

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

Injury No. 06-013126

Employee: James Valentine  
Employer: GBI, Inc. (Settled)  
Insurer: Auto Owners Insurance Co. (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 1, 2015. The award and decision of Administrative Law Judge Linda J. Wenman, issued July 1, 2015, 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 20<sup>th</sup> day of January 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: James Valentine Injury No.: 06-013126  
Dependents: N/A Before the  
Employer: GBI, Inc. (settled) **Division of Workers'**  
**Compensation**  
Additional Party: Second Injury Fund Department of Labor and Industrial  
Relations of Missouri  
Insurer: Auto Owners Insurance Co. (settled) Jefferson City, Missouri  
Hearing Date: March 18, 2015 Checked by: LJW

### 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: February 23, 2006
5. State location where accident occurred or occupational disease was contracted: St Louis County, MO
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 fell from a ladder landing on his right foot.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right ankle and psychological
14. Nature and extent of any permanent disability: 50% PPD referable to right ankle and 11.5% BAW PPD referable to psychiatric condition, previously paid by Employer. PTD benefits from SIF.
15. Compensation paid to-date for temporary disability: \$61,333.26 previously paid by Employer.
16. Value necessary medical aid paid to date by employer/insurer? \$85,545.03 previously paid by Employer.

Employee: James Valentine

Injury No.: 06-013126

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to produce the rates listed below.
- 19. Weekly compensation rate: \$696.97 / \$365.08
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

123.5 weeks of permanent partial disability from Employer Previously paid by Employer

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:  
\$331.89 weekly differential payable by SIF for 123.5 weeks beginning  
February 7, 2008, and \$696.97 weekly thereafter for Claimant's lifetime. To be determined

**TOTAL: TO BE DETERMINED**

23. Future requirements awarded: N/A

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 in favor of the following attorney for necessary legal services rendered to the claimant: James A. Fox

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	James Valentine	Injury No.: 06-013126
Dependents:	N/A	Before the
Employer:	GBI, Inc. (settled)	<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Auto Owners Insurance Co. (settled)	Checked by: LJW

### **PRELIMINARIES**

A Second Injury Fund hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on March 18, 2015. Post-trial briefs were received on April 22, 2015. Attorney James Fox represented James Valentine (Claimant). Assistant Attorney General Kristen Frazier represented the Second Injury Fund (SIF). Venue is proper for St. Louis, MO by consent of the parties.

On February 9, 2015, Claimant and GBI, Inc., (Employer) reached a settlement regarding the issue of Employer's liability for permanent partial disability. The stipulation represented 50% PPD referable to the right ankle and 11.5% BAW PPD referable to an aggravation of a psychological condition. The parties believe Claimant reached maximum medical improvement (MMI) from the primary injury on February 6, 2008, and testimony and medical evidence support this date.

Prior to the start of hearing the parties identified the issues for disposition in this case as the liability of SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits. Claimant offered Exhibits 1-9, and SIF offered Exhibit A. The exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

### **FINDINGS OF FACT**

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Claimant is 67 years old, completed the 10<sup>th</sup> grade, and later obtained a GED while serving in the Navy. While serving in Vietnam, Claimant developed drug and alcohol addictions that continued into his non-service working life. After his military discharge, Claimant worked as a union carpenter hanging drywall for 35 years. Post-military, Claimant had arrests due to drug possession and receipt of stolen property, and served two prison terms. Claimant also attended various out-patient drug rehabilitation programs during his working life. Claimant has

maintained sobriety for many years, and has been drug-free since 2005. Claimant worked for Employer hanging drywall for the last 5 years he worked.

2. On February 23, 2006, Claimant was hanging drywall when he fell approximately 6 feet off a ladder landing on concrete and injuring his right foot/ankle. Claimant was diagnosed with a right foot interarticular calcaneus fracture. Claimant underwent a subtalar arthrodesis on May 7, 2006. Between October 2006 and October 2007, Claimant underwent 2 additional surgeries due to non-unions. On February 6, 2008, Claimant was found to be at MMI. No permanent restrictions were placed as Claimant had retired from work.<sup>1</sup> During 2007, Claimant sought psychiatric help due to increasing depression and was placed on medication. Claimant last worked on February 23, 2006, the day of injury. On February 9, 2015, Claimant settled his case with Employer for 50% PPD referable to his right ankle, and approximately 11.5% BAW PPD referable to an aggravation of his psychological condition.

As of hearing, Claimant has limited use of his right foot/ankle. He is able to stand for approximately 30 minutes, but will then develop pain at a level of 5 (0=no pain and 10=extreme pain). He is unsteady on stairs, ladders, or if standing on uneven ground. His sleep is interrupted at night due to right ankle pain. He is prone to losing his balance and falls. Claimant takes Advil twice a day and elevates his foot multiple times per day for pain relief.

3. Claimant has rated preexisting injuries involving his shoulders, knees, and psychological condition.

**Shoulders** – During 1988, Claimant was diagnosed with right rotator cuff tendonitis after lifting heavy drywall. During 2001, an MRI of the right shoulder demonstrated a full thickness rotator cuff tear with retraction of the cuff. Claimant elected not to have surgical repair due to the length of time he would miss from work. During May 2005, Claimant complained of bilateral shoulder pain. Claimant's treating physician suggested Claimant might want to consider early retirement given the nature of his work. Leading up to the primary injury, Claimant complained of bilateral shoulder pain with the right worse than the left. Claimant testified he completed overhead work with difficulty, but the repetitive work caused him to experience shooting pain from his arms to his shoulders.

**Knees** - During 2001, Claimant complained of bilateral knee pain right greater than left. X-rays of the knees in 2001 demonstrated minimal joint line disease, and he was diagnosed with degenerative joint disease and bursitis. During 2005, Claimant's treating orthopedist felt Claimant's knee condition had worsened and suggested Claimant consider giving up the type of work he was doing. Claimant continued to perform his drywall work, but had difficulty with his knees buckling. Claimant testified he worked in pain every day, but he "toughed it out" to remain in consistent work.

**Psychological** – Following psychological examinations (see below) Claimant was diagnosed with the following preexisting psychological disorders: dysfunctional family origin; poly substance abuse and dependency, pain disorder; and personality disorder. Prior to the primary injury, Claimant's psychiatric treatment was primarily for substance abuse issues. Claimant's last substance abuse treatment occurred during 1998 while imprisoned.

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<sup>1</sup> On March 5, 2012, a 4<sup>th</sup> surgical procedure was performed to remove a keratinous cyst of Claimant's right heel.

4. Dr. Volarich examined Claimant at his request on August 6, 2009. Upon physical examination, Dr. Volarich noted multiple objective physical abnormalities. Following his examination and record review, Dr. Volarich rated the February 23, 2006 (primary injury) injury at 65% PPD referable to the right foot/ankle. Dr. Volarich rated the preexisting injuries as follows: 25% PPD referable to the right shoulder; 15% PPD referable to the left shoulder; and 30% PPD referable to each knee. Dr. Volarich placed numerous restrictions on Claimant's physical activities.

On July 13, 2010, Dr. Volarich reviewed the psychiatric report of Dr. Stillings and the vocational report of Mr. England. Following his review, Dr. Volarich opined Claimant was PTD due to a combination of his primary and preexisting conditions, his age, limited education, and inability to return to work.

5. Dr. Helfrey was Claimant's treating orthopedic physician for his 2<sup>nd</sup> and 3<sup>rd</sup> right ankle/foot surgeries. Dr. Helfrey provided an impairment rating for Claimant's primary injury, and did not comment regarding employability or restrictions as Claimant was "retired."

6. Dr. Stillings examined Claimant for his psychiatric disorders on March 22, 2010. Following his review, Dr. Stillings rated Claimant's primary psychiatric injury at 45% BAW PPD referable to mood, pain, and anxiety disorders. Dr. Stillings also rated preexisting psychiatric disorders related to dysfunctional family origin; poly substance abuse and dependency; pain disorder; and personality disorder. Dr. Stillings opined Claimant was PTD due to his primary and preexisting psychiatric conditions considered alone.

7. Dr. Stanislaus examined Claimant on behalf of Employer for his psychiatric disorders on May 2, 2011. Dr. Stanislaus diagnosed depression related to the primary injury that had resolved with treatment. Dr. Stanislaus diagnosed preexisting "serious and persistent substance abuse for most of his life affecting his social and occupational functioning," and noted Claimant had been unable to sustain a job until he became sober in 2000. Dr. Stanislaus did not diagnose a pain disorder, but noted Claimant's pain arose from actual injuries he had sustained over his lifetime. Dr. Stanislaus agreed with Dr. Stillings that Claimant had a preexisting anti-social personality disorder that contributed to his inability to sustain employment for most of his life. Dr. Stanislaus opined Claimant's primary injury was a contributory factor to his depression, rather than the primary prevailing factor for his depression after the primary injury. Dr. Stanislaus opined Claimant was mentally stable with treatment and psychiatrically able to work, but his "main problems has been pain and difficulties related to his heel fracture and preexisting knee problems."

8. Dr. Poetz examined Claimant at his request on November 2, 2009. Dr. Poetz rated Claimant's primary injury at 50% PPD referable to the right ankle. Dr. Poetz rated Claimant's preexisting injury at 20% PPD referable to the right shoulder, and 10% PPD referable to each knee. Dr. Poetz did not rate any psychiatric condition or comment regarding employability.

9. On January 11, 2010, Claimant was interviewed by Mr. James England, a vocational rehabilitation counselor. During the course of Claimant's evaluation, Mr. England administered the Wide-Range Achievement Test, which demonstrated Claimant scored in the 7<sup>th</sup> grade for

both reading and math. Mr. England noted Claimant's physical impairments appeared to limit him to less than full range sedentary activity. Mr. England further considered Claimant's physical impairments in conjunction with his psychological conditions and opined Claimant was PTD and unable to sustain employment in the open labor market due to a combination of his primary and preexisting conditions. Finally, Mr. England opined Claimant was unable to vocationally retrain due to his age, medical disabilities, and psychological conditions.

10. On July 10, 2014, Claimant was interviewed by Ms. June Blaine, a vocational rehabilitation counselor. Following her evaluation, Ms. Blaine noted Claimant's age, inconsistent work history, and educational level. Ms. Blaine noted Claimant possessed no computer skills or transferable skills. Ms. Blaine opined Claimant was PTD due to a combination of his primary and preexisting conditions, and no employer would be expected to hire Claimant over other candidates.

### **RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

#### **Issues related to liability of SIF for PTD benefits**

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury.<sup>2</sup> See *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). If the last injury standing alone did not cause the employee to become PTD, the inquiry turns to potential liability for PTD by Second Injury Fund. The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993). Further, §287.220.1 RSMo directs that the degree of disability be determined by "the degree or percentage of employee's disability that is attributable to all injuries or conditions existing *at the time the last injury was sustained*" (emphasis added). See also *Garcia v. St. Louis County and Treasurer of Missouri as Custodian of Second Injury Fund*, 916 S.W.2d 263 (Mo.App.1995) quoting

<sup>2</sup> All references are to RSMo., 2010 unless otherwise indicated.

*Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152 (Mo.App. 1993).

One medical expert, Dr. Volarich, one psychiatric expert, Dr. Stillings, and two vocational experts, Mr. England and Ms. Blaine evaluated Claimant and issued opinions finding Claimant PTD. I find these opinions persuasive. The second psychiatric opinion of Dr. Stanislaus was obtained at the request of Employer and was limited to Claimant's depression from the primary injury. Dr. Stanislaus was not asked to comment on the combination of all physical and psychological conditions. I find Claimant's last injury alone did not remove Claimant from the labor market. SIF offered no opinion to refute Claimant's assertion of PTD. I find Claimant is PTD due to a combination of his primary injuries and his preexisting conditions. Given Claimant's limitations, it would be unreasonable to expect any employer to hire Claimant, or to expect Claimant to successfully perform new work duties. I further find Claimant reached MMI on February 6, 2008 as considered by the parties and supported by the medical record. Claimant is permanently and totally disabled due to the combination of his last work injury and his preexisting disabling conditions measured at the time of his last work injury, and SIF shall pay PTD benefits as prescribed by law.

### **CONCLUSION**

Claimant is found to be permanently and totally disabled as of February 7, 2008. Employer paid 123.5 weeks of permanent partial disability. SIF will pay weekly differential of \$331.89 during the period of PPD. Following the 123.5 weeks of PPD paid by Employer, SIF shall provide Claimant with PTD benefits of \$696.97 weekly for Claimant's lifetime. As Claimant has been found PTD, the remaining issue of SIF liability for PPD is moot. Claimant's attorney is entitled to a 25% lien.

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

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*