

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

Injury No.: 01-168517

Employee: Donnell Durley

Employer: Anheuser-Busch, Inc.

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

Date of Accident: Alleged May 1, 2001

Place and County of Accident: Alleged City of 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 June 1, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued June 1, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Donnell Durley

Injury No.: 01-168517

Dependents: N/A
Employer: Anheuser-Busch, Inc.
Additional Party: Second Injury Fund (Open)
Insurer: Self-Insured
Hearing Date: May 4, 2005

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

Checked by: EJK:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: May 1, 2001 (alleged)
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, 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? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant developed tinnitus after he retired from working for this employer.
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: Head (tinnitus)
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Donnell Durley Injury No.: 01-168517

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$907.60
19. Weekly compensation rate: \$599.96/\$314.26
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: Open

TOTAL:

NONE

23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Donnell Durley	Injury No.: 01-168517
Dependents:	N/A	Before the Division of Workers'
Employer:	Anheuser-Busch, Inc.	Compensation
Additional Party:	Second Injury Fund (Open)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Self-Insured	Checked by: EJK

This case arises out of a Claim for Workers' Compensation, in which the claimant alleged that loud noise at work caused "hearing loss and damage." At the hearing, both parties agreed that the claimant sustained no compensable hearing loss, but the claimant seeks compensation for tinnitus. The issues for disposition are: (1) Occupational disease; (2) Medical causation; (3) Permanent disability; and (4) Future medical care. Based on the evidence, the claim is denied.

At the hearing, the claimant testified in person and offered medial reports from Joseph Hanaway, M.D. and Wallace P. Berkowitz, M.D. The defense offered a medical report from John W. McKinney, M.D., and the employers hearing test records from June 19, 1978, through January 14, 1999, relating to the claimant.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the alleged occupational disease was alleged to have been contracted in Missouri.

SUMMARY OF FACTS

This fifty year old claimant, who was born on October 1, 1954, worked for this employer from July 14, 1978, to May 7, 2001. During the last 22 years of his employment, he was a production worker, who used a forklift to load and unload rail cars. During the course of his employment, he was subjected to noise from machinery and construction. During the first few years of his employment, he did not wear hearing protection. Employment records indicate that hearing protection was used (a sponge type product which was readily available) by 1987.

The claimant noticed both high tone and low tone hearing loss around 1999; the high tone loss was worse than the low tone loss. The claimant also testified that he now has ringing and high pitch noises in his ears. The claimant testified that his only exposure to noise was at work.

The claimant testified that, when his hearing was checked on November 28, 1994, he checked boxes which indicate that he had ear aches, ear infections or drainage and frequent allergy, asthma and sinus attacks, but he did not check a box which indicated that he had ringing in his ears after work. When his hearing was tested on September 18, 1995, the claimant checked boxes which indicate that he had the same problems he had a year earlier and “trouble hearing”, but he did not check a box which indicated that he had ringing in ears after work. When his hearing was tested on May 7, 1996, the claimant checked two boxes which indicated that he had a bad cold or flu on the testing date and frequent allergy, asthma, sinus attacks, but he again did not check the box which indicated that he had ringing in his ears after work. When his hearing was tested on January 14, 1998, the claimant checked a box, which indicated that he had frequent allergy, asthma, and sinus attacks, but he did not indicate that he had ringing in ears after work. When the last hearing test was done on January 14, 1999, there was no reference to a complaint of ringing in ears after work. See Exhibit 2.

Dr. Hanaway examined the claimant on September 16, 2004, but did not test the claimant’s hearing. Dr. Hanaway noted that “the patient developed tinnitus” and that the claimant did not recall complaining of tinnitus when he had audiograms in 1989, 1994, 1995, and 1998. Dr. Hanaway did not provide an opinion regarding permanent partial disability in his September 16, 2004, report. In a supplemental report dated November 11, 2004, Dr. Hanaway referred to tinnitus, but he did not provide an opinion regarding permanent partial disability caused by tinnitus. In a second supplemental report dated March 2, 2005, Dr. Hanaway reported that he did not previously provide an opinion regarding permanent partial disability related to tinnitus because there was no mention of tinnitus in audiograms from 1989 through 1998. Dr. Hanaway also reported that the claimant told Dr. Hanaway that the claimant was never asked about tinnitus. Because the claimant complained of tinnitus, Dr. Hanaway concluded that tinnitus caused a five per cent disability of the body as a whole. See Exhibit B.

The first documented complaint of tinnitus is contained in Dr. McKinney’s March 2, 2004 report. See Exhibit 1. The claimant told Dr. McKinney that he was not sure when the tinnitus began. Dr. McKinney concluded that the claimant has no compensable hearing loss. Dr. McKinney also concluded that the claimant had no permanent partial disability as a result of work-related tinnitus, because the claimant had mild high frequency hearing loss, which is associated with tinnitus, before he began working for the employer and because there was no reference to tinnitus in the hearing test records. See Exhibit 1.

COMPENSABILITY

The claim for compensation in this case is limited to a claim of permanent partial disability related to tinnitus. In the instant case, the claimant seeks workers’ compensation benefits for his tinnitus, alleging his medical condition is attributable to an occupational disease arising out of and in the course of his employment. The applicable statutes are sections 287.063 and 287.067 RSMo 2000. Our Courts has been discussed the method of proving an occupational disease pursuant to these Missouri statutes:

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. ... The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Claimant must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. The opinion may be based on a doctor’s written report alone. Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. Where there are conflicting medical opinions, the fact finder may reject all or part of one party’s expert testimony which it does

not consider credible and accept as true the contrary testimony given by the other litigant's expert. Kelley v. Banta and Stude Const. Co., Inc., 1 S.W.3d 43 (Mo. App. E.D. 1999)

[M]ere exposure is not enough to shift liability to a subsequent employer. Instead, the subsequent employer must expose the employee to repetitive motion capable of producing [claimant's ailment]. Maxon v. Leggett and Platt, 9 S.W.3d 725 (Mo. App. S.D.2000).

In the instant claim, the claimant failed to establish through expert testimony the probability that his claimed occupational disease was caused by conditions in his work place. The claimant asserts that tinnitus began while he worked for this employer, but he did not identify when the ringing in his ears began. He could only estimate that he noticed hearing loss "around 1999" and he left the employment in May 2001. There is no documentary evidence of tinnitus until March 2, 2004, almost three years after the claimant left the employment. When the employer tested the claimant's hearing on January 14, 1999, and on several prior annual occasions, the claimant identified several other conditions but did not identify ringing in the ears as a condition affecting his hearing.

Dr. Hanaway examined the claimant on one occasion, September 16, 2004, and did not provide an opinion regarding permanent partial disability based on the audiograms. He reported that the claimant complained of tinnitus when he worked for this employer. However, none of the evidence, outside of the claimant's reports in 2004, reveals any corroboration of his complaints, the symptoms complained of, or to whom the complaints were addressed. Had the claimant filed a complaint with the employer, the complaint would corroborate his testimony. Audiograms cannot disclose complaints of tinnitus. On March 2, 2005, Dr. Hanaway prepared a second supplemental medical report stating that he did not previously provide an opinion regarding permanent partial disability related to tinnitus, because there was no mention of tinnitus in audiograms from 1989 through 1998. Dr. Hanaway also reported that the claimant told Dr. Hanaway that the claimant was never asked about tinnitus. Because the claimant complained of tinnitus, Dr. Hanaway concluded that tinnitus caused a five per cent disability of the body as a whole. However, he did not opine whether the disability resulted from the claimant's employment or from other causes. See Exhibit B.

The evidence suggests that the claimant now has a five percent permanent partial disability due to tinnitus, but has failed to prove that his work caused the condition that did not manifest until long after his employment ended. The claimant's testimony that he was exposed to loud noises at work is credible, but his testimony that he has no exposure to loud noises outside of work is not credible. Unless he lived in a library without exposure to lawn mowers, vacuum cleaners, and automobiles, his conclusion seems very self serving, uncorroborated, and unbelievable. More importantly, the temporal relationship between the onset of his symptoms in 2004 and his retirement in 2001 seems to support a conclusion that the condition is not work related. Dr. McKinney opined, "The most frequent finding in tinnitus is the presence of hearing loss in the higher frequencies and this finding on Mr. Durley's preemployment audiogram as well as no complaint of tinnitus during his work employment at Anheuser Busch, Inc. according to the medical records leads me to the opinion that his tinnitus is not related to his industrial noise exposure." See Exhibit 1.

Based on the evidence, the claim is denied, because the more credible evidence supports a finding that the work was not a substantial factor causing the claimant's tinnitus. The only evidence supporting the claim is the claimant's own self-serving testimony and report to Dr. Hanaway that he had the condition after his last hearing test for the employer, but before he left the employment. Dr. McKinney's findings appear to be more factually based than those of the claimant's expert. The claim is denied.

FUTURE MEDICAL CARE

Awards may and often do include an allowance for the expense of reasonable future medical care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo. App. W.D. 2001). Future medical care and treatment are provided for in Section 287.140.1, which states:

In addition to all other compensation, 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.

This statute has been interpreted to mean that a claimant is entitled to compensation for care and

treatment "which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail." Id. Of course, the appellant bears the burden to prove an entitlement to benefits for such care and treatment. Id. To prove an entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. Id. However, the claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. Id. Rather, it is sufficient for the claimant to show his/her need for additional medical care and treatment by a "reasonable probability." Id. "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." Id. "In determining whether this standard has been met, the court should resolve all doubt in favor of the employee." Id. "[A] claimant is not required to present evidence of specific medical treatment or procedures which will be necessary in the future in order to receive an award for future medical care." Id. Such a requirement could "put an impossible and unrealistic burden" upon the claimant. Id. The only requirement is that the finding of a need for future medical care and treatment be shown to be reasonably probable and be founded upon reason and experience. Id. To merit an award for future medical care, there must be evidence of a "subsistent condition of injury and a need of treatment proven beyond speculation by competent and substantial evidence...and a causal flow between the original and compensable injury and the subsistent condition." Williams v. A.B. Chance Company, 676 S.W.2d 1, 4 (Mo.App. 1984).

The only recommendation for future medical care was to continue to wear ear protection in the presence of loud noises and to check hearing on a regular basis. See Exhibit C. None of the experts attributed the need for regular hearing checks or ear protection to the claimant's work activities. Ear protection and regular hearing examinations are generally applicable to the general population. The claimant has failed to present evidence that he is entitled to future medical care as a result of his work activities.

Date: _____

Made by: _____

Edwin J. Kohner
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation