

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

Injury No.: 00-178154

Employee: Phillip Sanders
Employer: Ward Plumbing and Heating Co.
Insurer: Security National Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: August 28, 2000
Place and County of Accident: Springfield, Greene 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 July 5, 2006. The award and decision of Administrative Law Judge David L. Zerrer, issued July 5, 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 8th day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Phillip Sanders

Injury No. 00-178154

Dependents:
Employer: Ward Plumbing and Heating Co.
Additional Party:
Insurer: Security National Insurance Co.
Hearing Date: April 10, 2006

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: DLZ

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 28, 2000
5. State location where accident occurred or occupational disease was contracted: Springfield, Greene 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 was prying with pry bar when shoulder popped
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: Left shoulder
14. Nature and extent of any permanent disability: 30%
15. Compensation paid to-date for temporary disability: \$32,860.50
16. Value necessary medical aid paid to date by employer/insurer? \$21,683.00
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$855.53
19. Weekly compensation rate: \$314.26
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: -0-

22-5/7 weeks of temporary total disability (or temporary partial disability) less credits as set out herein

69.6 weeks of permanent partial disability from Employer

-0- weeks of disfigurement from Employer

22. Second Injury Fund liability: Yes No X Open

TOTAL: \$21,685.95

23. Future requirements awarded: None

Said payments to begin 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: Stuart Huffman

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Phillip Sanders

Injury No: 00-178154

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: Ward Plumbing and Heating Co.

Additional Party

Insurer: Security National Insurance Co.

Checked by: DLZ

On the 10th day of April, 2006, the parties appeared before the undersigned Administrative Law Judge for final hearing. Claimant appeared in person and by his attorney, Stuart Huffman. Employer appeared by its attorney, Michael Bandre. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is not a party this claim.

The parties have entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit:

On or about the 28th day of August, 2000, Ward Plumbing and Heating Co. was an employer operating subject to the Missouri Workers' Compensation law; the Employer's liability was fully insured by Security National Insurance Co.; on the alleged injury date of August 28, 2000, Phillip Sanders was an employee of the Employer; the Claimant was working subject to the Workers' Compensation Law; the parties agree that on or about August 28, 2000, Claimant sustained an accident/occupational disease which arose out of the course of and scope of employment; the employment occurred in Greene County, Missouri, and Greene County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident/occupational disease, Claimant's average weekly wage was \$855.53, sufficient to allow the following compensation rates: \$570.38 for temporary total disability and \$314.26 for permanent partial disability; temporary disability benefits have been paid in the amount of \$25,422.20 and an additional sum of \$7,438.30 was paid to the Claimant, the character of which payments is an issue in this claim; the Employer has paid medical benefits in the amount of \$21,683.00 prior to the date of this hearing; the Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award; the parties further stipulate that Employer is entitled to a credit for 10 weeks of temporary total disability paid to the Claimant in the sum of \$5,703.80 when Claimant was not entitled to temporary total disability because of an unrelated medical condition.

ISSUES

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.

Any temporary total benefits owed to the Claimant.

The nature and extent of any permanent disabilities.

DISCUSSION

A legal file was established which contains the Claim for Compensation, filed by the Claimant, and the Answer to Claim for Compensation, filed by the Employer.

Phillip Sanders, claimant herein, testified on his own behalf. Claimant testified that on August 28, 2000, his job task was to service large and small heating, ventilation, and air conditioning equipment. Claimant was 53 years of age at the date of the hearing and had worked in the heating and air-conditioning industry for more than 30 years. Claimant testified that he was trained in many service classes and was licensed as a master mechanic in the City of Springfield, Missouri. Claimant testified that the physical requirements of his job were such that he would lift Freon bottles which weighed about 50 pounds each, and he would also have to carry ladders that weighed as much as 50 pounds up onto roofs of commercial buildings. Claimant testified that his work was concentrated on commercial installations, most of which were located on roofs well above ground. Claimant further testified that he often worked above the ceiling level of commercial buildings while using a

ladder.

Claimant testified that he was sent to Dr. Carnell for initial treatment who referred Claimant to Dr. Roeder, orthopedic surgeon, after the results of an MRI of Claimant's left shoulder were evaluated. Claimant had surgery in April 2001 on his left shoulder and was referred to physical therapy by Dr. Roeder after the surgery. Claimant testified that his initial physical therapy was a "spider walk" on walls to improve raising Claimant's arm above his head. In addition, physical therapy included exercises and maneuvers to increase Claimant's range of motion, both in flexion and extension and abduction. Claimant further testified that he was given a series of home exercises with which he was compliant. Claimant testified that he was administered physical therapy until Dr. Roeder released him on November 5, 2001. Claimant testified that he continues to do his home exercise program in order to maintain the strength in his left arm.

Claimant testified that during the time he was doing his physical therapy, he began to develop pain in his lower arm and a sharp pain in his forearm as well as tingling in each of the fingers of his left hand except his little finger. Claimant testified that he had neither experienced this type of pain before the injury of August 28, 2000, nor during the physical therapy following his left shoulder surgery. Claimant further testified that he discussed this arm pain and finger tingling with Dr. Roeder who told Claimant if the pain got worse, Claimant may need additional surgery. Claimant testified that he decided to put up with tingling rather than have another surgery.

Claimant testified that currently he continues to suffer pain in his shoulder, especially when the weather changes. Claimant further testified that if he does too much activity, his forearm hurts and if he lifts too much weight, his arm will hurt for 2-3 days. Claimant also testified that the tingling in his fingers does not affect his grip but does affect his concentration because he is afraid of dropping things. Claimant stated that prior to his August 28, 2000, injury, he never had a problem with left forearm pain or tingling in his fingers. Claimant further testified that his complaints with regard to arm pain and finger tingling did not occur until he was doing exercises for his shoulder in physical therapy.

Claimant testified that he was released from Dr. Roeder's care in November 2001 and that Dr. Roeder told Claimant that he may need periodic shots and over-the-counter anti-inflammatory medications. Claimant states that he does take Aleve from time to time. Claimant further testified that Dr. Roeder gave him certain restrictions, which included not lifting more than 40 pounds with both arms, refrain from repetitive motion of the left shoulder and no climbing ladders while carrying objects. Claimant further testified that he could not do his job task with Employer under the restriction set out by Dr. Roeder; and therefore, Claimant did not return to work for the Employer.

Claimant testified that he was not employed from November 5, 2001, through April 2002 when Claimant started his own heating and air-conditioning business, which Claimant referred to as Walnut Grove Mechanical. Claimant further testified that when he started his own business, he hired personnel to do the job tasks that Claimant could not perform and that Claimant acted as manager and told workmen what to do but Claimant did not perform tasks which were outside of his permanent restrictions from Dr. Roeder. Claimant testified that the new business was closed in December 2005 because Claimant had to hire too many people to make the business profitable.

Claimant testified that after Dr. Roeder released him that he continued to receive benefit checks from Employer's insurer. Claimant stated that the amount of the checks changed without explanation and that the checks arrived for a period of time after November 2001 but that Claimant does not remember when the checks with the changed amount stopped being sent to Claimant. Claimant testified that no one from Employer ever indicated that the checks sent after November 5, 2001, were advances on a future settlement and further, that Claimant had no idea that Employer would claim any type of credit against Claimant's permanent partial disability award for the payment of checks sent to Claimant after November 2001. Claimant stated that he was not able to work between November 5, 2001, and April 2, 2002, when he started up his new business. Claimant testified that his physical condition remained about the same from November 2001 until April 2002. Claimant states that he believes he was unemployable from November 5, 2001, through April 2, 2002, and that he should receive temporary total disability for that period of time.

Claimant testified that he could no longer play golf or water ski or pick up his grandchildren who weigh more than 40 pounds. Claimant further testified that he feels that any future employment would have to be as a consultant and that Claimant is not aware of any plumbing or heating and air-conditioning companies who hire persons strictly as a consultant.

Claimant testified that he currently has shoulder stiffness that is worse when the weather is changing. He further testified that if he performs too much activity with his left shoulder that it will be painful for 2-3 days. Claimant also testified that he takes Aleve about one time per week, but not every week. Claimant stated that too much activity would be something lifted above Claimant's weight restrictions, using a chain saw, and stacking wood. Claimant further testified that he does not have a problem driving a motor vehicle except that if Claimant drives a long distance, he has to stop driving. Claimant stated that he does not travel much since the injury.

Claimant testified that he does not know exactly when he started having tingling in his fingers but that he is sure it was during the time that he was taking physical therapy. Claimant further testified that he discussed the arm pain and tingling with Dr. Roeder but that no treatment was recommended. Claimant testified that the arm and hand problems flare up periodically. He also stated that he does not know what causes the flare-ups but Claimant attributes them primarily to over stressing his arm.

On cross-examination Claimant admitted that he had surgery on his left shoulder in April 2001 and that he continued to perform exercises at home after he stopped physical therapy in November 2001. Claimant further admitted that he saw Dr. Belz for an examination in July 2003 and that Dr. Belz gave Claimant the same restrictions as Dr. Roeder gave.

Claimant denied telling Dr. Belz that the tingling in his hand predated Claimant's surgery and Claimant further denied that if the medical records reviewed by Dr. Belz stated that Claimant reported tingling in his hand occurred prior to his surgery, then those medical records were erroneous.

Claimant admitted on cross-examination that after January 2002, Claimant had no money coming into his household and that he had to do something and that was when Claimant decided to open his own business and hire people to do the manual lifting, etc., and to rely on Claimant's knowledge and experience to manage how the work was accomplished.

Claimant admitted that he did not look for work between January 2002 and April 2002. Claimant admitted that he did not know the exact date that Walnut Grove Mechanical began business and further admitted that the business did not start up sooner because Claimant did not have enough money to start the business.

Claimant also admitted on cross-examination that he has not taken any prescription medication for shoulder pain since November 2001 and that he has received no treatment to his shoulder since November 2001.

Claimant denied recognizing a letter marked for identification as Employer's Exhibit 3 from Employer's insurer dated March 11, 2002, purportedly stating that there was a temporary total disability overpayment and that the payments of \$314.26 each issued after November 5, 2001, were being treated as an advance on permanent partial disability. Claimant admitted that he did not remember a letter, marked for identification as Employer's Exhibit 2. Claimant admitted that he did remember calling the insurance adjuster about the fact that no rating had been obtained and that Dr. Roeder's staff person told Claimant that no rating had been issued because Dr. Roeder had not been paid. Claimant denied that he knew why the amount of the checks received after November 5, 2001, were in the amount of \$314.26 rather than in the amount of \$570.38, as received prior to November 2001.

Janet Lynn Sanders testified on behalf of Claimant. Janet Lynn Sanders testified that she is the spouse of Claimant and that she assisted in operation of the business operated by Claimant known as Walnut Grove Mechanical. Mrs. Sanders stated that she was the business manager/bookkeeper for the business and that the business was started in April 2002 and closed in December 2005. Mrs. Sanders testified that the business hired three employees and used several sub-contractors to accomplish the business and that Claimant diagnosed the problems and managed the repairs performed by employees or sub-contractors. Mrs. Sanders further testified that the income from the business was significantly less than Claimant earned prior to his injury of August 28, 2000, due to too many employees and sub-contractors.

The independent medical examination report of Dr. Norbert Belz was admitted into evidence. Dr. Belz's report rated Claimant's left shoulder injury at 20% at the 232-week level. Dr. Belz also rated Claimant's diagnosed left cubital tunnel syndrome at 5% at the 210-week level. Dr. Belz rated Claimant's diagnosed left radial tunnel syndrome at 12.5% at the 210-week level. Dr. Belz opined that both left elbow conditions were work-related and that the onset of each condition occurred as a result of the physical therapy administered to the Claimant following his left shoulder surgery.

Dr. Belz's report also discusses the issue of whether the Claimant was able to work prior to April 11, 2002. Dr. Belz opined that although Claimant attempted to work after January 2002, he was unable to perform the job tasks required of him in starting up his own business and that Claimant's attempts to work were failures due to his physical condition following left shoulder surgery. Dr. Belz opines that Claimant was temporarily disabled until April 11, 2002.

Dr. Belz's report also stated that Claimant might be in need of "occasional intraarticular injections" and "occasional nonsteroidal anti-inflammatories." There is no specific recommendation for future medical in Dr. Belz's report other than that which is set out herein.

Dr. Edwin Roeder testified on behalf of the Employer by deposition. Dr. Roeder testified that he first saw Claimant

on January 16, 2001. After conservative treatment was determined to be unsuccessful to relieve Claimant's complaints, Dr. Roeder performed surgery on April 11, 2001, on Claimant's left shoulder. Dr. Roeder testified that he performed an arthroscopic subacromial decompression and distal clavicle excision procedures.

Dr. Roeder testified that Claimant went through a period of physical therapy and that, in Dr. Roeder's opinion, Claimant reached maximum medical improvement on November 5, 2001, the last date that Claimant saw Dr. Roeder for treatment. Dr. Roeder issued a rating of 7% of the body as a whole for Claimant's impairment as well as permanent restrictions of no lifting over 40 pounds, no repetitive lifting and no overhead activity. Dr. Roeder testified that he did not believe Claimant could perform the job tasks required of Claimant's work at the time of the accident.

Dr. Roeder further testified that Claimant might benefit from periodic injections and/or therapy in the future. Dr. Roeder did not specify for how long Claimant might benefit from the future treatment or how often the future treatment should occur, however, Dr. Roeder did testify that injection treatment would not be more often than every six months. Dr. Roeder further testified that Claimant had not requested any such follow-up treatment since the last date of treatment on November 5, 2001, up to the date of Dr. Roeder's deposition testimony on March 16, 2005.

Dr. Roeder's written report was attached and admitted as part of the deposition. Dr. Roeder's report supports his testimony generally, including the permanency rating and the permanent restrictions issued as part of the rating report.

FINDINGS OF FACT AND RULING OF LAW

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.

Both Dr. Roeder and Dr. Belz opined that Claimant might benefit from some type of treatment in the future in the form of injection and/or physical therapy. Claimant testified that he has not obtained any such treatment since he was released from treatment. Dr. Roeder testified that Claimant has not sought any further treatment from him since Claimant's release on November 5, 2001. After a review of all the evidence presented at the hearing, both oral and written, I find that Claimant has failed in his burden of proof in that there is not substantial and competent evidence to prove that Claimant will require medical treatment in the future, based solely on this injury, in order to leave medical treatment open in the future. I find this issue in favor of the Employer.

Any temporary total benefits owed to Claimant.

Dr. Roeder testified that Claimant reached maximum medical improvement on November 5, 2001. Dr. Belz's report indicates that Claimant reached maximum medical improvement on April 11, 2002. Claimant testified that he could not perform the necessary tasks to return to his regular work duties because he could not carry the necessary tools to the job sites and could not climb ladders and other equipment while carrying necessary tools in

order to complete repairs and other tasks required in his job description. Claimant testified that in order to make some kind of living, he started his own business in April 2002 using employees and subcontractors to perform tasks that Claimant could not perform because of his permanent restrictions. Employer continued to make payments to the Claimant after November 5, 2001; the date Dr. Roeder found Claimant to be at maximum medical improvement, although the Employer changed the amount of the payments from \$570.38 per week to \$314.26 per week. Employer now contends that payments made after November 5, 2001, were an advance on permanent partial disability, even though Claimant never requested any advance payment of permanent partial disability benefit. Claimant testified that he was unclear as to why the amount of the benefit payments was changed and that he assumed that payments made after November 5, 2001, were temporary total disability benefit payments since Claimant was unable to return to work.

The amount paid by the Employer after November 5, 2001, is agreed to be \$7,438.30. The Claimant urges that he was temporary totally disabled until he started his own business on April 11, 2001, and that he is due temporary total disability benefits from November 5, 2001, until April 11, 2001, at the rate of \$570.38 per week.

The parties have agreed that during the treatment period Claimant suffered a medical condition which was not work-related and that the condition lasted for a period of ten weeks. The period of Claimant's non work-related medical condition took place prior to his surgery and is mentioned in Dr. Roeder's report. The parties agree that Employer is entitled to a credit in the amount of \$5,703.80 for payments of temporary total disability benefits during the period when Claimant would not be entitled to such benefits because of his non work-related medical condition.

After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant was not employable on the open labor market between the dates of November 5, 2001, and April 11, 2002; and therefore, Claimant is entitled to temporary total disability benefits for a period of 22-5/7 weeks at a compensation rate of \$570.38 per week.

I further find that Employer paid to Claimant during the period from November 5, 2001, thru April 11, 2002, the sum of \$7,438.30 which sum is treated as temporary total disability benefit payments. Employer is entitled to a credit against temporary total disability benefits in the sum of \$7,438.30. As agreed by the parties, Employer is entitled to a credit against temporary total disability benefits and/or permanent partial disability benefits in the amount of \$5,703.80 for temporary total disability benefits paid to Claimant for a period of ten weeks during a period when Claimant's non work-related medical condition made him ineligible for temporary total disability benefits.. To the extent that any temporary total disability benefits remain due and owing to Claimant after Employer's credit of \$7,438.30 is applied to temporary total disability benefits due, Employer shall be entitled to an additional credit against the balance due Claimant until the amount of temporary total disability benefits due to Claimant reaches zero; thereafter, Employer shall be entitled to a credit against permanent partial disability due to Claimant for the amount of overpayment of temporary total disability benefits which exceeds the amount of temporary total disability awarded to Claimant in the award. [22-5/7 weeks x \$570.38 = \$12,955.56 -

\$7,438.30 = \$5,517.26 - \$5,703.80 = -\$186.54 (amount to be credited against permanent partial disability)]

The nature and extent of any permanent disabilities.

Both the treating physician and the examining physician agree on Claimant's permanent restrictions of 40 pounds lifting, no repetitive lifting, and no overhead activity. Dr. Roeder testified that he rated Claimant's impairment at 7.2% of the body as a whole, notwithstanding the fact that Claimant's injury was to his left shoulder. Dr. Roeder did not rate Claimant's elbow or arm complaints. Dr. Belz rated Claimant at 20% of the left shoulder at the 232-week level, 5% of the left upper extremity at the 210-week level for left cubital tunnel syndrome, and 12.5% of the left upper extremity at the 210-week level for the left radial tunnel syndrome.

Dr. Roeder's rating totals 28.8 weeks of impairment with permanent restrictions of no lifting more than 40 pounds, no repetitive lifting, and no overhead activity. Dr. Belz's ratings total 83.15 weeks with the same restrictions as Dr. Roeder.

After reviewing all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant is permanently partially disabled to the extent of 30% of the left shoulder at the 232-week level. There is substantial and competent evidence presented at the hearing that Claimant has permanent restrictions that required him to stop performing the job tasks that he performed for many years prior to the injury of August 28, 2001. Claimant's range of motion is diminished, and he continues to have pain from time to time. I find this issue in favor of Claimant. Employer is hereby order to pay to Claimant the sum of \$21,872.50, less the amount of credit remaining from the calculations of temporary total disability benefits (\$186.55). (232-weeks x 30% = 69.6 weeks x \$314.26 = \$21,872.50 - \$186.55 = \$21,685.95) Employer is hereby ordered to pay to Claimant the sum of \$21,685.95 as and for permanent partial disability benefits. I find this issue in favor of Claimant.

Claimant's attorney has requested approval of an attorney fee in the amount of 25% of the amount of this award. Claimant's attorney fee request is hereby approved. Claimant's attorney is granted a lien against the proceeds of this award unless and until the attorney fee shall be paid in full.

Date: July 5, 2006

Made by: /s/ David L. Zerrer
David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secrest
Patricia "Pat" Secrest
Director
Division of Workers' Compensation