

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

Injury No.: 00-097226

Employee: Billy Baker  
Employer: Systems Testing and Analysis, Inc. (Settled)  
Insurer: Cincinnati Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: August 18, 2000

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge, except as modified herein, is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo., the Commission affirms the award and decision of the administrative law judge dated October 5, 2004, as modified. The award and decision of Administrative Law Judge Joseph E. Denigan, issued October 5, 2004, is attached and incorporated by this reference, except as modified herein.

The administrative law judge issued an award declaring employee permanently and totally disabled as a result of the combination of his pre-existing disability and the "present accident", assessing liability against the Second Injury Fund. An Application for Review was filed by the Second Injury Fund, contesting only whether the employee had met the burden of proof to establish permanent total disability. In its response, employee, in addition to reciting the evidence in the hearing record and arguing that the burden had been met, noted an apparent clerical error in the computation of the award by the administrative law judge, related to when the weekly differential payable by the Second Injury Fund would cease and full payment of lifetime permanent total benefits by the Second Injury Fund would begin. The award incorrectly recites that the weekly temporary total disability checks paid to employee ended on the date of ". . . 10/11/02, some 60 weeks after they began." In fact, 60 weeks after the date of the accident in question is consistent with the date of October 11, 2001. The record in this case is replete with references to a maximum medical improvement date of October 11, 2001. Therefore, the Commission will modify the award on this particular issue and affirm the award of the administrative law judge in all other respects.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 21<sup>st</sup> day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Billy Baker Injury No.: 00-097226

Dependents: N/A Before the  
Division of Workers'

Employer: Systems Testing Compensation

Additional Party: Second Injury Fund Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: Cincinnati Insurance Company

Hearing Date: June 25, 2004 Checked by: JED:tr

### 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: August 18, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:  
Fell 25 feet from ladder while checking HVAC.

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: Both feet, both knees, and low back
14. Nature and extent of any permanent disability: 50% of right ankle; 40% of left ankle; 15 % of each knee; and 12 ¾% of back
15. Compensation paid to-date for temporary disability: \$36,051.59
16. Value necessary medical aid paid to date by employer/insurer? \$80,550.27

Employee: Billy Baker Injury No.: 00-097226

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$1,040.00
19. Weekly compensation rate: \$599.96/\$314.26
19. Method wages computation: Stipulation.

#### COMPENSATION PAYABLE

21. Amount of compensation payable: (settled)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:  
weekly differential (\$285.70) payable by SIF for weeks beginning  
October 12, 2002, and \$599.96 thereafter, for Claimant's lifetime

TOTAL: INDETERMINATE

23. Future requirements awarded: Unknown

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

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

Robert J. Keefe

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Billy Baker Injury No.: 00-097226

Dependents: N/A

Employer: Systems Testing (Settled) Compensation  
Before the  
Division of Workers'  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Cincinnati Insurance Company (Settled)

Checked by: JED

This case involves a primary injury of severely fractured feet, bilateral knee injuries and low back all resulting to Claimant with the reported accident date August 8, 2000. Claimant fell some 25 feet to a concrete floor and landed on both feet. Employer and its insurer previously settled their risk of liability. The Second Injury Fund ("SIF") remains a party to this Claim. Both parties are represented by counsel.

The single issue for trial is the liability of the SIF.

### FINDINGS OF FACT

#### *age, education and work history*

Claimant testified that he is 53 years old, d/o/b 11/12/50. He has a high school degree but made D's as a student. He attended approximately one year of technical school in electronics but did not achieve a diploma or a certificate. There, too, he was a "D" student. In the early part of his work life Claimant worked in heavy equipment, typewriter repair and collecting coins from parking meters. In 1976 he learned heating and cooling systems testing, work he did until his fall in 2000. He has never been self-employed and has never had any type of supervisory, administrative or desk-type job.

#### *Pre-existing injuries*

When he was two years old Claimant lost the sight in his left eye and never regained it. The eye was ultimately removed when he was 16 years old. His blind left eye causes a lack of depth perception, and he has no peripheral vision to the left side. Over the years this has limited the types of jobs available to him. For example, he does not qualify for a truck driver's license. He also was not permitted to learn welding. On jobs he worked over the years, his lack of full vision forced him to be more careful to avoid being blind-sided and to check his work more carefully. These precautions caused him to work slower than other workers. Exhibit K lists a 10/99 Second Injury Fund settlement based on 110% disability of the left eye for complete loss of use. Dr. Volarich's report of 5/1/02 (Exhibit L) also lists 100% loss of the left eye.

When he was 17 years old Claimant was a passenger in a car that crashed into a tree at 60 miles per hour. The car was totaled. He injured his back and temporarily lost the use of his leg. He did not receive treatment at the time because he was a “stupid kid who didn’t know any better.” He regrets the decision. His back never got well.

In 1993 he re-injured his back moving furniture. He treated at the time and missed some six weeks of work. His back never totally recovered from that injury either.

Over the years his back has continued to bother him, and it restricted the type of work he could do. Exhibit F is the 9/12/02 report from the employer and insurer’s doctor, Dr. David Anderson, who states that Claimant had degenerative disc disease and spondylolisthesis that pre-dated his 8/00 work injury and that he suffered from 24% pre-existing disability. Dr. Volarich’s report of 5/1/02, contained in exhibit L, states that employee suffered 30% pre-existing disability due to his degenerative disc disease and spondylolisthesis in his low back.

In 1997 Claimant dropped a tool kit onto his left foot and broke it. In May 1997 he underwent surgery with an open reduction and internal fixation of two screws to stabilize the foot. (Exhibit J) That hardware remained in place until surgery for the present injury. He settled his Missouri workers’ compensation case for 28.75% of the left foot at the 110 level. (Exhibit K) Dr. Volarich found a 35% pre-existing disability to the left foot. (Exhibit L) Claimant testified that his left foot continued to bother him leading up to his 8/00 work injury. It would become stiff and painful, especially due to the constant ladder climbing required by his job.

#### *present injury*

On 8/18/00 Claimant fell 20 or 25 feet from a ladder to a concrete floor. He landed on both feet. He was taken by ambulance to St. Anthony’s Hospital where he stayed for two days. They diagnosed a fracture of the right calcaneus; fracture of the right base of the fifth metatarsal; and fractures of the left third, fourth and fifth metatarsal shafts. He also had x-rays of both knees, his low back and his pelvis. (Exhibit A)

Claimant ultimately underwent three surgeries for the multiple fractures in his feet. On 8/25/00 Dr. Daniel Schwarze performed an open reduction and internal fixation of the right calcaneus with bone graft and fascial release as well as an IM pinning of the left metatarsal 3, 4, and 5 with removal of the old hardware from the 5<sup>th</sup> metatarsal. (Exhibit B)

On 4/4/01 Claimant underwent a second surgery on the right heel at Barnes West Hospital to debride an ulcer exostosis of the calcaneus performed by Dr. Gary Schmidt. (Exhibit C)

On 5/9/01 Dr. Gary Schmidt performed a third surgery on the right heel at Barnes West in an effort to repair the non-union of the calcaneus fracture, to excise the sural nerve, and to graft bone from the iliac crest. (Exhibit D)

Claimant recovered poorly and was ultimately referred to Pain Management Services to treat his pain. Dr. Steven Schmidt took over his care and started him on a regimen of Vicodin and Oxycontin. (Exhibit E)

On 9/12/02 employer and insurer sent Claimant to Dr. David Anderson for a final evaluation. Dr. Anderson concluded that Claimant had reached maximum medical improvement and was capable of returning to sedentary work. He listed as restrictions: minimal walking, no climbing of ladders, minimal stairs and no standing greater than two hours. Claimant would be capable of “essentially desk work only,” due to the injuries to his feet; bilateral knee pain; and pre-existing degenerative disc disease and spondylolisthesis. (Exhibit F)

On 5/1/02 Claimant was evaluated by Dr. David Volarich, who is board certified in, among other fields, disability determinations. Dr. Volarich concluded that Claimant suffered 75% of the right ankle; 35% of the left foot; and 12.5% of the low back as a result of his fall in addition to his pre-existing disabilities of 100% of the left eye, 30% of the low back and 35% of the left foot. He felt that the combination of his injuries caused a greater overall disability than their simple sum. As a result of the combination of all of these disabilities, and considering Mr. Baker’s age, education and work history, Dr. Volarich concluded that employee could not engage in any substantial gainful activity nor be expected to do so in the future. He concluded that Claimant was permanently and totally disabled as a result of the work-related injuries of 8/18/00 in combination with his pre-existing low back injury, left foot injury and left eye blindness. (pgs. 9-10 of Volarich report contained in exhibit L)

On 12/12/02 Claimant settled his case against the employer and insurer for 50% of the right ankle; 40% of the left ankle; 15% of each knee; and 12 ¾% of the low back, leaving open the Second Injury Fund claim. Settlement documents

reflect \$80,550.27 in medical paid and \$36,051.59 in temporary total disability benefits. (Exhibit H)

In April 2003 Claimant moved to Florida for the warmer weather. The only shoes he can wear are sandals, and they do not do well in the snow. In Florida Claimant continues to treat for his pain. His current prescription for Oxycontin is 120 mg./day, up from the 30 mg./day he started with. He now takes an additional medicine to enhance the effectiveness of the Oxycontin.

*MMI, return to work and disability benefits*

After Mr. Baker's 9/02 exam by Dr. Anderson, his \$599.96 weekly TTD checks ended 10/11/02, some 60 weeks after they began. Claimant attempted to return to work. He first called his employer, Systems Testing, but they would not hire him. He next contacted his union hall but was told that no work existed for someone with his restrictions. He then set out on a job search, contacting 33 different employers of various sorts. No one was willing to hire him given his age, education and restrictions. He has not worked since the day of his fall.

Claimant did not apply for unemployment, even after his TTD benefits stopped. He said he felt that would be stealing, because he was not capable of working and therefore not entitled to unemployment benefits. He did, however, apply for social security disability benefits. He was promptly approved without getting an attorney and without appeals. He was also granted benefits from his union, because he could no longer work.

**RULINGS OF LAW**

1. Employee has a pre-existing 100% loss of use of his left eye as evidenced by his testimony, medical records, Dr. Volarich evaluation, and a prior Second Injury Fund settlement, which totals 154 weeks of compensation, and which constituted an obstacle and hindrance to his work.

2. Employee has a pre-existing 28  $\frac{3}{4}$ % disability of his left foot at the 110 level as evidenced by his testimony, medical records, Dr. Volarich evaluation, and prior settlement, which totals 31.625 weeks of compensation, and which constituted an obstacle and hindrance to his work.

3. Employee has a pre-existing 25% disability due to his low back as evidenced by his testimony, medical records, evaluation of Dr. David Anderson and evaluation by Dr. David Volarich, which totals 100 weeks of compensation, and which constituted an obstacle and hindrance to his work.

4. All told, employee suffered the equivalent of 285.625 weeks of pre-existing PPD.

5. Employee suffered 50% PPD right ankle; 40% PPD left ankle; 15% PPD each knee; and 12  $\frac{3}{4}$ % PPD low back as a result of his 8/18/00 work-related accident, totaling 238.66 weeks of disability.

6. Employee is totally and permanently disabled as a result of the combination of his pre-existing disability and the disability caused by the present accident, as evidenced by: a) employee's testimony regarding his limitations, b) employee's age, level of education and prior work experience, c) employee's failed efforts to find work at his former employer, through the union hall and in the open labor market, d) Dr. David Anderson's opinion, and e) the opinion of Dr. David Volarich.

7. Employee reached MMI, and TTD stopped, on 10/11/02. Settlement with employer and insurer constitutes 238.66 weeks covering 10/12/02 through 5/31/07. The Second Injury Fund is therefore liable to pay employee \$285.70 per week during that period. The Fund is further responsible to pay employee \$599.96 per week from 6/1/07 and thereafter until his death.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Joseph E. Denigan  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

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Reneé T. Slusher  
*Director*  
*Division of Workers' Compensation*