

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

Injury No.: 03-071105

Employee: Wayne Sanford  
Employer: ABC Moving & Storage (Settled)  
Insurer: Missouri Movers Risk Management (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 18, 2003  
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 (Commission) for review as provided by section 287.480 RSMo. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated November 3, 2005. The award and decision of Administrative Law Judge Paula A. McKeon, issued November 3, 2005, is attached and incorporated by this reference.

The administrative law judge awarded the employee the following permanent disability payable from the Second Injury Fund: 33 weeks of compensation at a rate of \$347.05, or \$11,452.65.

The employee timely filed an Application for Review with the Commission alleging the administrative law judge's award was erroneous in awarding employee permanent partial disability benefits from the Second Injury Fund, in lieu of awarding permanent total disability benefits due employee from the Second Injury Fund.

The Commission agrees with the award issued by the administrative law judge, in that the Second Injury Fund liability is one of permanent partial disability and not permanent total disability. However, the Commission modifies the award issued by the administrative law judge due to an apparent miscalculation of permanent partial disability benefits due employee.

All findings of fact and conclusions of law rendered by the administrative law judge are affirmed, other than the calculation of benefits due the employee from the Second Injury Fund.

The administrative law judge made the following findings, determinations and conclusions: 1) employee failed to demonstrate permanent total disability; 2) employee is entitled to compensation based on the combined effect of employee's current and pre-existing disability; 3) as a result of the primary injury, employee sustained 30% permanent partial disability of the left ankle; 4) employee had a pre-existing permanent partial disability of 23.75% permanent partial disability of the body as a whole referable to the cervical spine; 5) employee has greater disability when his injury/disabilities are considered together than the simple sum of each disability; and 6) an enhancement factor of approximately 15.5% was used by the administrative law judge.

Thirty percent permanent partial disability of the left ankle equates to 46.5 weeks of disability (155 x 30%); and 23.75% permanent partial disability of the body as a whole referable to the cervical spine equates to 95 weeks of disability (400 x 23.75%). The simple sum of these two disabilities equates to 141.5 weeks of disability. The administrative law judge incorrectly indicated the simple sum of the combination of these two disabilities equated to 215 weeks of disability.

When the administrative law judge used the incorrect calculation of 215 weeks with the enhancement factor of approximately 15.5%, the administrative law judge found the Second Injury Fund liable for 33 weeks of compensation.

However, the simple sum is actually 141.5 weeks of disability, and utilizing the same enhancement factor of 15.5%, the Second Injury Fund is actually liable for 22 weeks of disability.

Accordingly, the Commission concludes that the competent and substantial evidence results in Second Injury Fund liability of 22 weeks of compensation at a rate of \$347.05, or a lump sum amount due employee from the Second Injury Fund of \$7,635.10 (\$347.05 x 22 weeks).

All remaining findings of fact and conclusions of law found by the administrative law judge are affirmed. The award and decision of administrative law judge Paula A. McKeon, issued November 3, 2005, as modified, is attached and incorporated by 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 June 2006.

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: Wayne Sanford Injury No. 03-071105

Employer: ABC Moving & Storage

Insurer: Missouri Movers Risk Management

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

Hearing Date: September 23, 2005

Checked by: PAM/abj

**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: July 18, 2003.

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: Wayne Sanford injured his left ankle while stepping off a curb in the course and scope of his employment with ABC Moving & Storage.
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 ankle.
14. Nature and extent of any permanent disability: 30% permanent partial disability, 155-week level.
15. Compensation paid to date for temporary disability: \$16,210.82
16. Value necessary medical aid paid to date by employer/insurer? \$58,578.11
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$409.66 / \$347.05
20. Method wages computation: By agreement.

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: N/A
22. Second Injury Fund liability: Yes. The Second Injury Fund shall pay 33 weeks of compensation, or \$11,452.65 (See Findings and Rulings).
23. Future requirements awarded: N/A

Said payments to begin as of the date of this Award and to be payable and 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: Patrick Starke.

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

Employee: Wayne Sanford Injury No. 03-071105  
Employer: ABC Moving & Storage  
Insurer: Missouri Movers Risk Management  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: September 23, 2005 Checked by: PAM/abj

The above-referenced matter was heard in the Division of Workers' Compensation on September 23, 2005. The Division had jurisdiction to hear the case pursuant to §287.110. Claimant, Wayne Sanford, appeared in person and with counsel, Patrick Starke. The employer, ABC Moving & Storage, settled its claims prior to hearing. The Second Injury Fund appeared through Assistant Attorney General LaSandra F. Pearl.

### **STIPULATIONS**

At the hearing, the parties stipulated to the following:

1. On the date of injury, July 18, 2003, the employer, ABC Moving & Storage, was operating under and subject to the Missouri workers' compensation laws;
2. on the date of injury, July 18, 2003, the employer, ABC Moving & Storage, was fully insured for workers' compensation liability;
3. Wayne Sanford was an employee of ABC Moving & Storage on July 18, 2003;
4. Wayne Sanford was injured on July 18, 2003, while in the course and scope of employment;
5. Wayne Sanford provided the employer timely notice of the injury and a timely claim for workers' compensation was filed pursuant to Missouri statute;
6. for the July 18, 2003, claim, the employer paid \$58,578.11 in medical benefits and 31 4/7ths weeks of temporary total benefits. Temporary total disability was paid by the employer at a rate of \$409.66; and
7. a Stipulation for Compromise Settlement was executed by both Wayne Sanford and the employer, ABC Moving & Storage, and approved by the ALJ on July 21, 2004. The stipulation reflects a lump-sum settlement of \$16,137.83, which represents approximate disability of 30 percent of the left ankle (155-week level) as full and final settlement of its claim against the employer.

### **ISSUES**

The following issue is in dispute: Liability of the State Treasurer as Custodian of the Second Injury Fund.

### **FINDINGS AND RULINGS**

Sanford is a 55-year-old gentleman who attended school through the 10<sup>th</sup> grade. Sanford did not complete the 10<sup>th</sup> grade, did not receive his GED, nor did he receive further academic training. Sanford has a work history including primarily heavy labor, including work on a sod farm as well as his last position as a loader/packer with ABC Moving & Storage, for whom he had been employed eight years.

On or about July 18, 2003, Sanford sustained an injury to his left ankle that resulted in three surgeries. He was

initially taken to Lee's Summit Hospital where x-rays revealed a left ankle plafond/trimalleolar ankle fracture. He was then referred to an orthopedic specialist, Dr. Susan K. Bonar, who initially diagnosed a severe ankle fracture with evidence of fracture blisters. On July 29, 2003, Dr. Bonar performed a closed reduction and application of a left ankle external fixator. On August 22, 2003, Dr. Bonar removed the external fixator and performed an open reduction/internal fixation of the pilon fracture on the left. Sanford eventually underwent a third operation for removal of the hardware from his left ankle.

Prior to July 18, 2003, Sanford previously suffered a neck injury on or about June 1, 2002, while loading boxes weighing 75 to 100 pounds. Sanford complained of pain, numbness, and tingling in his left side from his shoulder to his long and ring fingers. Sanford was employed by the same employer, ABC Moving & Storage, at the time of that injury.

An MRI of the cervical spine taken on October 17, 2002, revealed disc extrusion at C6-7 and an EMG revealed C8 radiculopathy. Sanford was initially treated conservatively with modification of his activities and medications and taken off work. On January 2, 2003, Sanford underwent an anterior cervical discectomy and fusion at the C5-6 and C6-7. Five months following the surgery, June 2, 2003, Sanford returned to Dr. Jackson, who stated, "He reports no discomfort in his neck, however, he continues to have numbness in his arm, has not improved remains stable. He denies any arm pain and feels that his strength is good." On this date, Dr. Jackson indicated his progress in work hardening paralleled the job demands of a driver for his employer; therefore, Sanford was allowed to return to work the following day without restrictions. The Work Hardening/Conditioning Progress/Discharge report prepared on May 28, 2003, indicated Sanford's exertional level began at light and had progressed to heavy, which is what was required of his employment. That same report indicated that Sanford reported "his pain is a non factor" but he continued to experience right forearm and fourth and fifth digit numbness. Sanford then returned to Dr. Jackson for his final visit on June 30, 2003, at which time Dr. Jackson indicated "He has returned to work and states that he is tolerating work well." Even though he continued to experience some numbness, Dr. Jackson released Sanford at maximum medical improvement and advised him that the numbness in his fingers should not be disabling. He told him to avoid activities that might aggravate his neck, extreme neck positions, and heavy lifting or bending but "no permanent restrictions" were placed on him.

On July 15, 2003, Sanford saw Dr. Truett Swaim for an independent medical examination. Dr. Swaim restricted Sanford to medium work with the ability to exert between 20 and 40 pounds occasionally, between 10 and 25 frequently, and up to 10 pounds constantly. Sanford was further to avoid repetitive or forceful use of the upper extremities above shoulder height.

Sanford testifies that following his neck injury, he experienced stiffness in his neck on an occasional basis. He stated this stiffness would occur every time he drove within the first few weeks after his neck surgery; however, it decreased over time. He further testified that as a result of his neck injury, he continues to experience numbness in either two or three fingers. He testified that his neck injury made his work "pretty rough." He indicated that he was not physically able to lift as prior to the neck injury. Sanford further stated that as a result of his primary left ankle injury, he now uses a cane to walk and is limited in his ability to sit, stand, or walk. He stated that sitting down helps reduce the pain in his ankle. He indicated when he sits down, he gets his "foot up" to help relieve pressure. He also stated that his ability to sit is limited to 30 minutes before he experiences pain in his low back. Furthermore, Sanford testified at trial that he takes up to eight Excedrin a day for pain relief. He concluded that he did not believe he could perform other work driving due to difficulty getting in and out of a vehicle as well as his limitation in walking. However, he indicated he may be able to perform a job that did not require prolonged walking and allowed him to sit and stand as he needed.

Mary Titterington, Claimant's vocational expert, testified that Sanford possessed the transferable skill of driving. However, she believed he would not be able to perform driving work because he would not be able to sustain the sitting without elevating his leg and without taking breaks. Titterington concluded that considering Sanford's low intellect, work background, and his need to elevate his foot throughout the day, Sanford was unable to access the open labor market.

Bud Langston, vocational expert for the Second Injury Fund, testified at trial. Langston testified that based on the objective medical restrictions imposed by Dr. Jackson, Dr. Bonar, and Dr. Stuckmeyer, Sanford is able to perform work in the open labor market. Specifically, Langston identified several positions available to Sanford in the Kansas City job market, including pharmaceutical/laboratory courier; floral delivery driver; courtesy driver for an automotive dealership; lot attendant – auto dealership; and parking lot attendant. He stated these positions all meet the most restrictive restrictions imposed by Sanford's treating and examining physicians. Langston acknowledged in preparing his report and providing these opinions he did not have the deposition of Sanford or Mary Titterington to review. However, a review of Titterington's deposition would not change his vocational opinion and a review of Sanford's deposition was not necessary to determine the nature and extent of the restrictions imposed by medical professionals.

The central question in determining whether a claimant suffers from permanent total disability is whether any

employer in the usual course of business would reasonably be expected to employ the claimant in his present condition to perform the work for which he is hired and, given the employee's situation and condition, if he is competent to compete in the open labor market. Faubion v. Swift Adhesives Co., 869 S.W.2d 839 (Mo.App. 1994); Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo.App. E.D. 1992). In making this determination, this Court must first assess Sanford's credibility.

Sanford's testimony is inconsistent and contradicting and therefore is not credible. First, Sanford informed Mary Titterington that he must elevate his foot when seated; however, he stated at trial that he only needed to raise his foot occasionally to take pressure off it. During his deposition testimony taken by the Second Injury Fund on September 6, 2005, Sanford was directly asked about the need to elevate his foot and he specifically stated he did not need to do so. Sanford was asked at trial if he understood the question that had been presented to him in the deposition and he stated he did. No medical restrictions of this nature were imposed by any doctor. Furthermore, any alleged need to elevate his foot is not documented in the medical record. A review of Dr. Bonar's records reveals no mention of a need to elevate his foot and a review of Dr. Stuckmeyer's report and testimony also do not mention a need to elevate his foot. Sanford also testified that he needed to use a cane, although again there are no medical records or reports to support his use of a cane is medically necessary.

Sanford's testimony at trial regarding his neck injury was inconsistent with his prior testimony. Sanford's complaints contained in his deposition are significantly less than what he testified to at trial. Another contradiction present in Sanford's testimony involves his condition prior to the primary injury. Sanford testified at trial that he was limited in his ability to move his neck from left to right and that his neck would get stiff when driving. However, in his deposition he was specifically asked by the Second Injury Fund attorney, "Do you have any limit in how far you can turn your neck either direction?" And he responded that he did not. He was also asked, "Do you have any problem using your upper extremities, like above head, if you have to do overhead work?" And he again responded that he did not. Finally, Sanford was asked by the Second Injury Fund attorney, "So how would you describe your physical state, let's say, July 17<sup>th</sup>, the day before your injury happened? Was there anything that was bothering you?" And he responded that he "felt fine."

Sanford stated he left his employment due to an inability to perform the work with ABC. However, according to Titterington's report and testimony, Sanford informed her that he left his employment due to conflicts over the way his wife was being treated. There is a clear contradiction in Sanford's statements.

An additional inconsistency in Sanford's testimony involves his use of medication. He testified at trial that he took up to eight Excedrin a day and had done so for six months. However, when specifically asked at his deposition if he was taking any medications, he indicated he was not. Sanford was not specifically asked about "prescription" medications but instead was simply asked if he was taking any medications at all and he failed to offer any mention of Excedrin up to eight tablets a day. Sanford was asked a second time during his deposition if he was taking any medications and he again indicated he was not.

There is no dispute that Sanford sustained a significant ankle injury on July 23, 2003. Furthermore, I find that Sanford's prior neck injury and disability is sufficient enough to create a hindrance or obstacle to employment or reemployment. I do not find, however, that the combination of the two prior disabilities render Sanford permanently and totally disabled.

Bud Langston, Second Injury Fund vocational expert, opined that Sanford was employable in the open labor market. Langston based his opinions on Sanford's medical records and the specific medical restrictions imposed by the physicians. Mary Titterington based her opinion in part on Sanford's subjective complaints and self-imposed restrictions of foot elevation and cane use. Langston's testimony is more persuasive and credible than Titterington's in this case.

Based on the testimony of the claimant, medical testimony and records, and vocational expert testimony, I find Sanford failed to demonstrate permanent total disability. I do find that Sanford is entitled to compensation based on the combined effect of his current and preexisting disabilities. I find Sanford to have permanent partial disability of 30 percent at the 155-week level as a result of his July 18, 2003, injury. I find Sanford had disability of 23.75 percent body as a whole referable to his neck, which predates the injury of July 18, 2003. I find Sanford has more disability when his injuries are considered together than the simple sum of each disability. The simple sum of Sanford's disability is 215 weeks of compensation or approximately 53.75 percent. I find Sanford's combined disability is 248 weeks of compensation or approximately 62 percent body as a whole. The Second Injury Fund liability is therefore 8.25 percent body as a whole. Sanford is entitled to 33 weeks of compensation at a rate of \$347.05, or \$11,452.65, from the Second Injury Fund.

This Award is subject to an attorney's lien in the amount of 25 percent in favor of Patrick Starke for legal services

rendered Claimant.

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

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

Paula A. McKeon  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*