigates against any allegation that his discharge from the military was due to any type of psychiatric disability. He simply failed to prove a preexisting psychiatric disability.

Moreover, even assuming that Claimant had proved preexisting psychiatric disability, the standard for establishing Second Injury Fund liability is that the disability must constitute a hindrance or obstacle to employment or reemployment. Leutizinger; Garcia. Claimant proved neither. There was no objective or credible evidence that Claimant's alleged preexisting psychiatric disability was a hindrance or obstacle to his employment or reemployment. There was no evidence that he was terminated from any position due to a psychiatric disability. There was no evidence that he was disciplined on any job due to a psychiatric disability. There was no evidence that he was accommodated on any job due to a psychiatric disability. There was no evidence that any employer ever refused to hire him due to a psychiatric disability. There was no evidence that he ever had any difficulty in finding a job due to a psychiatric disability. There was no evidence that he was placed on any type of job restrictions due to a psychiatric disability. Also, again as noted above, there was no credible evidence that the short tenure of some of his prior jobs was related in anyway to a psychiatric disability.

Claimant simply failed to prove any permanent disability, which predated the December 1998 accident and which was a hindrance or obstacle to his employment or reemployment. In so finding, however, it was recognized that Drs. Pro and Khalid rendered disability ratings for the alleged preexisting psychiatric impairment. Neither relied on any objective evidence. Neither explained the bases for their opinions. Neither explained how it could be determined that Claimant had preexisting psychiatric disability when their examinations occurred in late 2002 and early 2003 respectively, and there were no medical reports, diagnoses, findings or evidence predating the December 1998 accident which supported Claimant's allegation of such an impairment. Claimant's alleged disability was not like a fractured bone or arthritis or some condition where a person might not have received treatment, but a later physician in reviewing x-rays and conducting an examination could offer an opinion to a reasonable degree of medical certainty that some preexisting disability existed.

Moreover, Dr. Pro was hired by Claimant to testify in the case. It was in Claimant's best interest to establish preexisting psychiatric disability. Dr. Khalid was hired by Claimant's employer to testify in the case. It was in Claimant's employer's best interest to establish that Claimant had preexisting psychiatric disability. Preexisting psychiatric disability might show that Claimant's employer was not liable for all of Claimant's psychiatric problems. More importantly, by offering evidence of preexisting psychiatric disability, Claimant's employer was providing a basis for any award of permanent total disability benefits to be against the Second Injury Fund instead of the employer.

Thus, the opinions of Drs. Pro and Khalid on the issue of whether Claimant had preexisting psychiatric disability were based on speculation, conjecture and surmise. There was no credible evidence to support their opinions. Their opinions combined with the other evidence did not meet Claimant's burden of proving that he had preexisting psychiatric disability, which was a hindrance or obstacle to his employment or reemployment.

Finally, the opinions of Ms. Titterington, the vocational expert, employed by Claimant were also considered. Ms. Titterington based much of her conclusions about Claimant's employability on what she termed his general "slowness" of movement and complete lack of psychomotor movements and dexterity of the upper extremities. The evidence did not

support Ms. Titterigton's conclusions.

Ms. Titterington essentially concluded that Claimant had no dexterity of the upper extremities and that, therefore, he could not do sedentary unskilled type labor. That opinion was contrary to the overwhelming weight of the evidence.

The December 1998 accident involved an injury to Claimant's low back and lower extremity. No doctor concluded that he sustained any injury in the December 1998 accident, which would have affected his upper extremities. There was no evidence that he had ever sustained any type of injury or any medical problem, which would have affected his upper extremities. Thus, there was no credible explanation for the alleged complete lack of dexterity and psychomotor movements found by Ms. Titterington.

In addition, prior to the December 1998 accident, Claimant held jobs, which clearly required dexterity of the upper extremities. He worked as a roofer. That job required the use of his upper extremities. That job required him to use hammers, nails and other tools. Prior to December 1998, Claimant worked as a maintenance man. That job certainly required dexterity of the upper extremities. He worked as a cabinet and wood floor installer and did remodeling work on one job. That job certainly required dexterity and the use of tools and equipment. It also required fine motor skills.

In summary, there was no evidence to support the finding of Ms. Titterington that Claimant had essentially no psychomotor movements or dexterity in the upper extremities. Either Ms. Titterington's test results regarding Claimant's skills in those areas were skewed or Claimant's performance on the tests involved gross symptom magnification as found by his own testifying orthopedic surgeon during the doctor's examination of claimant for the workers' compensation case.

In conclusion, Claimant proved that he sustained a permanent partial disability of 49 percent to the body as a whole as a result of the injuries caused or aggravated by the December 1998 accident at work. He did not prove his employer's liability for any additional medical treatment, or the Second Injury fund's liability for any compensation.

Date: _____ Made by: _____

Kenneth J. Cain
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renee T. Slusher
Director
Division of Workers' Compensation