

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

Injury No.: 01-168535

Employee: Mike Breihan  
Employer: Banta & Stude Construction Company, Inc.  
Insurer: Highlands Insurance Group  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: October 22, 2001  
Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 22, 2006. The award and decision of Administrative Law Judge Grant C. Gorman, issued September 22, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 27<sup>th</sup> day of April 2007.

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:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Mike Breihan

Injury No.: 01-168535

Dependents: None  
Employer: Banta & Stude Construction Company, Inc  
Additional Party: Second Injury Fund  
Insurer: Highlands Insurance Group  
Hearing Date: June 16, 2006

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

Checked by: GCG

### 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: October 22, 2001
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:  
Claimant fell when a brace broke on the wall on which he was walking.
12. Did accident or occupational disease cause death? No Date of death? Not Applicable
13. Part(s) of body injured by accident or occupational disease: Right Shoulder, Psychiatric Injury
14. Nature and extent of any permanent disability: 40% Right Shoulder, 40% Psychiatric Injury
15. Compensation paid to-date for temporary disability: \$80,822.20
16. Value necessary medical aid paid to date by employer/insurer? \$33,501.90

Employee: Mike Breihan Injury No.: 01-168535

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$531.45
19. Weekly compensation rate: \$354.30 TTD PTD/\$329.42 PPD
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable: \$83,277.38  
0 weeks of temporary total disability (or temporary partial disability)

252.8 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:  
Weekly differential (\$24.88) payable by SIF for 252.8 weeks beginning  
December 12, 2005, and \$354.30 thereafter for Claimant's lifetime\*

TOTAL: \$83,277.38\*

23. Future requirements awarded: None

Said payments to begin as of the date of this 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ray Marglous

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mike Breihan	Injury No.: 01-168535
Dependents:	None	Before the <b>Division of Workers'</b>
Employer:	Banta & Stude Construction Company, Inc	<b>Compensation</b>
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Highlands Insurance Group	Checked by: GCG

## INTRODUCTION

Hearing on the above referenced case was held on June 16, 2006 in the Division of Workers' Compensation in St. Charles County, Missouri. Claimant Mike Breihan was present in person and represented by Ray Marglous and Robert Merlin. Susan Turner represented employer and its insurer. Assistant Attorney General Laura Wagener represented the Second Injury Fund (SIF).

The parties made the following stipulations: On October 22, 2001 Claimant sustained an accidental injury arising out of and in the course of his employment; Claimant was an employee of Employer; venue is proper in St. Charles County, Missouri; Employer received proper notice; the claim was filed in a timely manner; the applicable rates of compensation are \$354.30 for total disability and \$329.42 for permanent partial disability; Employer paid \$80,822.20 in temporary total disability benefits (228 weeks); Employer paid medical benefits totaling \$33,501.90; Claimant reached MMI on December 12, 2005.

The following issues are presented for determination: Nature and extent Claimant's disability attributable to the primary injury; whether or not Claimant is permanently and totally disabled; liability of SIF; disfigurement.

Claimant testified in person at the hearing. Mr. James England, Jr. testified by deposition on June 6, 2006 (Exhibit A). Dr. Bruce Schlafly testified by deposition October 20, 2004 (Exhibit B). Dr. Wayne Stillings testified by deposition August 10, 2004 (Exhibit C).

The following exhibits were offered by Claimant and received into evidence:

Exhibit A:	Deposition of Mr. James England
Exhibit B:	Deposition of Dr. Bruce Schlafly
Exhibit C:	Deposition of Dr. Wayne Stillings
Exhibit D:	Twenty-two (22) pages of records from Orthopedic Associates; and
Exhibit E:	Physical therapy records;
Exhibit F:	Eighty-four (84) pages of records from Washington University; and
Exhibit G:	Records from Meramec Medical Group

The following exhibit was offered by Employer and received into evidence:

Exhibit 1:	Report of Dr. Cantrell
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SIF did not offer any exhibits into evidence. The parties further agreed that any objections made during the depositions were not waived by stipulating to the admission of the deposition transcript.

#### FINDINGS OF FACT

1. Claimant worked as a carpenter for Employer. His job duties included setting-up poring concrete foundations for buildings. Prior to his employment with Employer, he worked as a laborer and journeyman carpenter for B&W Foundations. Prior to that he worked for a lumberyard for approximately 20 years. Claimant completed high school, but has had no formal education post high school.

2. On October 22, 2001, while employed by Employer, and performing his job duties, was walking on a wall when a brace broke, causing Claimant to fall. His right shoulder bore the brunt of the fall. He immediately felt pain in his shoulder, and heard and felt his muscles rip. He immediately sought medical treatment.

3. Prior to the work injury of October 22, 2001, Claimant had sought treatment for pain in his right shoulder. Medical records received into evidence reveal that he had been receiving treatment for right shoulder pain beginning on January 14, 2000 (Exhibit G). On November 20, 2000, Dr. Johnston's records reflect "Chronic rotator cuff tendonitis right shoulder versus possible chronic partial tear right rotator cuff." (Exhibit G).

4. In 1992, Claimant began treating with his primary care physician for depression, which coincided with the death of his father. In 1992, he was prescribed Prozac, and in 1998 he was prescribed Paxil. Neither of these medications was successful in treating his depression.

5. Claimant testified that prior to the work injury of October 22, 2001, he had missed work on occasions due to depression or arm pain.

6. After the injury of October 22, 2001, Dr. Johnston ordered an MRI of Claimant's right shoulder. On November 7, 2001 Claimant underwent an MRI that revealed a partially torn retracted supraspinatus tendon, a suspected tear along the head of the biceps tendon and small joint effusion. On January 31, 2002 Dr. Johnston performed arthroscopic surgery to repair the right shoulder.

7. Claimant's shoulder improved for a time, but he again had pain in his shoulder, and after some

conservative treatment was given another MRI on May 23, 2006. This MRI revealed that the repaired rotator cuff had return and had a significant gap. Dr. Hulseley performed a second surgery to repair the rotator cuff on July 12, 2002. Dr. Hulseley also noted mild degenerative changes to the humeral head.

8. After the second surgery, Claimant began a course of physical therapy and work hardening. According to the physical therapy records (Exhibit E), On January 30, 2003 he told the physical therapist "My shoulder is as good as it is going to get and I don't need to spend more time in P.T." and discontinued the physical therapy. Dr. Hulseley opined that patient was at maximum medical improvement (MMI) on March 19, 2003.

9. Due to ongoing pain and weakness in the shoulder, Claimant saw Dr. Ken Yamaguchi on March 25, 2004. On April 26, 2004, at Dr. Yamaguchi's request, Claimant underwent an ultrasound that revealed a full thickness tear of the right rotator cuff. Ultimately, Dr. Yamaguchi performed another arthroscopic procedure to repair the rotator cuff on May 12, 2005. Claimant continued to complain of pain in the shoulder after the third surgery, and Dr. Yamaguchi ordered another ultrasound that was performed on November 8, 2005, which indicated Claimant had a large tear of the right rotator cuff. Dr. Yamaguchi placed patient at MMI December 12, 2005 (Exhibit F). Dr. Yamaguchi put the following restrictions on Claimant: No overhead activity; no repetitive activity; and a lifting restriction of 10 pounds.

10. Claimant testified that he has "lost the will to live." He feels useless, that it is hard to function, and that he "can't accomplish anything." He continues to have constant pain in the right arm. He can't raise arm above chest level. He can't lift more than 5 pounds. He has a constant "sting & burn" in shoulder, and it is hard for him to sleep at night. He testified that he cannot work 40 hours per week due to the pain in his arm, and he is mentally not capable of working.

11. Claimant further testified that he has "had a gun to his head several times." And that he tried to take a whole bottle of Paxil.

12. Claimant has not worked since the October 22, 2001 work injury.

13. Dr. Bruce Schlafly, on behalf of Claimant, finds that Claimant sustained a 45% permanent partial disability to his right shoulder due to the October 22, 2001 work injury. He further finds that Claimant had a 10% pre-existing permanent partial disability to the right shoulder (Exhibit B, p.19). He placed the following restrictions on Claimant: No repetitive overhead work with the right arm; no lifting more than 5 pounds overhead with the right arm; no lifting more than 15 pounds with the right arm to the level of the chest (Exhibit B, p.18). He further opined that Claimant could not go back to work in the construction industry (Exhibit B, p. 30).

14. Dr. Russell Cantrell, on behalf of Employer, finds that Claimant sustained a 5% permanent partial disability to his right shoulder due to the October 22, 2001 work injury. He further finds that Claimant had a 20% pre-existing permanent partial disability to his right shoulder (Exhibit 1, p.3). He placed the following restrictions on Claimant: Claimant should not perform any work in an overhead position; that he restrict his lifting capacity to 25 pounds; and that he should not engage in any repetitive reaching activities with his right arm (Exhibit 1, p.3). Dr. Cantrell further acknowledged that these restrictions would preclude him from returning to concrete foundation work (Exhibit 1, p.3).

15. Dr. Wayne Stillings, on behalf of Claimant, finds that Claimant sustained a 60% permanent partial disability to the body as a whole from depression due to the October 22, 2001 work injury. (Exhibit C, p.26). He further finds that Claimant had a 15% pre-existing permanent partial disability due to depression (Exhibit C, p.27). Dr. Stillings further opines that the combination of psychiatric problems and physical problems, Claimant is permanently and totally disabled from gainful employment in the open labor market (Exhibit C, p.30). Dr. Stillings is a board certified psychiatrist and has been practicing forensic psychiatry for 22 years. Dr. Stillings based his opinions on reviewing medical records and conducting a mental status examination. Dr. Stillings further found Claimant suffered a 10% permanent partial disability attributable to pain disorder.

16. Dr. Schlafly and Dr. Stillings both reached their conclusions prior to Claimant's third surgery. However, since the third surgery did not improve Claimant's condition, Claimant had the same subjective pain complaints, and Dr. Yamaguchi put nearly identical restrictions on Claimant at MMI after the third surgery, there is

no reason to believe that the additional treatment undermines the opinions expressed by Dr. Schlafly or Dr. Stillings.

17. Mr. James England, Jr., a rehabilitation counselor, on behalf of Claimant, rendered an opinion that claimant is not employable in the open labor market (Exhibit A, p.34). He believes that due to a combination of Claimant's ongoing physical problems with the shoulder and his psychiatric condition, he is rendered incapable of doing regular work activity out in the work force (Exhibit A, p.35).

18. Claimant has minimal scarring on his right shoulder.

## RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observation of Claimant, expert testimony presented in deposition, and other exhibits received into evidence in this case, I find:

1. Claimant sustained an injury October 22, 2001 while working for Banta & Stude Construction Company and that as a result of the accident, injured his right upper extremity and suffered depression.

2. As a result of the accident and the injuries and after a healing period and reasonable and necessary medical treatment, Claimant has sustained a 40% permanent partial disability to his right upper extremity measured at the shoulder, and a 40% permanent partial disability to the body as a whole relating to the psychiatric injury of depression.

3. Prior to the October 22, 2001 work injury, Claimant had a permanent partial disability of 15% of the right upper extremity measured at the shoulder, and a 15% permanent partial disability to the body as a whole relating to depression. Claimant's pre-existing disability is of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Claimant testified that in the past, he had missed work on account of his shoulder and depression prior to October 2001. However, actually missing work or having a diminished earning capacity is not a pre-requisite to finding the pre-existing disability to be a hindrance or obstacle to employment. A permanent partial disability of 15% of the right upper extremity measured at the shoulder and a 15% permanent partial disability to the body as a whole relating to depression have the potential to combine with a work-related injury to cause a greater degree of disability than would have resulted in the absence of those conditions.

4. Following the work injury of October 22, 2001 and the healing period therein, Claimant became permanently and totally disabled. Claimant reached maximum medical improvement on December 12, 2005. It was not this last injury alone that caused Claimant to become permanently and totally disabled. Claimant's pre-existing 15% disability to the right shoulder and the body as a whole, combined with the 40% permanent partial disability to the right shoulder and body as a whole, result in permanent partial disabilities of 55% of the right upper extremity measured at the shoulder, and 55% the body as a whole referable to depression. This finding is consistent with the medical evidence that demonstrate the injury to the shoulder is far greater than just the pre-existing shoulder injury. The MRI's revealed additional injury to the shoulder than had been previously diagnosed. Assuming for the sake of argument that the pre-existing condition was a partially torn rotator cuff, there were additional elements diagnosed after the injury, such as the tear to the biceps tendon, which required surgical intervention, and small joint effusion. Further, the tear to the rotator cuff was far more serious, being described by Dr. Yamaguchi as "massive." Claimant's subjective complaints of pain and weakness also increased dramatically after the work injury. With regard to the depression, Dr. Stillings found that the depression was significantly worse after the October 2001 work injury, testifying that he had "major depression." There is also the un-rebutted vocational rehabilitation evidence of James England that Claimant cannot compete for, or perform work in the open labor market.

5. Claimant's permanent total disability is due to the combination of both his pre-existing and current physical and psychological conditions. As a result, Employer is responsible for the permanent partial disability caused by the October 22, 2001 work injury, and the Second Injury Fund is responsible for permanent and total disability benefits.

6. Claimant's scarring does not meet the requirements of §287.190.4 RSMo. and therefore he is not

entitled to any additional recovery for disfigurement.

### CONCLUSION

Based on the foregoing, Claimant is entitled to recover 252.8 weeks of permanent partial disability compensation from Employer/Insurer beginning December 12, 2005, for a total of \$83,277.38. Claimant is entitled to recover from SIF the weekly differential between the rate for total disability and partial disability in the amount of \$24.88 for 252.8 weeks beginning December 12, 2005. Thereafter, SIF shall pay \$354.30 per week for permanent total disability benefits for the remainder of Claimant's lifetime, or as long as Claimant remains so disabled. Claimant is not entitled to recover any benefits for disfigurement.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of Ray Marglous for necessary legal services rendered to Claimant.

Date: September 22, 2006

Made by: /s/ Grant C. Gorman  
Grant C. Gorman  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Patricia "Pat" Secret  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*