

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

Injury No.: 99-182574

Employee: Leo Ducote
Employer: Anheuser-Busch Companies, Inc. (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 30, 1999
Place and County of Accident: St. Louis, 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 December 23, 2004. The award and decision of Administrative Law Judge Jennifer L. Schwendemann, issued December 23, 2004, 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 25th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Dependents: N/A
Employer: Anheuser-Busch Companies, Inc. (Settled)
Additional Party: Second Injury Fund
Insurer: Self-Insured (Settled)
Hearing Date: November 2, 2004

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

Checked by: JLS:tr

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 30, 1999
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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: N/A
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: Right ear, body as a whole
14. Nature and extent of any permanent disability: 110% hearing loss of the right ear, 5% of the body as a whole combines with preexisting disability of 30% neck, body as a whole, 20% left knee and 15% of the right knee
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Leo Ducote Injury No.: 99-182574

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$294.73 PPD
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: (Settled)
22. Second Injury Fund liability: Yes

22.99 weeks of permanent partial disability from Second Injury Fund \$6,775.84

TOTAL: \$6,775.84

23. Future requirements awarded:

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:

Mark Panzeri

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Leo Ducote	Injury No.: 99-182574
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Anheuser-Busch Companies, Inc. (Settled)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Self-Insured (Settled)	Checked by: JLS:tr

PRELIMINARIES

On November 2, 2004, a hearing was held at the Division of Workers' Compensation in the City of St. Louis. Attorney Mark A. Panzeri represented Claimant and Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund. The primary injury against the Employer/Insurer had previously settled.

The parties agreed that Claimant, on June 30, 1999, Claimant sustained an occupational disease arising out of and in the course of his employment with the Employer that resulted in injury to Claimant. The parties agree that they were subject to the Act, that venue was proper in the City of St. Louis, that Employer received proper notice, and that Claimant filed a timely claim.

The sole issue to be determined by hearing is: Does the primary injury meet statutory threshold for permanent partial disability?

The following exhibits were admitted into evidence:

Claimant's Exhibit A/SIF Exhibit I.	Contingent Agreement as to Preexisting Disabilities.
Claimant's Exhibit B/SIF Exhibit II.	Stipulation for Compromise Settlement in Injury Number 99-182574.

FINDINGS OF FACT

Based upon the credible and substantial evidence, I find:

The Claimant sustained an injury on June 30, 1999 arising out of and in the course of his employment with the Employer resulting in disability. The Claimant sustained a 110% hearing loss to his right ear. (See Claimant's Exhibit B/SIF Exhibit II). Prior to the June 30, 1999, the Claimant sustained injuries resulting in a 30% disability to his neck and body as a whole, a 20% disability to his left knee, and a 15% disability to his right knee. (See Claimant's Exhibit A/SIF Exhibit I).

RULINGS OF LAW

Based upon the above findings of fact, I find:

In *Pierson v. Treasurer of the State*, 126 S.W.3d 386 (Mo.banc. 2004), the Missouri Supreme Court rejected the Fund's contention that an injury to an eye is neither an injury to a major extremity nor an injury to the body as a whole. *Id.* at 389. The Court noted the Fund's admission that injuries to all other members of the body listed in §287.190 RSMo, other than eyes *and ears*, are compensable by the Fund as injuries to major extremities; and that injuries to all parts not listed in §287.190 RSMo are compensable by the Fund as injuries to major extremities; and that injuries to all parts not listed in §287.190 RSMo are compensable by the Fund as injuries to parts of the "body as a whole". *Id.* at 389. Thus, the Court concluded that, "An injury to the eye is also a partial injury to the body as a whole for purposes of fund liability". *Id.* at 390. Given that holding in *Pierson*, an injury to the ear would likewise be analyzed as a partial injury to the "body as a whole" for purposes of Fund liability.

In addressing injuries to the body as a whole, §287.220 RSMo provides a threshold for imposing Fund liability. That threshold requires that the Claimant's subsequent compensable work injury must result in permanent disability equal to a minimum of 50 weeks compensation. Additionally, §287.220 RSMo specifically provides that the percentage of disability attributable to injuries or conditions which preexist the last injury is not determined until, "After the compensation liability of the employer for the last injury, *considered alone*, has been determined ...".

In this case, the relevant compensation liability of the Employer for the last injury, considered alone, is 110% of the right ear. This amounts to 53.9 weeks of compensation based on the fact that 100% total disability of the ear entitles the Claimant to 49 weeks compensation per the schedule of losses, and also the fact that such complete loss of use entitles the Claimant to an additional 10%, or 4.9 weeks compensation. This additional 10% liability of the Employer is not discretionary but is in fact mandated by §287.190.2 RSMo. Said statute specifically provides that the "shall" increase the disability and weeks of compensation by 10% when the loss is total by reason of complete loss of use. Therefore, by statutory directive, the Employer's compensation liability in this matter is clearly 53.9 weeks which satisfies the threshold for Fund liability under §287.220 RSMo. *Id.* at 390.

In *Pierson*, the Commission had applied the 10% loss of use premium directly against the Fund to increase the number of weeks of compensation relative to a preexisting condition (in that case, an eye condition resulting in total disability of the eye). To the contrary, the present case involves application of the 10% loss of use premium only to the Employer's liability on the primary claim, and not against the Fund in relation to any of the preexisting disabilities. Therefore, application of the 10% loss of use premium against the Employer is consistent with *Pierson*.

If the Court accepts the Fund's position, a primary injury to an ear would never be sufficient to result in Fund liability because an ear would never reach the 50-week level. Such a result was clearly rejected by the reasoning of the Court in *Pierson*. In particular, the Supreme Court stated that there is no logical reason why the legislature would have chosen not to allow Fund compensation for injuries to eyes and ears, but would for all others. *Id.* at 389.

Finally, the Fund's position is inconsistent with the statutory and caselaw directive to interpret workers' compensation laws with the view toward the public welfare and interpret the law liberally so that any doubt is resolved in favor of the injured employee. §287.800 RSMo; *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 408 (Mo.App. W.D. 1996).

The Employee is therefore entitled to 22.99 weeks of compensation at a weekly rate of \$294.73 based upon a 110% disability to the right ear and the preexisting disabilities set forth under the Contingent Agreement as to Preexisting Disabilities. (See Claimant's Exhibit /SIF Exhibit I).

This award is subject to an attorney's fee in favor of Mark Panzeri for services rendered.

Date: _____

Made by: _____

Jennifer L. Schwendemann
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary J. Estenson
Acting Director
Division of Workers' Compensation