

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

Injury No.: 04-145716

Employee: Fred Golleher  
Employer: McDonnell Douglas Aircraft Co. (Settled)  
Insurer: Self-Insured c/o Broadspire (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence and briefs, heard the parties' oral arguments and we have considered the whole record. Pursuant to §286.090 RSMo, the Commission reverses the award and decision of the administrative law judge, as it relates to Second Injury Fund liability, dated September 8, 2008.

#### Preliminaries

The administrative law judge heard this matter to consider: 1) employer's liability for past medical expenses; 2) employer's liability for future medical care; 3) the nature and extent of permanent partial or permanent total disability; and 4) the nature and extent of any Second Injury Fund liability.

The administrative law judge found that employer is not liable for employee's past medical expenses. However, the administrative law judge did find employer liable for employee's future medical expenses related to his hearing aids. The administrative law judge further found that as a result of employee's industrial noise exposure while employed with employer, he sustained 49.9% hearing loss and awarded employee \$31,800.77. Lastly, the administrative law judge determined employee was permanently and totally disabled prior to his hearing loss and, therefore, the Second Injury Fund has no liability.

Employee appealed to the Commission alleging the administrative law judge erred by failing to use the proper legal criteria to determine permanent total disability and reimbursement of past-partial payment for hearing aids.

Employee has since settled his case against employer and they submitted a Stipulation for Compromise Settlement to the Commission. Said settlement was approved by the Commission on March 25, 2009. Therefore, the only issue currently before the Commission concerns the nature and extent of any Second Injury Fund liability.

#### Findings of Fact

The findings of fact and stipulations of the parties were recounted in the award of the administrative law

judge; therefore, the pertinent facts will merely be summarized below.

Employee began working for employer in 1966 and, except for a brief stint in the military from 1968-1970; he was continuously employed by employer until his retirement on September 30, 2004. While employed by employer, employee primarily worked as a machinist in the loudest buildings on employer's campus. From 1981-1985, employee also worked as a business representative for the union.

In addition to the primary injury, employee had a history of significant medical conditions and problems.

Employee weighs approximately 330 pounds and has had trouble with obesity since the mid 1990's. At age 4, he sustained a fractured right knee when a car hit him. Later when he was in the Army it was determined that he had a ligament sprain in that knee. In 1991, employee was in an automobile collision that also damaged his right knee. He had surgery on his right knee in 1993 and 1994. However, despite the surgeries, his knee continued to give out on him occasionally, including while he was at work. Employee testified that as a result of his knee instability he once fell at work requiring first aid in an ambulance. Due to the instability in his knee he walks down stairs sideways.

In the 1980's employee had right and left forearm fibroid tumors. During a 1999 visit at St. John's Mercy, a review of employee's systems by Dr. Richard Pennell indicated esophageal reflux. Employee has hiatal hernias for which he had surgery and he also has extensive diabetes.

Employee has suffered severe cases of pneumonia which required hospital stays and was later diagnosed as having chronic obstructive pulmonary disease (COPD). Due to this disease, he has had trouble breathing since 1998. He is constantly short of breath and fatigued.

In 2002, employee suffered a heart attack at work and was taken to St. Joseph's Hospital in St. Charles, Missouri where Dr. D'Orazio performed a triple bypass. Following said surgery, he was diagnosed with triple-vessel coronary artery disease, COPD, obstructive sleep apnea, and gastroesophageal reflux disease.

Employee was given temporary restrictions, but before he left employer in September of 2004, he did not have any permanent restrictions for any conditions.

As for employee's primary injury, he began really noticing his hearing loss during his time as a business representative for the machinist union from 1981-1985. Employee testified that he had a lot of problems communicating with people because he could not hear them. He stated that in conference rooms he could hear the noise, but could not understand what people were saying. Employer sent him for hearing tests from time to time and he received his first set of hearing aids in the mid 1980s. He testified that he has had approximately 5 or 6 sets of hearing aids and received his latest set in 2007. Employee's hearing loss and use of hearing aids is documented in various medical records from the 1990s. Specifically, on December 30, 1999, Dr. Paulk documented decreased hearing and included in his note, "hearing aids for 6 years."

There is no congenital hearing loss in employee's family and employee testified that there is no doubt in his mind that the environment that he worked in with his employer caused his hearing loss. He further testified that if he did not have his hearing loss, he would be able to work and that he cannot tell any major hearing loss since he left employer in 2004. There is no audiogram or other evidence establishing evidence of hearing loss before employee began his employment with employer.

Dr. Karen Boone initially saw employee with regard to his hearing loss on June 27, 2002 and has continued to see him since. She testified that she has been to employer's place of business and observed the noise environment in which employee worked and stated that it was loud enough to create noise induced hearing loss. Dr. Boone opined employee had a 68.8% binaural hearing loss under the regulations, with one-half of the loss or 34.4% binaural hearing loss attributable to the noise at employer's machine shop. This was based upon an arbitrary allocation of 50% of his hearing loss being noise induced.

Dr. Boone testified that she was of the opinion that employee requires hearing aids for his hearing loss, which is attributed to his employment with employer.

Dr. John McKinney also felt that employee had suffered significant hearing loss, but disagreed with Dr. Boone's methodology used for her calculations. Dr. McKinney performed three audiograms and calculated employee's binaural hearing loss at 49.9%. Dr. McKinney attributed employee's hearing loss to years of industrial noise exposure. Dr. McKinney agreed with Dr. Boone's finding that employee had progressive hearing loss not related to his industrial noise exposure. He also agreed with Dr. Boone's arbitrary assignment of 50% of the disability related to work and 50% not work related.

Dr. Robert Poetz evaluated employee on February 19, 2007 and provided an Independent Medical Evaluation. In addition to employee's hearing loss, Dr. Poetz's report documented that employee had a past medical history significant for diabetes, hypertension, coronary artery disease, and COPD. In addition, Dr. Poetz documented employee's shortness of breath, triple vessel coronary artery bypass, sleep apnea and right knee problems. Dr. Poetz assigned the following disability ratings for each injury and medical condition: 35% permanent partial disability to the body as a whole due to binaural hearing impairment resultant from the work related injury occurring up to September 30, 2004; 30% permanent partial disability to the body as a whole measured at the cardiovascular system, pre-existing; 25% permanent partial disability to the body as a whole due to diabetes, pre-existing; 25% permanent partial disability to the body as a whole due to COPD, pre-existing; 15% permanent partial disability to the body as a whole due to sleep apnea, pre-existing; 20% permanent partial disability to the body as a whole as measured at the abdomen, pre-existing; and 35% permanent partial disability to the lower right extremity as measured at the right knee, due to his injury at age 4 and 1993 car accident.

Dr. Poetz considered all of employee's preexisting medical conditions and problems and opined that he is permanently and totally disabled as a result of the combination of his work-related binaural hearing impairment and his preexisting medical conditions.

## Conclusions of Law

As the administrative law judge correctly stated in the award, employee is permanently and totally disabled. The unsettled issue challenged in employee's Application for Review is whether his permanent total disability was the result of the last accident combined with his preexisting disabilities, resulting in Second Injury Fund liability.

### Second Injury Fund

Section 287.220 RSMo. creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." In order to trigger liability of the Second Injury Fund, employee must show the presence of an actual and measurable disability at the time the work injury is sustained and that work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In this case, it is clear based upon prior medical records, medical reports, medical expert testimony, and employee's own testimony, that employee had multiple preexisting disabilities at the time of his last exposure to industrial noise that caused hindrances and obstacles to his continued employment with employer. However, the administrative law judge incorrectly concluded that his preexisting disabilities alone rendered him permanently and totally disabled and that his noise induced hearing loss ("primary injury") did not

contribute to his permanent and total disability.

First of all, every doctor that evaluated employee's hearing loss attributed at least 50% of his hearing loss to industrial noise exposure. In addition, Dr. Poetz concluded that it was a *combination* of employee's *primary injury* and preexisting disabilities which render employee permanently and totally disabled. Dr. Poetz is the only physician who evaluated employee's overall condition and provided disability ratings for each separate medical condition. According to Dr. Poetz, employee's hearing loss resulted in the single greatest permanent partial disability (35%) of all of employee's other medical conditions. Secondly, there is not any evidence that employee's hearing loss is not a significant part of his inability to work. Lastly, before employee's hearing became so poor, he was employed without restrictions.

The administrative law judge's conclusion that employee would not be able to work even if he had excellent hearing is not supported by the medical evidence or lay testimony. Employee testified that hearing is a very integral function of any machine operator because you have to audibly hear a problem coming, such as a vibration. Also, machine operators have to be able to communicate with other people working with them. Essentially, employee concluded that you have to be able to hear to be a machine operator.

In evaluating cases involving preexisting disabilities, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo.App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

*Kizior v. Trans World Airlines*, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

In this case, Dr. Poetz provided in his report and testified that he is of the opinion that employee is 35% permanently partially disabled at the body as a whole due to his binaural hearing impairment directly resultant from work related injury occurring up to September 30, 2004. In step (2) of the above analysis, Dr. Poetz went on to opine that prior to the last injury employee had 30% preexisting permanent partial disability of the body as a whole measured at the cardiovascular system, 25% preexisting permanent partial disability to the body as a whole due to diabetes, 25% preexisting permanent partial disability of the body as a whole due to COPD, 15% preexisting permanent partial disability to the body as a whole due to sleep apnea, 20% preexisting permanent partial disability to the body as a whole as measured at the abdomen, and 35% preexisting partial disability to the lower right extremity as measured at the right knee, due to his injury at age 4 and 1993 car accident. Lastly, Dr. Poetz opined that employee is permanently and totally disabled as a direct result of combining the primary injury with his preexisting medical conditions.

The administrative law judge stated that none of employee's job duties required hearing and that his hearing loss did not prevent him from doing any aspect of his job. This statement is against the weight of both the medical and lay evidence provided in the record. Employee testified that his preexisting medical conditions do contribute to his inability to work, but he also stated that he would still be able to work if it were not for his hearing loss.

For the foregoing reasons, the administrative law judge incorrectly concluded that employee was permanently and totally disabled prior to his last exposure to industrial noise at employer's facilities. The Commission, based on the totality of the opinions of Drs. Boone, McKinney and Poetz and the record as a whole, disagrees with the administrative law judge and finds employee to be permanently and totally disabled as a result of combining employee's preexisting disabilities with the primary injury. Therefore, the Second Injury Fund is liable for employee's permanent total disability benefits.

We adopt Dr. Poetz's opinion that employee sustained 35% permanent partial disability to the body as a whole due to binaural hearing impairment resultant from employee's work related exposure to industrial noise at employer's facilities. Employee's last exposure to said industrial noise occurred on September 30, 2004. Therefore, according to §287.197.7 RSMo (2004), employee's date of disability is March 31, 2005.

We direct the Second Injury Fund to pay to employee a weekly permanent total disability benefit in the amount of \$321.85 (\$675.90 – \$354.05), the difference between employee's permanent total disability rate and permanent partial disability rate, for 140 weeks (35% of 400 weeks) beginning March 31, 2005, the date of employee's disability. Thereafter, the Second Injury Fund shall pay to employee \$675.90 per week for his permanent total disability benefit for the remainder of his lifetime, or until as modified by law.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued September 8, 2008, is attached hereto for reference. Its findings are incorporated to the extent they are not inconsistent with our findings and conclusions herein.

Ray Gerritzen, Attorney at Law, is allowed a fee of 25% of the amount awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 5th day of May 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

AWARD

Employee: Fred Golleher

Injury No.: 04-145716

Dependents: n/a

Before the

Employer: McDonnell Douglas

Division of Workers'

Compensation

Department of Labor and Industrial

Additional Party:

Second Injury Fund (SIF) Relations of Missouri

Jefferson City, Missouri

Insurer: Self c/o Broadspire

Hearing Date: June 16, 2008; July 14, 2008

Checked by: KMH

#### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
  - 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
  - Date of accident or onset of occupational disease: last exposure September 30, 2004, retired
  - State location where accident occurred or occupational disease was contracted: St. Louis County
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
  - 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: Claimant sustained hearing loss due to years of work in a noisy environment.
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: bilateral ears
  - Nature and extent of any permanent disability: 49.9% binaural hearing loss
15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Fred Golleher

Injury No.: 04-145716

17. Value necessary medical aid not furnished by employer/insurer? None

- Employee's average weekly wages: unknown

19. Weekly compensation rate: \$675.90/\$354.05

20. Method wages computation: stipulation

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

89.82 weeks of permanent partial disability from Employer	\$31,800.77
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22. Second Injury Fund liability: No

Total: \$31,800.77

23. Future requirements awarded: Pursuant to 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:

Ray Gerritzen

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Fred Golleher

Injury No.: 04-145716

Dependents: n/a

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

Employer: McDonnell Douglas

Additional Party: SIF

Insurer: self c/o Broadspire

Checked by: KMH

A hearing was held on the above captioned matter June 16, 2008. Fred Golleher (Claimant) was represented by attorney Ray Gerritzen. McDonnell Douglas (Employer) was represented by attorney Terry Mort. The SIF was represented by Assistant Attorney General Kay Osborne.

Exhibits D and K contain a large amount of medical records. The court requested Claimant paginate these exhibits and request admission of specific pages. The record was left open, and on July 14th, the parties presented the agreed pages for admission in these exhibits. Instead of paginating and itemizing the agreed upon pages, the exhibits were offered with red tabs on the numerous pages the parties agreed to admit. Given the requirement the record be closed within 30 days of hearing, the exhibits were admitted with the red tabs. Red tabs were found on the pages listed below, and those are the pages that were admitted into evidence and that the Court read and relied on in making its award.

The pages in Exhibit D are numbered in red ink and circled at the bottom right corner of the page. The pages admitted into evidence in Exhibit D are as follows:

2,3,4,5,6,9,10,17,18,19,20,26,27,30,31,32,34,41,42,49,50,51,52,62,71,73,  
78,108,111,139,144,146,148,150,159,161,218,219,352,366,376,381,390,392,  
411,414,417,418,419,420,421,422,424,439,473,476,488,508,537,540,541,  
542,543,546,547,548,550,554,613,614,615,621,663,666,667,668,669,671,  
672,673,700,702,703,726,727,728,753.

The pages in Exhibit K are numbered in black ink at the bottom of the page. The pages admitted from this exhibit are as follows: 6,7,18,21,29,48,64,65,86,96,98,107,108,116,119,130.

All objections not expressly ruled upon in this award are overruled.

## STIPULATIONS

The parties stipulated to the following:

- Claimant sustained some degree of occupational hearing loss on or about September 30, 2004, while in the course and scope of his employment for Employer.

- Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law. Employer's liability was self-insured c/o Broadspire. Employer had notice of the injury and a claim for compensation was timely filed.
- Claimant's average weekly wage was sufficient to entitle him to the maximum rates of \$675.90 for TTD/PTD and \$354.05 for PPD. Employer paid no TTD or medical to date.

## ISSUES

The parties stipulated the issues to be resolved are as follows:

- Liability for past medical expenses of approximately \$900.00 for hearing aids.
- Liability for future medical care.
- Nature and extent of permanent partial or permanent total disability.
- Second Injury Fund liability.

## FINDINGS OF FACT

Based upon the competent and substantial evidence and my observations of Claimant at trial, I find:

- Claimant is a 61 year-old male who is a high school graduate. He attended a community college for less than one year, then worked as a drill press operator for approximately one year. He then worked on the assembly line at Ford Motor Company for 3 months until they shut down for a model change. Claimant next began working for Employer as a machine operator in August of 1966. He served in the military as a senior welder from 1968-1970, then returned to Employer as a milling machine operator in Building 27.
- In December 1981, Claimant became a Business Representative for the Union. He worked in an office off campus from 1981 through 1995. As a Business Rep, he investigated complaints. He met with shop stewards and plant managers. During the course of an investigation, he went to all buildings on campus and participated in arbitrations off campus. He continued to work occasionally as a machinist during this time.
- In 1995, Claimant returned to work on the milling machine, and also worked occasionally as a Business Representative. While working as a machinist, Claimant worked mainly in Building 27. This was the machine shop, and at one time it was the largest machine shop in the world. It contains 400 machines which operate all day. It is an open shop with only the grinding room enclosed. The noisiest machine is the Gantry, which makes

bulkheads for the F15 and F18. The Gantry is approximately 30 feet wide and 60-90 feet long, and it operated all day long. The Gantry cuts titanium and aluminum. While working in Building 27, Claimant wore foam earplugs when he thought they were necessary.

- Claimant worked in Building 276 from 2000 until his retirement, for a total of about 1 ½ years. He testified Building 276 was noisier than Building 27. 276 had one machine which was high speed and noisier than the Gantry.
- Claimant missed a significant amount of work in late 2002 and into 2003 while recovering from bypass surgery. When he returned to work, he had temporary restrictions and continued to miss time from work. He testified he used all his vacation and sick days and got to the point he felt he could no longer perform his duties. A machinist is required to load and unload machines. Claimant had difficulty reaching over to load the cutters. His co-workers helped him lift the parts. Claimant testified he also fell asleep at the machine and was afraid he would get hurt at work. Because he felt he could not perform his duties anymore, he retired September 30, 2004.
- Claimant had a number of injuries and health problems before he retired. When he was a child, he was crossing the street and a car rolled over his right knee. He does not recall what type of treatment he had, but testified he continued to have trouble with his knee after this event.
- In 1968, while in the military, he developed pneumonia. He was hospitalized for about one week, and his symptoms resolved. The hospital records indicate he had occasional sore throats and “running ears”. He was also diagnosed with a strained ligament in his right knee. In 1998 Claimant developed bacterial pneumonia and was hospitalized. He testified the doctor told him this was one of the worst cases he had seen. Since then, Claimant has had constant shortness of breath. He is winded and fatigued, and he feels he never got over the pneumonia. Claimant has smoked 2 ½ - 3 packs of cigarettes a day since well before his retirement. He now is down to about 1 ½ packs a day.
- Claimant testified he was involved in a motor vehicle accident in 1991. The medical records indicate the accident occurred in December 1993. He sustained a head laceration and concussion. He also injured his right knee and had surgery consisting of plica resection and tibial chondroplasty in 1994. His knee still gives out occasionally. If he is not able to catch himself, he falls. He has to hold onto the handrail and go down stairs sideways.
- Claimant is 5’11” and weighs approximately 330 pounds. He has had a weight problem since the mid 1990s, and his primary care physician told him he is obese.
- In 1999 Claimant was admitted for repair of a recurrent ventral hernia. He had a previous hernia repair in 1991. He testified he has had a “knot” in his stomach since 1993, but it does not protrude as much since his last surgery.

- In 2001 he was diagnosed with sleep apnea. He was hospitalized in June 2002 for COPD exacerbation and sleep apnea. The doctor recommended he use a CPAP machine. As a result of this condition, he wakes up every few hours because of breathing difficulty and other health problems.
- In October 2002, Claimant had a heart attack and underwent a triple bypass. He developed significant respiratory insufficiency due to his COPD and heavy smoking, and he was intubated for 9 days. He had extensive cognitive and physical rehabilitation. He developed edema in his left leg, which is where the vein was taken for his bypass. He lost about 30 pounds after his surgery. He continues to have swelling in his left leg.
- The records of Claimant's primary care physician, Dr. Paulk, document ongoing treatment for chest pain, congestion, shortness of breath, coughing and wheezing as far back as 2000. By early 2004, the records indicate Claimant was falling asleep at work, and the doctor recommended Claimant return to the sleep center. He also prescribed an inhaler which he opined Claimant would need the rest of his life. He recommended pulmonary rehabilitation and evaluation.
- Claimant first noticed his hearing problems in the mid 1980s while working as a business representative. He could not understand what people were saying in meetings.
- Employer sent Claimant for hearing tests from time to time. His first evaluation was in the mid 1980s, and he got hearing aids in both ears. Since that time, he has had several sets of hearing aids. He testified he got his last set in November 2007 and paid \$970.00 for them. Claimant testified each set of hearing aids lasts about three or four years.
- Claimant last worked for employer September 30, 2004. He has not worked anywhere since then. He had no medical restrictions before his retirement, but testified he believes the sleep apnea, knee complaints, COPD and heart condition rendered him unable to perform the essential functions Employer required for him to maintain employment.
- Claimant believes he is unable to work because of his COPD, sleep apnea, edema, obesity, fatigue, diabetes, and "maybe" his hearing loss. He had some physical limitations which affected his work before his bypass surgery in 2002. He testified he is now physically unable to do anything. He gets fatigued if he stands ten to fifteen minutes. After walking about 100 feet, he is fatigued and short of breath and has to rest. He uses a scooter to get around. He doesn't sleep well, and testified he is unable to use the CPAP machine to help him sleep because of his congestion. He lives with his mother, and his daughter cares for them. She cleans the house, and her son does the yard work and maintenance. Claimant spends most of the day watching television or sleeping. He believes his hearing loss has stabilized since his retirement and has not gotten worse. Without the hearing aids, he can not hear conversations. He only hears loud noises.
- Danny Malloy, Claimant's former co-worker, also testified. He worked for Employer 33 years and retired in 2004. He worked in Buildings 27, 276, and 245. He testified Building 27 had the highest noise level. It is

approximately 25,000 square feet and has 300-500 machines operating at all times. Building 276 had the high pitched tones from the high speed machine, and Claimant worked this high speed machine.

- Mr. Malloy testified before Claimant's retirement, he observed Claimant was slow, short of breath, had difficulty lifting parts, and his knee gave out. The job required stooping to lift parts off a pallet and load them into a machine. Machine operators should be able to lift 75 pounds. Claimant could not stoop over and used a crane to lift all the time. He essentially could not do the work. Mr. Malloy also has significant hearing loss, and testified the foam earplugs didn't help reduce the noise.
- Dr. Poetz testified on behalf of Claimant. He reviewed multiple records, examined Claimant, and opined Claimant is permanently and totally disabled and unable to compete in the open labor market due to a combination of his hearing loss and his prior conditions. Dr. Poetz opined continued hearing loss after removal from a noisy environment can be caused by the noisy environment. He opined as a result of Claimant's heart condition, diabetes, COPD, and sleep apnea, any exertion in the workplace puts Claimant at increased risk of acute coronary syndrome and death.
- Claimant's otolaryngologist, Dr. Karen Boone, examined Claimant before and after his retirement. She performed numerous audiograms and provided a number of reports with hearing loss calculations. Her final report was issued in March 2007. Based on audiograms performed in early 2007, Dr. Boone calculated Claimant's binaural hearing loss at 68%. She arbitrarily attributed 50% of that loss to his work and 50% to genetic progressive hearing loss. Claimant wears hearing aids, and Dr. Boone opined he will need them for the rest of his life.
- Employer's otolaryngologist, Dr. McKinney, examined Claimant in January 2006. He performed three audiograms and calculated Claimant's binaural hearing loss at 49.9%. He attributed Claimant's hearing loss to years of industrial noise exposure. In December 2006, he reviewed Dr. Boone's updated report and agreed with her finding that Claimant had progressive hearing loss not related to his industrial noise exposure. He agreed with her arbitrary assignment of 50% of the disability related to work and 50% not work related. Dr. McKinney agreed Claimant will need hearing aids for the rest of his life.
- During his testimony, Claimant frequently coughed and explained he was not used to talking this much. He was short of breath throughout his testimony.

## **RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

- **Employer is not liable for past medical expenses.**

Claimant testified he has had numerous sets of hearing aids. He testified he bought his last set in November 2007 and paid \$970.00 for them. No receipt or documentation was produced regarding this purchase. Dr. Boone's medical records contained a bill for Claimant's hearing aids in July 2002. The bill totaled \$1,692.00 and is marked "bill insurance". No testimony was presented regarding this 2002 bill.

"In *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. banc 1989), our Supreme Court stated that "when [employee] testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the *professional services rendered as shown by the medical records in evidence*, a sufficient factual basis exists for the commission to award compensation. *Id.* at 111-12[7] (emphasis added)." *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. E.D. 1994).

Section 197.7 provides "no claim for compensation for occupational deafness may be filed until after six months' separation from the type of noisy work for the last employer...and the last day of such period of separation from the type of noisy work shall be the date of disability." Regarding the 2002 bill, there is no evidence of work related hearing loss until more than six months after separation from employment. Employer cannot be held liable for medical benefits that pre-date the date of disability. Further, no testimony from Claimant was presented regarding this bill.

Regarding the 2007 hearing aids, no receipt was presented documenting the cost of the hearing aids. Employer can not be held responsible for medical bills based on Claimant's testimony alone.

- **Employer is liable for future medical expenses to cure and relieve Claimant of the effects of his hearing loss.**

It is sufficient to award future medical benefits if the claimant shows by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 437 (Mo.App. E.D. 2001).

Both experts opined Claimant will need hearing aids for the rest of his life. The experts agree Claimant has a degree of hearing loss not attributed to his work. Each expert arbitrarily attributed 50% of the future need for hearing aids to Claimant's work related hearing loss. The fact that a medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. *Bowers v. Hiland Dairy Company* 188 S.W. 3d 84 (MoApp S.D.)

I find Claimant has established by reasonable probability he is in need of additional medical treatment in the form of hearing aids for the rest of his life. The fact that the hearing aids will also benefit his non work related hearing loss is irrelevant. I find Claimant is entitled to, and Employer is obligated to provide hearing aids and their associated expenses to Claimant for the rest of his life.

- **Claimant sustained 49.9% binaural hearing loss and is entitled to \$31,800.77 in compensation.**

The parties stipulated Claimant sustained some degree of occupational hearing loss that arose out of and in the course and scope of his employment with Employer. Numerous ratings were provided by each expert.

Section 287.197 (RSMo 2000) outlines the calculations for hearing loss. Dr. Boone's initial calculations are

incorrect, and therefore her November 2006 report can not be relied upon. She incorrectly used a 2002 audiogram which was performed while Claimant was still working in the noisy environment. She also used the highest decibel response instead of the lowest decibel response on the audiograms to calculate the loss.

Dr. McKinney's report of January 2006 fully complies with the statutory and regulatory requirements in calculating hearing loss. These audiograms were performed closest to Claimant's retirement and most accurately reflect Claimant's level of hearing loss at the time his claim accrued in March 2005. Dr. McKinney's calculations are correct, and I find Claimant has sustained 49.9% binaural hearing loss.

Each expert arbitrarily allocated 50% of the hearing loss to industrial noise and 50% of the hearing loss to progressive hearing loss which is not work related. Each expert testified there is no good, discernable information in the medical literature that can determine the allocable percentage of loss when you have more than one attributable cause.

Section 287.197.6 and 8 CSR 50-5.060(13) provide a deduction in calculating hearing loss in order to "allow for the average amount of hearing loss due to nonoccupational causes found in the population at any given age". The only other statutorily allowed deduction in hearing loss occurs when "previous deafness is established by a hearing test or by other competent evidence". §287.197.8. Dr. McKinney reviewed hearing tests from the 1970s and 1980s, while Claimant worked for Employer, which he opined show no compensable hearing loss. Claimant has no history of congenital hearing loss and no reported hearing loss before working at Boeing. He does have Eustachian tube dysfunction which both experts agree can be transitory or permanent.

I find the statute and regulations already account for and make deductions for hearing loss due to non-occupational causes, and Claimant's 49.9% binaural hearing loss is the result of his industrial noise exposure while working for Employer. Accordingly, Claimant is entitled to 89.82 weeks of compensation or \$31,800.77 in PPD benefits.

- **The Second Injury Fund has no liability.**

Claimant alleges he is permanently and totally disabled as a result of the combination of his hearing loss and his preexisting disabilities.

§287.220.1 (RSMo 2000) provides, in pertinent part, when and how the Fund incurs liability:

After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund.

The percentage of Claimant's disability from his work injury has been established. Next, it is necessary to determine the percentage of Claimant's disability that is attributable solely to the pre-existing conditions at the time of his retirement or accrual of his hearing loss in order to determine the liability of the SIF.

I find Claimant was permanently and totally disabled prior to the hearing loss disability. Claimant was substantially limited in his ability to work before his retirement. Claimant admitted he was up every 2 hours due to his sleep apnea, he had trouble completing his job because of his sleep apnea, he had trouble with all aspects of his job and had to get co-worker's assistance, and he was extremely fatigued at work. He can't work now because of his COPD, edema, obesity, apnea and diabetes, and "maybe" his hearing loss. He testified he got to the point he was unable to perform the basic essentials of his job, and he used all his sick, vacation and FMLA days prior to retirement. He simply got to the point he couldn't do the job anymore. None of his job duties required hearing. He terminated working because he was unable to do so physically, and the hearing loss played no part in that decision.

Claimant's co-worker testified he observed the difficulties Claimant had at work. He testified Claimant could not bend over to lift parts at work and he had to use a crane to do his lifting. He testified Claimant had problems with his knee while working and he was short of breath.

The medical evidence and testimony clearly show Claimant is unemployable. I find Claimant was permanently and totally disabled before his retirement as a result of his pre-existing conditions in and of themselves. Claimant was substantially limited in his ability to work before his retirement. His sleep apnea, COPD, diabetes, hernias, obesity, right knee, and cardiovascular conditions rendered him unable to compete in the open labor market and unable to perform his job. His hearing loss did not prevent him from doing any aspect of his job. I find there is no job Claimant could do even if he had not sustained the hearing loss.

## CONCLUSION

Claimant was clearly unable to do his job before the six month separation period lapsed. If Claimant was restored to perfect hearing, he would still be unable to work solely as a result of the prior conditions.

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

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

KATHLEEN M. HART

*Administrative Law Judge*

*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffery W. Buker

*Director*

*Division of Workers' Compensation*

