

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

Injury No.: 02-060794

Employee: Randy Wineland
Employer: Missouri Highway & Transportation Department
Insurer: Self-Insured
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 April 16, 2014. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued April 16, 2014, 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 16th day of September 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Randy Wineland Injury No.: 02-060794
Dependents: N/A
Employer: Missouri Highway & Transportation Department
Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: February 26, 3014

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

Checked by: HDF/scb

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: June 6, 2002
5. State location where accident occurred or occupational disease was contracted: Cole 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:
See award
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: Low back
14. Nature and extent of any permanent disability: Permanent and total disability as of July 14, 2005
15. Compensation paid to-date for temporary disability: \$51,184.63
16. Value necessary medical aid paid to date by employer/insurer? \$206,771.21

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17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: ----
19. Weekly compensation rate: \$420.92 for TTD and PTD/\$329.42 for PPD
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: PTD from July 14, 2005
(456 weeks from 7/14/05 through 4/10/14 of \$420.92 per week = \$191,939.52)
22. Second Injury Fund liability: No
23. Future Requirements Awarded: Ongoing medical as described in the award.

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: Allen & Nelson PC/Truman Allen.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Randy Wineland

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Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Missouri Highway & Transportation Department

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

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

Insurer: Self-Insured

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on February 26, 2014. Memoranda were submitted by March 14, 2014.

The parties stipulated that on or about June 6, 2002, the claimant, Randy Wineland, was in the employment of the Missouri Highway and Transportation Department (MoDOT). On or about that date the claimant sustained an injury by accident; the accident arose out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was self insured. The employer had notice of the injury. A claim for compensation was timely filed. The compensation rate is \$329.42 per week for permanent partial disability benefits and \$420.92 per week for temporary and permanent total disability benefit.

Temporary disability benefits have been paid in the amount of \$51,184.63, reflecting 121 weeks of benefits paid through July 13, 2005. Medical aid has been provided in the amount of \$206,771.21.

The issues to be resolved by hearing include 1) the nature and extent of permanent disability, 2) the liability of the Second Injury Fund, 3) the liability of the employer/insurer for past medical bills as set out in Exhibit Y, and 4) the liability of the employer/insurer for future medical treatment. Permanent total disability benefits as of July 14, 2005, are sought.

FACTS

The claimant, Randy Wineland, was employed by MoDOT on June 6, 2002, when he injured his back while stacking bags of bentonite into the back of a van. Mr. Wineland's job with MoDOT involved core drilling and the bentonite was used to maintain the drilled holes in sandy soil. Mr. Wineland was in a bent position and felt a slight pulling sensation as he was stacking the 50 pound bags; Mr. Wineland could not stand from his bent over position. Mr. Wineland reported his injury and saw several physicians and had physical therapy and injections to improve his back condition. Mr. Wineland returned to full duty work with MoDOT in January of 2003, and on January 6, 2003, he was unable to get out of his truck without assistance after driving to St. Louis

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and his supervisor had to bring him home. At that point Mr. Wineland saw Dr. Trecha, whom he had seen after the June 2002 accident, again.

Dr. Trecha operated on Mr. Wineland's back followed by surgery on his back by Dr. Robson. Dr. Robson's initial back surgery included a two-level fusion with hardware. Dr. Robson performed his second back surgery for Mr. Wineland after Mr. Wineland's bone growth following Dr. Robson's first surgery stopped. Mr. Wineland was on modified duty at a temporary job mapping with MoDOT periodically during this time. Mr. Wineland's job during this time was very flexible, including breaks and going outside to walk as needed for comfort.

Mr. Wineland noted signs of depression setting in after his second surgery with Dr. Robson and received anti-depressant medication from Dr. Robson. Mr. Wineland had had an episode of depression before and recognized the signs when he became depressed after the back surgeries. Mr. Wineland described his depression as triggered by his inability to do more than walk in his house for a limited time, worries about bills, and thoughts of things he was no longer able to do. Dr. Robson referred Mr. Wineland to Dr. Spalding for treatment of his depression in 2005. Mr. Wineland discontinued his antidepressants in 2007, and could not immediately see Dr. Spalding when Mr. Wineland wished to resume the antidepressant medications. Mr. Wineland's family physician, Dr. Finney, prescribed antidepressant medications in the interim period. When Dr. Spalding left the area, Mr. Wineland's care was transferred to Dr. Frick.

Dr. Robson released Mr. Wineland from treatment on about July 8, 2005; around that time Mr. Wineland's temporary total disability benefits ceased and his long-term disability benefits set in. Mr. Wineland was not released to full duty by Dr. Robson; Mr. Wineland described his permanent restrictions as including 15 pounds maximum lifting and no bending or twisting and limited sitting, standing, and walking with the ability to change positions.

Mr. Wineland described a previous back injury resulting from a work accident in 1996 when a pipe wrench he was working with snapped causing low back pain; the injury resulted in prescription medications and a week of physical therapy. Mr. Wineland returned to full duty work with MoDOT in core drilling, which Mr. Wineland described as very heavy and demanding work involving drill bits weighing from 20 to 150 and 180 pounds. Mr. Wineland testified to only intermittent slight numbness in his right buttocks after the 1996 accident and said that his job responsibilities did not change after the 1996 accident.

Currently, Mr. Wineland continues to have pain and numbness in his low back radiating into his left leg into his toes. Mr. Wineland cannot lift without pain and gets to his knees when he has to lift something. Mr. Wineland cannot sit for extended periods of time due to his low back pain and needs to take breaks when he is driving. Mr. Wineland spends his days with limited shopping trips to the grocery store or small woodworking projects and in the summer utilizes the swimming pool as a pain reliever.

Records from St. Mary's Health Center for May 13, 2009, describe Mr. Wineland as seeking help for his depression pertaining to stress over family issues, including the impending loss of a job

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for his wife, and his daughter moving out of the home to live with her mother, Mr. Wineland's ex-wife.

Dr. Robert Frick, with Capital Region Medical Center wrote in a letter to defense counsel on February 23, 2011, that "Mr. Wineland is being treated for Major Depression and Generalized Anxiety Disorder. The Effexor is prescribed for both disorders. I agree that the depression and Generalized Anxiety Disorders began prior to the 2002 work injury. Therefore, the injury is probably not responsible for the bulk of his psychiatric problems. However, the pain and functional limitations stemming from that injury probably do increase the degree of depression and anxiety with which he struggles. He most likely will need Effexor or a similar medication indefinitely." (Frick letter 2.23.11)

Dr. David Volarich testified by deposition that he evaluated Mr. Wineland on March 28, 2006, and authored a report pertaining thereto on the same day. Dr. Volarich opined that Mr. Wineland had a "herniated nucleus pulposus L5-S1 to the left, as well as aggravation of degenerative disc disease at L4-5 and L5-S1-S/P microdiscectomy L5-S1 to the left ... post laminectomy syndrome ... failed back syndrome ... [and] persistent post-laminectomy/failed back syndrome with chronic left leg S1 radiculopathy" as the result of the June 6, 2002 accident. (Volarich report 3.28.06) Dr. Volarich found Mr. Wineland to have a permanent disability of 75 percent of the body attributable to the June 6, 2002 accident and opined that Mr. Wineland would not be able to "engage in any substantial gainful activity nor ... perform in an ongoing work capacity in the future." (Volarich depo p14) Dr. Volarich noted Mr. Wineland's prior back injury and evaluated the permanent disability from that injury to be 7.5 percent of the body; Dr. Volarich opined that if Mr. Wineland is determined to be unable to return to an appropriate job that his permanent total disability is attributable to the June 6, 2002 accident and injury alone. Dr. Volarich testified that he disagreed with Dr. Ryan's diagnosis of a herniated lumbar disc in 1996; Dr. Volarich concluded that the appropriate diagnosis for Mr. Wineland's complaints in 1996 is "historic lumbar syndrome" based on the absence of diagnostic tests, symptoms, and treatment.

Gary Weimholt, vocational rehabilitation consultant, testified by deposition that he saw Mr. Wineland for an assessment and authored a report dated August 4, 2006, pertaining thereto. Mr. Weimholt concluded that Mr. Wineland could not compete in the open competitive labor market and would not be hired for a job for which he was qualified by an employer in the normal course of business. Mr. Weimholt attributed Mr. Wineland's total vocational disability to the June 6, 2002 accident.

Dr. A. E. Daniel, psychiatrist, testified by deposition that he saw Mr. Wineland twice, to take basic information and to administer the MMPI and then to discuss the MMPI and conduct a full interview; the resulting report is dated November 21, 2012. Dr. Daniel describes Mr. Wineland's history of depression as 1) a pre 2002 episode in 1998 while going through a difficult relationship with his wife followed by divorce and included the need for hospitalization, 2) a 2005 episode which started during his treatment for his back by Dr. Robson and resulted in treatment for major depressive disorder with Dr. Spaulding through January of 2006, 3) an episode in 2009 "partly concurrent with his adopted daughter moving out" and included the need for hospitalization; treatment since 2009 has been with Dr. Spaulding and Dr. Frick. Dr. Daniel notes in his report that the 1998 depressive episode was "possibly precipitated by his then marital

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difficulties and subsequent divorce” while “subsequent episodes of depression are attributable to the work-related injury in June 2002. In [Dr. Daniel’s] professional opinion, this injury and the subsequent failed treatment were the prevailing factors for the psychiatric disability caused by the recurrent episodes of depression.” (Daniel report 11.21.12) In his deposition testimony, Dr. Daniel stated that the stressors pertaining to the 2005 depressive episode as “basically, you know, since the injury in 2002 he had undergone substantial orthopaedic treatment consisting of multiple operations, epidural injections, narcotic pain medication treatment and physical therapy....also he was having family-related problems at that time but those problems became much more prominent in 2008 and 2009.” (Daniel depo p11) When asked about how the work injury could be the prevailing cause of Mr. Wineland’s depression in the face of the family issues which caused depression for Mr. Wineland, Dr. Daniel went on to say that he believed Mr. Wineland’s work injury and the failed treatment and the loss of earning capacity due to the work injury were the prevailing cause of his depression in 2006. Dr. Daniel admitted that the most recent depression could possibly have been caused by “other things besides the injury.” (Daniel depo p41)

Dr. Patrick Hughes testified by deposition that he is a board certified psychiatrist. Dr. Hughes evaluated Mr. Wineland on December 3, 2010, and authored two reports pertaining to Mr. Wineland’s mental status, dated December 3, 2010, and November 11, 2013. Dr. Hughes opined that Mr. Wineland’s depressive episodes were not caused by his continued pain following his back surgeries after the 2002 accident. Dr. Hughes said that Mr. Wineland did not suffer either a major depressive episode or an adjustment disorder as the result of his chronic pain following his accident and back surgeries post 2002. Dr. Hughes cites an inherited “depression/anxiety gene” as the cause of Mr. Wineland’s episodes of depression following the 2002 accident and back surgeries followed by chronic pain.

Dr. David Robson, orthopedic surgeon with a subspecialty in the treatment of spinal disorders, testified by deposition that he initially saw Mr. Wineland on February 11, 2004. Dr. Robson described his treatment of Mr. Wineland as including a “revision lumbar laminectomy at L4-5 and L5-S1, with an instrumental spinal fusion from L4 to S1” in April of 2004, followed by a “revision spine fusion posteriorly and anteriorly at Missouri Baptist Medical Center ...at the end of the year 2004.” (Robson depo p10) Dr. Robson released Mr. Wineland from treatment on July 13, 2005. Dr. Robson opined to a permanent disability of 30 percent of the body attributable solely to the 2002 accident and injury. Dr. Robson testified that he released Mr. Wineland with a ten-pound lifting restriction, no bending, stooping, twisting, or awkward positions, standing and walking two to four hours at a time, sitting two to four hours at a time, and data entering and typing two to four hours at a time, changing positions briefly, from sitting to standing to walking, every 45 minutes. Robson limited Mr. Wineland to six-hour work days. Dr. Robson’s records also reflect his release of Mr. Wineland from treatment on July 13, 2005, with a note that Mr. Wineland is released “with previous restrictions.” The previous restrictions are dated June 7, 2005, and limit standing and walking, sitting, data entry and typing, and grasping to zero to two hours at a time. In all other respects the June 7, 2005 restrictions in the records comport with Dr. Robson’s testimony regarding his restrictions on his release of Mr. Wineland. Dr. Robson released Mr. Wineland from treatment with a prescription for Hydrocodone. Dr. Robson had given Mr. Wineland a prescription for Elavil and then Effexor, both anti-depressants, during his treatment of Mr. Wineland; Dr. Robson thought that Mr. Wineland was no longer taking the

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antidepressants at the time of his release from treatment. Dr. Robson testified that he released Mr. Wineland with a prescription for pain medication. Dr. Robson's release from treatment on July 13, 2005, refers to Mr. Wineland's ongoing need for Hydrocodone. Dr. Robson did not attribute permanent disability to any condition Mr. Wineland had prior to 2002.

Mr. James England, vocational rehabilitation counselor, personally evaluated Mr. Wineland on January 28, 2009, as well as reviewed background material pertaining to Mr. Wineland's pending workers' compensation claim. Assuming the restrictions imposed by Dr. Robson, Mr. England opined to Mr. Wineland's ability to "perform some work within the sedentary to light ranges of exertion such as cashiering jobs where a stool is provided, some security work, and as mentioned earlier, cost estimation for a painting contractor utilizing the knowledge he acquired in the past." (England 2009 report p10) Mr. England elaborated on Dr. Robson's restrictions in a May 5, 2009 letter to counsel for the employer/insurer stating that "considering the June 2005 restrictions it would appear that [Mr. Wineland] would be limited to work that would allow flexibility of movement every 45 minutes, that there would be a 10 pound lifting limit and that he would be limited to 6 hour workdays. ... this indicates that this man would be limited to a 30 hour work week rather than 40 hours but it certainly does not indicate that he is unemployable or unable to compete in the open labor market. The same types of jobs that I listed in my original report would be, in my opinion, appropriate for this man but he simply would be limited to working 30 hours a week rather than 40." (England 2010 report) Mr. England conceded that Dr. Volarich's restriction that Mr. Wineland lay down periodically during the day would foreclose Mr. Wineland from at least some types of sedentary work.

Mr. Wineland described the following medications for which he is seeking payment by the employer/insurer: Alprazolam for anxiety--\$168.88, Effexor for depression--\$5032.63, Ambien for sleeplessness--\$109.14, Diazepam for anxiety--\$85.08, Clonazepam for anxiety--\$204.63, Lexapro for depression--\$115.91, Risperidone for anxiety--\$159.39, Buspirone for anxiety--\$251.54, Trazadone for sleeplessness--\$190.69, and Venlafaxine, a generic form of Effexor--\$1275.65. Prescriptions, including Hydroco/APAP, Alprazolam, Effexor, Ibuprofen, Ambien, Methylpred pak, Diazepam, Lyrica, Clonazepam, Lexapro, Risperidone, Buspirone, Trazadone and Venlafaxine prescribed between January of 2005 and August 2013 and prescribed by Dr. Robson, Dr. Spalding, Dr. Watson, Jan Finney, Robert Frazier, Robert Frick, and James Ennis are the subject of the claim for reimbursement. The employer/insurer acknowledged liability for Hydroco/APAP, Ibuprofen, Methylpred pak, and Lyrica. The prescriptions for Effexor, Alprazolam, Ambien, and Diazepam run through August of 2007, and then do not reappear until March and April of 2009. Also appearing in 2009 are prescriptions for Venlafaxine, Clonazepam, Lexapro, Risperidone, and Buspirone. Trazadone is initially prescribed in 2010.

APPLICABLE LAW

RSMo Section 287.020.2 The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the

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resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

RSMo Section 287.140.1 In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

AWARD

The claimant, Randy Wineland, has sustained his burden of proof that he is permanently and totally disabled as the result of his injury of June 6, 2002. Even using the most liberal restrictions posited by Dr. Robson, who testified on behalf of the employer/insurer with regard to his treatment of Mr. Wineland, it is apparent that Mr. Wineland cannot compete for employment in the open labor market. Dr. Robson has limited Mr. Wineland to less than a full day of working activity. Mr. England, the vocational expert who opined on behalf of the employer/insurer was not able to discuss employment for Mr. Robson without qualifications such as sitting, working no more than 30 hours a week, or changing positions on a more frequent than hourly basis. Dr. Volarich's restrictions included the need for Mr. Wineland to lay down during the day, rendering him unemployable on the open labor market. Mr. Weimholt, the vocational expert who testified on behalf of the claimant, opined that Mr. Wineland is not employable.

Mr. Wineland has failed to sustain his burden of proof that the Second Injury Fund is liable for benefits where the evidence is that Mr. Wineland's permanent and total disability is the result of

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his 2002 accident and injury. No physician opined that Mr. Wineland's permanent disability is the result of anything other than his 2002 accident; likewise, no vocational expert opined to vocational impairments Mr. Wineland had prior to 2002.

Mr. Wineland has sustained his burden of proof that the employer/insurer is liable for the reimbursement of the following prescription expenses: Effexor--\$4023.14, Alprazolam--\$168.88, Diazepam--\$85.08, and Ambien--\$109.14. These are prescription expenses initially prescribed by Dr. Robson (with the exception of the Ambien) to treat Mr. Wineland for his depression and then prescribed by Dr. Spalding when he took over Mr. Wineland's mental health care from Dr. Robson at Dr. Robson's request. These are prescriptions January 5, 2005, through June 18, 2007. While I found neither Dr. Daniel's nor Dr. Hughes' opinions particularly convincing with regard to the cause of Mr. Wineland's permanent mental health status, I did find Dr. Daniel's opinion that the 2005 depression was caused by Mr. Wineland's 2002 accident and the multiple back surgeries he endured to cure or relieve his condition persuasive. Thus, those prescriptions mentioned which appear to have their origin in the 2005 depression are the responsibility of the employer/insurer. Later prescriptions for Effexor, Alprazolam, and Diazepam appear in 2009, around the time when Mr. Wineland suffered depression related to family issues with his daughter and are not the responsibility of the employer/insurer.

Finally, the employer/insurer are liable for ongoing pain medications for Mr. Wineland, including the Hydrocodone mentioned in Dr. Robson's report made at the release of Mr. Wineland from his treatment. As noted previously, the testimony pertaining to Mr. Wineland's depression after the conclusion of treatment for the 2005 episode of depression as caused by the 2002 work injury is not persuasive given Mr. Wineland's past history of depression unrelated to a work injury and Mr. Wineland's 2009 hospitalization for depression related to his family issues; thus, antidepressant medications are not included in the award of future medical treatment.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation