

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

Injury No.: 01-116772

Employee: Robert G. Fisher

Employer: Anheuser Busch, Inc.

Insurer: Self-Insured

Date of Accident: April 1, 2001

Place and County of Accident: St. Louis City, 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 January 25, 2005. The award and decision of Administrative Law Judge John Howard Percy, issued January 25, 2005, 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 22nd day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Robert G. Fisher

Injury No. 01-116772

Dependents: N/A
Employer: Anheuser Busch, Inc.
Additional Party: None
Insurer: Self-Insured
Hearing Date: September 9, 2004

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

Checked by: JHP

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: May 31, 2000
5. State location where accident occurred or occupational disease was contracted St. Louis City, 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? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was exposed to harmful noise during 20 years as a security guard for 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: Ears and body as a whole
14. Nature and extent of any permanent disability: 3.4% hearing loss in the right ear and 5% permanent partial disability of the body as a whole due to tinnitus
15. Compensation paid to-date for temporary disability: none
16. Value necessary medical aid paid to date by employer/insurer? none

Employee: Robert G. Fisher

Injury No. 01-116772

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: >\$768.20
19. Weekly compensation rate: \$303.01 PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

21.67 weeks of permanent partial disability from Employer

\$6,566.23

22. Second Injury Fund liability: Yes No Open N/A

TOTAL: \$6,566.23

23. Future requirements awarded: No

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jagadeesh Mandava

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert G. Fisher`	Injury No: 01-116772
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Anheuser Busch, Inc.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	None	
Insurer:	Self-Insured	Checked by: JHP

Employee asserts a claim under Section 287.067.3 Mo. Rev. Stat. (2000) for hearing loss allegedly due to exposure to harmful noise. A hearing in this proceeding was held on September 9, 2004. Both parties submitted proposed awards, the latter of which was received on October 8, 2004.

STIPULATIONS

The parties stipulated that on or about May 31, 2000¹¹:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was self-insured;
3. the employee's average weekly wage exceeded \$768.20; and
4. the rate of compensation for permanent partial disability was \$303.01.

The parties further stipulated that:

1. the employer had notice of the alleged hearing loss and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer has not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant sustained an occupational disease of loss of hearing and tinnitus due to industrial noise while in the employment of employer;
2. if claimant sustained a compensable hearing loss, whether he should be provided with any future medical treatment; and
3. if claimant sustained a compensable hearing loss and tinnitus, the nature and extent of any permanent disability sustained by the employee.

HEARING LOSS DUE TO INDUSTRIAL NOISE

Robert Fisher, claimant herein, alleges that he sustained a binaural loss of hearing and tinnitus due to prolonged exposure to harmful noise during his employment with Anheuser Busch. Inc. from 1980 through November 30, 1999.

Section 287.067.3 Mo. Rev. Stat. (2000) recognizes a loss of hearing due to industrial noise as an occupational disease. In order to prevail, claimant must prove that he was exposed to harmful noise (i.e. "sound capable of producing occupational deafness") in his employment which caused a loss of hearing in one or both ears.

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2000). It defines occupational disease as:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability."^[2]

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section 287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw

interpreting the prior statute is of some significance.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (1994). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). 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. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Brufat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. I also find that Gary Suttner, who testified on behalf of employer, is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant and Gary Suttner and on the medical records, I make the following findings of fact.

Robert Fisher, claimant herein, was employed as a security guard at Anheuser Busch from 1980 until the end of November, 1999. He was almost 59 years old at the time of his retirement. He generally worked 50 to 60 hours per week. His responsibilities involved patrolling the various premises around Anheuser Busch.

Some of the areas he patrolled included the Bevo Plant, the Automatic Bill of Lading lot (ABOL), helipad, grains unloading, brew-house/kettles and power plant. He described in detail the activities occurring at each location and estimated the noises he was exposed to in the respective sections. The major sources of noise according to Mr. Fisher were an enormous exhaust fan (which was removed around 2000), eighteen-wheeler trucks, tow motors, helicopters, palletizers and construction equipment. Most of this equipment emitted noise louder than that caused by tractor trailers, which was measured at over 90 decibels. He did not any wear hearing protection.

Photographs recently taken at Anheuser Busch generally showed some of the many areas where claimant worked. However, some of the areas had been recently improved to reduce the noise level. While the photographs also contained measurements of sound levels at each of these locations, it was clear that measurements were not taken of all relevant noise-causing activities. No measurement was taken of the enormous exhaust fan.

Mr. Fisher first began to experience problems with his hearing in the mid-1990s. He was not tested during his employment at Anheuser Busch. He served on the safety committee during his employment and spoke to members of that department as well as his supervisor, union steward, and OSHA about his concerns.

Mr. Fisher was required to carry a firearm. He qualified on the use of that firearm twice per year. He last hunted 12 to

15 years prior to the hearing. He did not receive any medical treatment for his ears or hearing related problems.

Prior to his employment at Anheuser Busch, Mr. Fisher worked as an engineer for Frisco Railroads for approximately 15 years. He had minimal noise exposure. He underwent regular physicals and did not have any noticeable hearing problems. He left that employment because of a back and knee injury and began working for the City of St. Louis.

Mr. Fisher was employed as a patrolman by the City of St. Louis in approximately 1966. This job required him to carry a firearm and he was responsible for a qualification on this firearm approximately one time per year. He experienced no hearing problems during that employment and wore hearing protection during qualifications or training.

Prior to his employment with the City of St. Louis, Mr. Fisher was a cryptographer with the Marine Corps. He spent most of his time in a radio room. He was, however, exposed to weapons fire during training at Camp Shepherd for two weeks as well as combat fire occurring in the regions where he was stationed.

Mr. Fisher had no injuries during his employment with the St. Louis Police Department or during his military service. He suffered an injury to his low back and knee during his employment with Frisco Railroads and had an injury to his right knee, left wrist and right shoulder during his employment with Anheuser Busch. He was involved in a motor vehicle accident in 1997 that resulted in a brief loss of consciousness. He had no other injuries to his head and did not notice any changes with his hearing as a result of the 1997 auto accident.

Medical Opinions

Dr. Barry N. Rosenblum, an otolaryngologist, testified by deposition on behalf of the employee on March 4, 2004. He examined Mr. Fisher on May 22, 2002.

Dr. Rosenblum took a history from Mr. Fisher which was largely consistent with Mr. Fisher's testimony at hearing. He noted no abnormalities on physical exam. He reviewed the audiograms performed at HearAmerica and noted that the results were somewhat inconsistent. He also reviewed audiograms performed by Dr. McKinney in December of 2001.

Dr. Rosenblum opined that claimant had 7.5% hearing loss in the left ear and 0% in the right ear. He further assigned a 12.5% permanent partial disability of the body as a whole attributable to Mr. Fisher's complaints of tinnitus.

Dr. Rosenblum also opined that Mr. Fisher would benefit from hearing aids and estimated the cost of a pair of digital hearing aids to be approximately \$5,000.00 a pair.

Dr. Rosenblum opined that exposure to industrial noise during Mr. Fisher's employment at Anheuser Busch was a substantial factor in causing his hearing loss and tinnitus.

On cross examination, Dr. Rosenblum agreed that Mr. Fisher did not tell him about the decibel ranges to which he was exposed in the various environments at Anheuser Busch. Dr. Rosenblum stated that according to OSHA standards, sound above 105 dB is considered harmful and that sound below that level may be harmful depending on the duration of the exposure.

Dr. Rosenblum testified that there was no agreed upon standard of conversion from the American National Standard Institute (ANSI) scale to the American Standards Association (ASA) scale.

Dr. Rosenblum also opined that, generally speaking, the severity of tinnitus is directly proportional to the severity of an individual's hearing loss. Dr. Rosenblum explained that as there was no medical literature regarding the assignment of disability to tinnitus, he examined at least one Missouri Workers' Compensation case involving hearing loss in arriving at his final disability rating. He used this case for guidance.

Dr. John W. McKinney, an otolaryngologist, testified by deposition on behalf of Employer on May 13, 2004. He examined Mr. Fisher on December 11, 19, and 28, 2001.

Mr. Fisher gave Dr. McKinney a history which was consistent with employee's testimony at the hearing. Dr. McKinney's physical examination was essentially normal. He reviewed the audiograms taken in his office and performed the requisite calculations. He noted that employee's average hearing level, after deducting 10 decibels for non-occupational hearing loss due to his age, was 28.3 decibels in the right ear and 20.00 decibels in the left ear. He deducted 26 decibels since only hearing loss above 26 decibels is allowed and multiplied the 2.3 decibels loss by 1.5%. He calculated that Mr. Fisher's

hearing loss was 3.4% in the right ear and 0% in the left ear.

Dr. McKinney testified that no audiometers in use in the United States use the ASA reference scale and that all hearing testing in the United States after the early 1970s has been measured by the ANSI reference scale and therefore only hearing loss above the 26 decibels level should be considered. He noted that the Missouri statute's reference to hearing loss above 15 decibels is based on an obsolete ASA scale. (Employer's Exhibit 9, Page 15)

Dr. McKinney opined that it was plausible that Mr. Fisher may have sustained a hearing loss secondary to industrial noise exposure at Anheuser Busch. His opinion remained unchanged after reviewing a pre-employment audiogram performed on September 28, 1978. (Employer's Exhibit 9, Pages 10-11)

Dr. McKinney also assigned 1% permanent partial disability of the body as a whole referable to Mr. Fisher's complaints of tinnitus. He stated that his employment may have been a factor in causing his tinnitus. Dr. McKinney explained that tinnitus is a subjective complaint and that there were no objective tests for physicians to perform to ascertain the cause or determine the severity of tinnitus. (Employer's Exhibit 9, Page 12)

Dr. McKinney stated that it is not known what causes tinnitus. He related that the discharge of one bullet from a .22 caliber gun has been reported to have caused irreversible tinnitus in individuals. He stated that librarians with little noise exposure have reported tinnitus and that he has interviewed boilermakers with profound hearing loss who did not have tinnitus. He opined that there is no relationship between the severity of hearing loss and the severity of tinnitus. (Employer's Exhibit 9, Pages 14 & 19)

On cross examination, Dr. McKinney agreed that Mr. Fisher's current hearing loss was secondary to industrial noise exposure from his employment at Anheuser Busch. He noted that claimant's pre-employment audiogram showed no hearing loss in the lower frequencies and only a moderate drop in the higher frequencies. (Employer's Exhibit 9, Pages 18 & 21)

Additional Findings

Based on my prior findings and the opinions of Drs. Rosenblum and McKinney, I find that Mr. Fisher's exposure to harmful industrial noise during his employment at Anheuser Busch was a substantial factor in causing hearing loss in his right ear and tinnitus.

FUTURE MEDICAL CARE

Employee is requesting an award of lifetime hearing aids.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394

(Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. at 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Medical Opinions

Dr. McKinney was not asked his opinion on whether claimant would benefit from hearing aids.

Dr. Rosenblum opined that Mr. Fisher would benefit from hearing aids. He did not opine on whether his employment at Anheuser Busch was a substantial factor in causing the need for hearing aids. (Claimant's Exhibit A, Pages 10-11)

Additional Findings

As Dr. Rosenblum relied on tests which were inconsistent and as he differed with Dr. McKinney as to which ear had no hearing loss and which ear had a hearing loss, I find the evidence is insufficient to support an award of lifetime hearing aids. The compensable hearing loss in this case is minimal. Most of employee's hearing loss (10 decibels) is non-occupational and due to age.

PERMANENT DISABILITY

Under Section 287.197.8 Mo. Rev. Stat. (2000) an employer is liable for "the entire occupational deafness to which his employment has contributed...." Previous deafness can be established by "a hearing test or other competent evidence". Generally the employee must prove the nature and extent of any disability by a reasonable degree of certainty. Griggs v. A. B. Chance Company, 503 S.W.2d 697, 704 (Mo. App. 1974); Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Id. at 703. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975).

Hearing loss is measured in accordance with Section 287.197 Mo. Rev. Stat. (2000) and 8 C.S.R. § 50-5.060.

Claimant's Testimony

Mr. Fisher testified that he had a constant ringing (screeching) in both ears. He said that the ringing interferes with his hearing.

Additional Findings

There is a recognized conflict between current measurement standards and Section 287.197 and the applicable Regulations.

Dr. McKinney tested Mr. Fisher's hearing on December 11, 19, and 28, 2001 as required by law and measured his thresholds of hearing at the prescribed 3 frequencies. He applied the correction factor applicable for employee's age for hearing loss from non-occupational causes. He noted that employee's average hearing level was 28.3 decibels in the right ear and 20.00 decibels in the left ear. He deducted 26 decibels since only hearing loss above 26 decibels is allowed and multiplied the 2.3 decibels loss by 1.5%. He calculated that Mr. Fisher's hearing loss was 3.4% in the right ear and 0% in the

left ear.

Based on my review of the depositions, I find that Dr. McKinney's calculations are consistent with the intent of the statute and regulations. I also find that Dr. Rosenblum's calculations difficult to understand as he claimed to have relied on both the HearAmerica tests (Claimant's Exhibit B), which were described as unreliable, and Dr. McKinney's tests and yet he found a hearing loss in the left ear and no hearing loss in the right ear, just the opposite of Dr. McKinney's findings. (Claimant's Exhibit A, Pages 16-19 & depo ex 2) Accordingly, based on the calculations of Dr. McKinney, I find that claimant sustained a compensable hearing loss of 3.4% in the right ear and no hearing loss in the left ear.

I further find that claimant sustained 5% permanent partial disability of the body as a whole due to tinnitus. Whatever the level of his tinnitus may be, it did not interfere with his hearing in the courtroom. I observed that he had no difficulty hearing any of the questions posed by counsel.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 20% of the additional payments hereunder in favor of the employee's attorney, Jagadeesh Mandava, for necessary legal services rendered to the employee.

Date: _____

Made by: _____

JOHN HOWARD PERCY

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secrest

Director

Division of Workers' Compensation

[1] At the beginning of the hearing the parties referred to the date as April 1, 2000. Employee testified that he was last employed by Anheuser Busch, Inc. on November 30, 1999. Section 287.197.7 Mo. Rev. Stat. (2000) provides that the disability with respect to an occupational deafness begins 6 months after the employee was last exposed to the harmful noise. Hence, the date of disability is May 31, 2000.

[2] Subsection 2 of Section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.