

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

Injury No. 10-113656

Employee: Kathy Hall
Employer: Solo Cup Company (Settled)
Insurer: Zurich American Insurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 18, 2015. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued February 18, 2015, 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 4th day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Kathy Hall

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the Commission should reverse the award of the administrative law judge.

Employee alleges her present primary injury, tinnitus, causes her to suffer problems with speech discrimination. She testified she has trouble understanding what people say on television. Dr. P. Brent Koprivica testified on employee's behalf, and opined that her speech discrimination issues were an impairment and he restricted her from any job requiring normal speech discrimination. He noted that claimant's audiograms, which showed hearing loss at high frequencies, were consistent with tinnitus. However, he was unaware of any objective test that could measure the impact of tinnitus. Dr. Koprivica believed claimant was permanently and totally disabled as a result of the combination of claimant's pre-existing injuries and her subjective complaints that her tinnitus caused her to have trouble with speech discrimination. Wilbur Swearingin, a vocational expert, opined that employee was unable to compete in the open labor market as a result of the combination of her pre-existing conditions and her tinnitus. He based his opinion on Dr. Koprivica's restrictions, which eliminated any jobs that required normal speech discrimination.

Dr. Allen J. Parmet testified that while tinnitus is subjective in nature, a person's ability to hear and understand speech could be objectively measured. He stated "if you want to test the effect of tinnitus in impeding someone's ability ... to appreciate the spoken word, you do speech reception threshold testing. And if the speech reception threshold is normal, then they're not impaired from the tinnitus." Claimant received speech recognition testing, and the results indicated a normal ability to understand spoken words.

§ 287.190.6(2) RSMo provides, in relevant part, as follows:

In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

The only restriction placed on employee due to her tinnitus was based on her lack of normal speech discrimination. I credit Dr. Parmet's testimony that the only objective evidence in the record regarding claimant's ability to understand speech showed she had a normal ability to understand the spoken word. Because § 287.190.6(2) requires objective evidence prevails over subjective evidence of complaints, I would conclude that employee did not show any actual disability exists due to her tinnitus.

It naturally follows that employee has not proven the combination of the last injury (tinnitus) and her significant pre-existing injuries resulted in total disability. The Second Injury Fund is only liable for PTD under § 287.220.1 when the employee "establishes that he is permanently and totally disabled due to the combination of his present

Employee: Kathy Hall

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compensable injury and his preexisting partial disability." *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 157 (Mo. App. 2014). Because employee has not established that she is permanently and totally disabled due to the combination of the tinnitus and her pre-existing conditions, I would not find the Second Injury Fund is liable.

Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee: Kathy Hall Injury No. 10-113656
Dependents: N/A
Employer: Solo Cup Company
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Zurich American Insurance
Hearing Date: 11/18/14 Checked by: MEH

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: 12/12/10
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, 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:
WORKING IN LOUD ENVIRONMENT RESULTING IN TINNITUS.
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: BODY AS A WHOLE
14. Nature and extent of any permanent disability: 7.5%
15. Compensation paid to-date for temporary disability: NONE
16. Value necessary medical aid paid to date by employer/insurer? NONE

Employee: Kathy Hall

Injury No. 10-113656

- 17. Value necessary medical aid not furnished by employer/insurer? NONE
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$418.58/\$490
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: N/A

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential \$71.42 payable by SIF for 30 weeks, beginning 12/13/10
and \$490 thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded: N/A

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:

JOSEPH HOSMER

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kathy Hall Injury No. 10-113656

Dependents: N/A

Employer: Solo Cup Company

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

Insurer: Zurich American Insurance

Hearing Date: 11/18/14 Checked by: MEH

The parties appeared before the undersigned administrative law judge on November 18, 2014, for a final hearing. The claimant appeared in person represented by Joseph Hosmer. The employer and insurer did not appear as they have previously settled their claim with the claimant. The Second Injury Fund appeared represented by Skyler Burks. Memorandums of law were filed by December 16, 2014.

The parties stipulated to the following facts: On or about December 12, 2010, Solo Cup Company was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Zurich American Insurance. On the alleged injury date of December 12, 2010, Kathy Hall was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about December 12, 2010, the claimant sustained an occupational disease which arose out of and in the course and scope of employment. The occupational disease occurred in Greene County, Missouri. The claimant notified the employer of her injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the occupational disease, the claimant's average weekly wage was sufficient to allow a compensation rate of \$490 for temporary total and permanent total disability compensation, and a

compensation rate of \$418.58 for permanent partial disability compensation. No temporary disability benefits have been paid to the claimant. The employer and insurer have paid no medical benefits. The attorney fee being sought is 25%.

ISSUES:

1. The nature and extent of permanent disabilities.
2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant is 62 years old. She graduated from high school and worked in factories and offices for four years before going to work for the employer. She worked for the employer for approximately 36 years, from 1975 to March 2011, when the business closed. The employer produced paper products. During this time she worked in the tub department, producing food tubs and paint buckets; the GEM department, where she loaded machines to make paper cups and pulled out jams; and for about 30 years, in the print shop. In the print shop she worked for 5 years on the presses putting cylinders with plates in to print, and later in the plate room where they make the plates and mounted them. In the plate room she used two different types of machines.

Claimant testified live, and I found her to be a very credible witness. Claimant developed the occupational disease of tinnitus from noise exposure at the employer. In the GEM department the machines banged and made noise. She wore ear protection. She testified that the protection was not as strictly enforced in 1975 as it was later. She said the tub department was not as noisy nor was the print shop, but there was still considerable noise.

Claimant first started to notice hearing loss and ringing in her ears in 2008-2009. She said that she could not understand what was being said on the television and could not stand loud

noises. She began having trouble talking on the phone because of the constant ringing and buzzing noise in her ears. This noise is continuous 24 hours a day. When it is quiet she notices the noise more.

Currently, claimant has ringing in both ears, the right worse than the left. She described it as a buzzing or ringing. She also has severe high frequency hearing loss in the right ear. This causes her difficulty using a telephone, hearing a television. Background noise makes it difficult for her to hear speech, and she has to look at a person's lips, and it is hard for her to understand if more than one person is talking at the same time. Claimant settled her claim with the employer for 7.5% of the body as a whole at the 400-week level for tinnitus.

Before December 2010, claimant had preexisting conditions to her knees, back, fibromyalgia, and a heart condition. The problem with both of her knees started in the 1980's. This caused her pain and difficulty walking, particularly stairs. The employer would allow her to park close to the building where she could avoid using stairs. She also took hydrocodone to manage her pain.

In December 2010, claimant had arthroscopic surgery to both knees. Her right knee was not improved very much and she still had to walk with a cane. In February 2011 she had a total knee replacement to the right knee. She did not return to work after this surgery because the company closed. Her last day of employment was December 12, 2010. On the last day she worked, her knees interfered with her ability to walk more than a half mile. Steps were a significant problem as was standing. She took breaks at work when she could, and limited her sitting and squatting.

Claimant has back pain in her lower back and down her leg. She said this condition would flare from time to time and she would seek chiropractic care. In February 2012 she went

to the chiropractor. Her personal physician, Dr. Ellis, gave her pain patches she thinks in 2010. She would wear these patches to work every day.

Her fibromyalgia began in the 1990's. She initially had pain of about a 4-5 out of 10 in her arms, shoulders, hands, legs, and hips. On December 12, 2010, the last day she worked, she had pain at 6 out of 10. The pain changed how she did her job, limiting her ability to sit to one or two hours before she had to move. It also caused fatigue requiring her to take more breaks. She has taken medication daily for this condition. She testified that she would miss approximately 2-3 weeks of work due to her knees and fibromyalgia. This condition worsened over the years.

Claimant's heart condition began in May 2009 when she had a heart attack and coded requiring her to be revived. She had a triple bypass performed two days later. She also has a pacemaker and defibrillator. She was off work about six months following her surgery and continued to take prescription medication. After she returned to work following her heart surgery she was slower and could not do as much. She had help pushing racks with cylinders on them. She could not lift more than 10-20 pounds. She was readmitted to the hospital in October 2010 for increased chest pain.

Claimant testified that currently she cannot put any weight on her right knee, cannot do anything repetitively due to the fibromyalgia, and is tired because she cannot sleep well. Claimant testified that she does not feel she can work. She said that before the last injury she was almost unable to work due to her knee and heart conditions. She said she has had no worsening to her knees since 2012. Her left knee and back does not hurt as much since she is not standing on concrete floors, and her right knee feels better after the replacement. Her fibromyalgia condition gradually worsened. It has not improved since 2010. Her cardiac condition is the same since 2010.

On July 27, 2012, Dr. Brent Koprivica examined the claimant at her request. He testified by deposition. He issued an initial report dated July 27, 2012, and after reviewing the vocational report of Wilbur Swearingin, he issued a supplemental report dated January 9, 2013. He testified that his opinion did not change after reviewing Mr. Swearingin's report nor reviewing additional medical records.

Dr. Koprivica found that claimant had several conditions prior to the last injury that were significant enough to impact her employment and would be an obstacle to employment. These were a cardiac condition of ventricular tachycardia and ventricular fibrillation. She was identified as having an ischemic cardiomyopathy, a lack of circulation to the heart. He notes she went through a triple bypass surgery in May 2009. She told him that she could not work in extreme conditions, and had to have a protected environment. She also had to pace herself because if she does things too demanding she gets chest pain. He also noted significant end-stage arthritis in both knees dating back to at least February 2009. She had steroid injections but did not get good relief. In December 2010 she had bilateral knee surgery and then in April 2011 a total knee replacement. In December 2010 she was taking narcotics to manage her knee pain.

The last condition he notes is fibromyalgia for which she took hydrocodone. Her history showed she was hindered at work in lifting or carrying as she did not have the strength and endurance.

As for the occupational injury of December 12, 2010, Dr. Koprivica noted she had high end hearing loss and tinnitus. In his opinion, to a reasonable degree of medical certainty, the claimant's "complaints of tinnitus were a result of frequency neurosensory hearing loss related to the noise exposure she had sustained over the years through her employment with Solo Cup." It was specifically the exposure to background noise that was the prevailing factor in causing her

tinnitus. He found she had objective findings on audiograms that showed the loss of hearing at high frequencies.

Dr. Koprivica imposed permanent partial disability of 12.5% of the body as a whole for the high frequency hearing loss with bilateral tinnitus; she did not have any hearing loss that is compensable under the Missouri Workers' Compensation law. He later explained that he did not discriminate between the disabling symptoms of the high frequency hearing loss and tinnitus because "I don't know how to discriminate between those two because if you have high frequency hearing loss and you have no symptoms, you're not going to have a significant disability. The disabling symptoms are the tinnitus." He placed restrictions on her due to the tinnitus of restriction from work that required normal speech discrimination.

He also assigned permanent disability for her preexisting conditions prior to December 2010. For the cardiovascular condition he assigned 25% to the body as a whole. For the knee conditions he assigned 35% of the right knee and 25% of the left knee. For the fibromyalgia he assigned 15% to the body as a whole. He also imposed restrictions due to the preexisting conditions of no squatting, crawling, kneeling or climbing; ad-lib ability to sit and stand; no repetitive upper extremity use, especially pushing or pulling against resistance; occasional lifting or carrying of 20 pounds; need to work in a controlled environment; limit metabolic demand activities to the light level; and finally, restrict her to no work requiring normal speech discrimination due to the tinnitus for the last injury.

As a result of her preexisting conditions and the last injury, Dr. Koprivica found a synergistic effect resulting in claimant being permanently and totally disabled. He did not think she was permanently and totally disabled from the last injury, rather a combination of the prior conditions and the last injury. If she was not found to be totally disabled as determined by a vocational expert, then he thought this enhancement of disability would be represented by 10

percent of the simple sum of all the disabilities. Dr. Koprivica specifically testified that the claimant was not totally disabled from the effects of the tinnitus alone.

Dr. Allen Parmet performed a record review at the request of the Second Injury Fund and issued a report on August 30, 2013. Dr. Parmet testified by deposition. As part of his review he reviewed medical records as well as the claimant's deposition and the reports of Dr. Koprivica and Mr. Swearingin. Dr. Parmet found claimant had prior medical conditions of coronary artery disease, osteoarthritis with surgeries to both knees, fibromyalgia, hypertension, hyperlipidemia, and tendonitis as well as complaint of tinnitus and hearing loss in her right ear. He found the cardiac condition, osteoarthritis at both knees, and the fibromyalgia were a hindrance or obstacle to claimant's employment before December 12, 2010.

Dr. Parmet rated claimant's heart condition at 20% of the body as a whole, her right knee at 35% of the 160-week level, her left knee at 25% of the 160-week level, and the fibromyalgia at 10% of the body as a whole. Regarding her preexisting conditions, he would impose restrictions placing her at the light level of labor, specifically no prolonged standing, walking, crawling, kneeling or climbing stairs.

Dr. Parmet testified that tinnitus can be the result of many different conditions, including infections, inner ear organ damage, drugs, and cardiac disease. He found the audiogram taken in 2012 showed high frequency hearing loss in the right ear at 6000 Hz, but did not feel there was significant hearing loss elsewhere. He also found her speech reception threshold level was normal so he did not believe there was any impairment from the tinnitus. Dr. Parmet concluded that claimant's work was not the prevailing factor in causing her tinnitus. Rather, he found that there was insufficient facts to point to a specific cause of her tinnitus. He testified that her hearing loss did not match occupational hearing loss or tinnitus pattern. He said that on the contrary, there were numerous other potential causes present from both medical conditions and

medications she has taken. He did not believe any restrictions were necessary from the tinnitus or that it combined with the simple sum of claimant's preexisting disabilities.

Wilbur Swearingin, a certified vocational rehabilitation counselor, testified. I find him credible. He evaluated claimant on December 14, 2012, and prepared a report. He testified that he reviewed medical records, took a history from the claimant, reviewed medical depositions, and performed academic and dexterity testing. He concluded to a reasonable degree of professional certainty that the claimant had preexisting hindrance or obstacle to employment of fibromyalgia, cardiac condition, and her knees. He said that these preexisting conditions caused her profound limitations regarding her physical ability to stand, walk, and perform repetitive work. He found the occupational disease of tinnitus to cause her difficulty with speech discrimination. When he considered both the preexisting limitations and the limitations caused by the tinnitus along, with her advanced age, high school education level, and working for over 30 years performing industrial production, he concluded she was not employable or placable in the open labor market.

He further concluded that the restrictions due to the tinnitus considered in isolation did not make her unemployable. Rather it is the last injury, tinnitus, in combination with her preexisting disabilities that renders her permanently and totally disabled. He explained that the preexisting limitations would place her at a sedentary level of employment. This makes speech discrimination more important to a sedentary worker.

When asked about Dr. Parmet's restrictions putting claimant at a light level of employment, he said that light level is defined at 20 pounds, and walking and standing are similarly described as to those imposed by Dr. Koprivica. He said these really put her at a sedentary rather than light level. He explained that desk work only is categorized as sedentary work.

Mr. Swearingin said that she could not return to the same job. When questioned on cross-examination about this he explained that she was being accommodated by employer. He finds that if she tried to go back with all of her restrictions she would not be similarly hired. He also pointed out that her job with employer was in a high noise environment, and she did not need to utilize speech discrimination as communication was not a primary requirement.

After carefully considering all of the evidence, I make the following rulings:

1. The nature and extent of permanent disabilities.

I find that the claimant is not permanently and totally disabled as a result of her last injury, namely the occupational disease of tinnitus, for which she was last exposed on December 12, 2010. Furthermore, I find that she has incurred a permanent partial disability as a result of the last injury of 7.5% of the body as a whole as reflected in the Stipulation for Compromise Settlement.

2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

Section 287.220.1 RSMo. states that when an employee has a pre-existing permanent partial disability sufficient to constitute a hindrance or obstacle to employment and subsequently sustains a compensable work injury resulting in additional disability, and these disabilities combine to create an additional permanent disability, the employer, at the time of the last injury, shall be responsible only for the degree or percentage of disability resulting from the last injury. After the disability from the last injury, standing alone, has been determined, the degree of disability attributable to all the injuries sustained is determined. The degree of disability from the last injury is deducted and the Second Injury Fund is liable for the balance. If the last injury, combined with prior injuries or disabilities, results in the claimant being unable to compete in the open labor market, and is thus permanently and totally disabled, the minimum standards for

disability do not apply. If the claimant is found to be permanently and totally disabled, the Second Injury Fund is liable for benefits after the completion of payment by the employer for the disability due to the last injury.

I find that prior to December 12, 2010, claimant had conditions that constituted a hindrance or obstacle to employment or reemployment; namely, coronary artery disease, bilateral osteoarthritis of her knees, and fibromyalgia. Dr. Koprivica, Dr. Parmet and Mr. Swearingin opined that these conditions constituted a hindrance or obstacle to employment or reemployment prior to December 12, 2010. Claimant's testimony also supports that finding. As a result of the last injury of December 12, 2010, claimant sustained an occupational disease of tinnitus. The extent of disability of claimant for the last injury is 7.5% at the 400-week level of the body as a whole, as reflected in the Stipulation for Compromise Settlement entered into by the claimant and employer and insurer. The last injury, in isolation, does not result in permanent total disability.

Based on the testimony of Dr. Koprivica and Mr. Swearingin, I find that the claimant is unable to compete in the open labor market as a result of the combination of the December 12, 2010 injuries and the preexisting affecting her heart, bilateral knees, and fibromyalgia. Dr. Koprivica assessed substantial restrictions which he opined were necessitated by the synergistic interaction of the 2010 injury and the preexisting coronary artery disease, bilateral osteoarthritis of her knees, and fibromyalgia. Mr. Swearingin opined that such restrictions placed claimant into a less than sedentary exertional level. Based on those restrictions, I find claimant to be permanently totally disabled as a result of a combination of the 2010 injuries and preexisting affecting the heart, bilateral knees, and body as a whole.

The claimant settled her claim against the employer and insurer for a total of 30 weeks, representing disability of 7.5% at the 400-week level of the body as a whole. I find that the

claimant was at maximum medical improvement as of December 12, 2010, the date on which she last worked. The rate for permanent partial disability is \$418.58 and permanent total disability is \$490, resulting in a differential of \$71.42.

Accordingly, the Second Injury Fund shall pay \$71.42 weekly differential for 30 weeks beginning December 13, 2010, and then \$490 weekly for claimant's lifetime.

Attorney for the claimant, Joseph Hosmer, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: _____
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation