Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 01-165099

Employee: David Hickey

Employer: URS Corporation

Insurer: National Union Fire Insurance Company

Date of Accident: July 7, 2001

Place and County of Accident: Jasper County, 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 May 17, 2007. The award and decision of Administrative Law Judge Robert H. House, issued May 17, 2007, 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 28th day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David Hickey Injury No. 01-165099

Dependents: N/A

Employer: URS Corporation

Additional Party:

Insurer: National Union Fire Insurance Company

Hearing Date: March 5, 2007

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by:

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: 7-7-2001
5. State location where accident occurred or occupational disease was contracted: Jasper 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
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:
    DRIVING HEAVY EQUIPMENT
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: Psychological injury, Ears (Hearing Loss) & body as a whole
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? $7,760.46
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: $769.98
19. Weekly compensation rate: $513.32 / $329.42
20. Method wages computation: Agreement of parties

COMPENSATION PAYABLE

21. Amount of compensation payable: Permanent Total Disability @ $513.32 per week beginning 9-8-2001, less a 16 week credit allowed Employer/Insurer

    Unpaid medical expenses:

    weeks of temporary total disability (or temporary partial disability)

    weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

22. Second Injury Fund liability: NO

TOTAL:

23. Future requirements awarded: YES

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

JEREMY BROWN

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Hickey

Dependents: N/A

Employer: URS Corporation

Additional Party:

Insurer: National Union Fire Insurance Company

Injury No. 01-165099

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

AWARD ON HEARING

The parties presented evidence at a hearing on March 5, 2007. Appearing at the hearing were claimant, and his attorney, Jeremy Brown. Employer/insurer appeared through their attorney, James E. Laramore. The parties agreed that claimant's average weekly wage was $769.98, and that his rate of compensation was $513.32 for permanent total and temporary total disability benefits and $329.42 for permanent partial disability benefits. The parties additionally agreed that medical benefits were paid in the amount of $7,760.49 and that no temporary total disability benefits were paid.

The parties presented the following issues for determination:

1. Whether claimant sustained an injury by accident or occupational disease resulting in a physical/mental injury.

2. Whether claimant's mental injury was caused by his accidental or occupational injury at work.

3. The nature and extent of claimant's disability with the parties agreeing that claimant's hearing loss resulted in a disability of 67 weeks of compensation.

4. Whether claimant is entitled to future medical care as it related to his alleged mental injury.

Claimant was an employee of URS Corporation operating a water truck, a dump truck, and a bulldozer. Claimant testified that the large majority of his work was performed in an open-cabbed bulldozer. There is no dispute that claimant sustained an injury by accident or occupational disease resulting in a hearing loss and tinnitus. However,claimant is asserting that he is suffering from a major psychological injury as a result of his physical injury at work. Claimant admits that he continued to work for URS through its completion of its work in the Joplin, Missouri area. He was not fired from his employment, and he was able to do his work until URS left the Joplin area. Following his employment at URS, claimant attempted to obtain work elsewhere, and he was successful in finding work for the Oklahoma Turnpike Authority. However, claimant testified at trial and in his deposition that he worked only a short period of time for the Oklahoma Turnpike Authority, somewhere between two weeks to two months. He testified that he was physically able to do the work, but he experienced difficulty working for the turnpike authority because of loud noise. Claimant could not tolerate the noise at work while wearing his hearing aids. He stated that his employer would not allow him to work without his hearing aids turned on. Claimant's wife, Fonda Hickey, testified that claimant's work at the turnpike authority frustrated and agitated him. Because of those difficulties, she wanted him to quit that employment. She also testified that in the last part of his work for URS he was also upset and exhausted when he came home from work.

It is clear, from claimant's testimony and his medical history, that claimant was physically capable of performing the work for URS and the turnpike authority. Indeed, it was claimant's testimony that he is capable of significant physical activity. However, claimant testified, as supported by his medical history, that he has significant hearing loss and is suffering from a psychological or mental injury. Indeed, the testimony of claimant, claimant's wife, and his friends, Doyle Tucker and Larry Gross, it is clear that claimant is suffering from a major hearing problem along with the inability to interact with others as he had done prior to his hearing loss. From claimant's testimony, and that of his wife, it is clear that claimant is depressed, unable to concentrate, anxious, agitated, frustrated, and unable to sleep. Claimant and his wife testified that

claimant tries to keep busy to avoid being agitated and frustrated, but that his ability to perform tasks is of short duration because of his agitation, frustration, and lack of patience. Claimant has been able to work in his garden, mow his lawn, use a weedeater, drive his vehicle, assist his wife with household chores, and go fishing. That is clear from claimant's testimony, and is borne out in part by the surveillance video showing claimant working in his garden and operating a Bobcat. However, it is also clear from the evidence that claimant is able to perform tasks for only short periods of time because of his depression which causes problems of frustration, anxiety, impatience, and lack of concentration.

Claimant was assessed by Dr. Steven M. Corey, a psychiatrist, as suffering from a major depressive disorder (4/30/03) and a mood disorder due to his medical condition and an anxiety disorder (4/14/03). Dr. Corey assessed Mr. Hickey as a result of a referral from claimant's personal family physician, Dr. Fred Ray. Dr. Ray also noted that claimant had mental stress from his hearing loss and tinnitus. Dr. Judith Long, a psychologist, also diagnosed claimant as having a major depressive disorder of a severe nature along with a generalized anxiety disorder. Dr. Long concluded that, "Mr. Hickey is experiencing medical issues that are quite stressful and prevent him from working in the capacity of his training and expertise. He is very stressed due to financial difficulties and fear that he will lose everything that he has worked for during his lifetime. He is experiencing both severe levels of depression and anxiety due to health and financial stressors." Dr. Long also noted that claimant needed medications and would benefit from out-patient mental health services (5/15/03). Dr. Long also noted that there was no history of psychiatric illness or treatment of claimant prior to her evaluation.

Dr. Dale Halfaker, a psychologist, also evaluated claimant and noted that claimant was experiencing a moderate to severe major depressive disorder with no indications of preexisting psychological problems. Dr. Halfaker found that claimant's major depressive disorder was directly related to his hearing impairment, especially his tinnitus, and that the hearing impairment and tinnitus were the substantial and prevailing factors in causing his major depression. Dr. Halfaker rated claimant as having a 50 percent psychological impairment. He additionally found that claimant was in need of anti-depressant medication and the monitoring thereof. Dr. Halfaker opined that claimant needed to have individual counseling to assist him in better managing his condition as it relates to his hearing loss and tinnitus. Dr. Halfaker did not believe that such counseling would cure or relieve claimant of his psychological condition but that it would assist him in his quality of life and improved interactions with others. Dr. Halfaker anticipated the need of four to six months of individual psychotherapy on a weekly basis with approximately 16 to 24 individual hour-long sessions (4/27/05). Dr. Halfaker's ultimate conclusion was:

> Given the nature and extent of his depression I do not see him as having the capacity to maintain attention and concentration for extended periods to work effectively; being able to be reliable to be able to consistently perform activities within a schedule, maintain regular attendance, or to be punctual within socially and professionally customary tolerances; being able to complete a normal workday or workweek without interruptions from psychologically based symptoms, or to be able to effectively interact with the general public, supervisors, or coworkers.

Dr. Halfaker's opinion related solely to claimant's work-related psychological impairment and not claimant's physical impairment.

Dr. Richard C. Aiken, a board certified psychiatrist, also examined claimant and opined that claimant was suffering from a major depressive disorder that was severe in nature and was caused by claimant's work-related hearing loss and tinnitus. He assessed claimant's permanent impairment as 55 percent of the whole person due to his "mental disorder of Major Depressive Disorder, Severe." Dr. Aiken indicated that claimant had reached maximum medical improvement, but he recommended that claimant continue with medication and undergo psychotherapy. Dr. Aiken did not state any limitation on either the medication or the psychotherapy (12/28/05). Dr. Aiken ultimately concluded that Mr. Hickey would be unable to participate in employment for which he has training and experience. Claimant's personal physician of over 20 years, Dr. Fred A. Ray, also opined that claimant could no longer perform duties and achieve gainful employment due to his hearing loss and other conditions (01/08/03, 04/28/03, 05/14/03).

Phillip Eldred, a certified vocational rehabilitation counselor, examined, tested, and evaluated claimant. He reviewed claimant's medical records. Mr. Eldred found that claimant quit school in the 11th grade, did not obtain a GED, and had limited reading, spelling, and arithmetic skills. Mr. Eldred did not believe that he could assess claimant as having any transferable skills because of his depression and emotional deficits. He found that claimant was approaching advanced age (50-54) which may significantly limit adapting to new work when an individual has restrictions, and "[a]s the result of his hearing impairments, tinnitus, and psychological limitations, it is unlikely an employer in the normal course of business would consider employing Mr. Hickey." He opined that claimant could not be vocationally retrained. He opined that claimant has lost the ability to perform gainful employment and is neither employable nor placeable in the open labor market because of Mr. Hickey's cognitive limitations, emotional disability, and limited educational background. He stated that Mr. Hickey's psychological restrictions prevent him from working in competitive employment. As a result, Mr. Eldred found that claimant was permanently and totally disabled from a vocational standpoint.

Employer/insurer presented the reports of Wayne A. Stillings, a board certified psychiatrist, and Robert M. Hosutt, a certified rehabilitation counselor and licensed professional counselor. Dr. Stillings issued his report on September 6, 2005. He found that claimant was suffering from a temporary adjustment disorder causally related to his employment with URS which was essentially in remission. He found nothing to suggest that claimant had any psychiatric problems that were not work related "except for his pre-existing histrionic independent personality traits." He indicated that claimant did not need future care and had sustained a 2 percent permanent partial psychiatric disability. Dr. Stillings had the benefit of the reports of Drs. Corey, Long, and Halfaker along with claimant's doctors who treated his hearing loss and tinnitus. His report was issued before that of Dr. Aiken.

Mr. Hosutt reviewed claimant's medical records concerning the treatment for his hearing loss and tinnitus along with the records of psychological evaluations from Drs. Corey, Long, Halfaker, Stillings, and Aiken. Mr. Hosutt determined that

claimant had the ability to succeed in several employment settings and has a number of transferable skills. He indicated that claimant had limited reading, spelling, and arithmetic skills ranging from the 3rd to the 8th grade level. He also opined that claimant did not have limitations in performing physical activity from a review of the medical records of claimant, but he noted that claimant should not perform work in a noisy environment without hearing protection, and that claimant would perform better in positions that did not require a high level of verbal interaction or telephone communications. He noted that claimant should be able to perform functions in the medium work level. He then concluded that he would anticipate that claimant would have an earning capacity of $21,500.00 per year. However, it does not appear that Mr. Hosutt considered claimant's psychological condition in his assessment even though he reviewed several psychological reports in his assessment of claimant's ability to work, nor did Mr. Hosutt specifically opine that claimant was capable of work based upon the combination of claimant's physical and mental condition.

Claimant clearly has a significant hearing loss and tinnitus. Indeed, the parties have agreed that claimant is suffering from a specific hearing loss of 67 weeks of permanent partial disability. On August 25, 2004, Dr.Stanley R. Lang, Ph.D., assessed claimant's permanent impairment for his hearing on the right ear of 45 percent, left ear 92 percent, binaural 53 percent, with a percentage of impairment due to tinnitus of 7 percent. On September 14, 2004, Dr. Thomas A. Dodson, M.D., also calculated those percentages of impairment as 45 percent to the right ear, 92 percent to the left ear, and 53 percent binaurally with 7 percent whole man impairment due to tinnitus. Dr. Dodson specifically found that claimant's hearing impairment was caused by his exposure due to industrial noise at URS Corporation. He further opined that those losses were permanent and not surgically or medically correctable. However, claimant has been prescribed a hearing aid for his right ear and employer/insurer have agreed to reimburse claimant for the cost of that hearing aid and to provide such future hearing aids as are necessary in the future along with any medical assessments necessary to provide such hearing aids to claimant.

It is also clear, based upon the treatment records of Dr. Corey, Dr. Long, Dr. Halfaker, and Dr. Aiken, that claimant is suffering from major depression. Only Dr. Stillings disagrees. Nevertheless, all of those doctors, including Dr. Stillings, recognize that claimant has a psychological condition caused by his work. As a result, of carefully reviewing all of the reports, I find that claimant's psychological injury was caused by his work for URS Corporation.

Claimant has sought permanent total disability benefits. Total disability, as defined in §287.020, RSMo,". . . shall mean inability to return to any employment and not merely mean inability to return to employment in which the employee was engaged at the time of the accident." As stated in *Gordon v. Tri-State Motor Transit Co*., 908 S.W. 2d 849, 853 (Mo.App. S.D. 1995):

> The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.S.D.1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.E.D.1992). Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo.App.E.D.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally

> disabled. *Id*. The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d at 367. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.E.D.1993); *Kowalski v. M-G Metals and Sales*, 631 S.W.2d at 922.

Moreover, a claimant's ability to return to any reasonable or normal employment or occupation does not mean claimant's returning to a demeaning and undignified occupation such as selling peanuts, pencils or shoestrings on the street. *Vogle v. Hall Implement Company,* 551 S.W.2d 922 (Mo.App. 1977).

It is clear from the testimony of claimant that he believes he is permanently and totally disabled. Indeed, the recitation of claimant's normal daily activities would demonstrate a very limited ability to concentrate and perform any task for extended periods of time. Based upon claimant's physical condition, there is little to indicate that claimant physically could not perform work similar to what he performed in this past. However, it is clear from the medical reports of Drs. Ray, Long, Halfaker, and Aiken that claimant cannot compete in the workforce because of his work-related psychological condition. Considering together claimant's hearing limitations and his psychological problems, Philip Eldred, a vocational rehabilitation counselor, found that claimant is vocationally permanently and totally disabled and cannot compete in the workforce generally. Employer/insurer's report from Robert Hosutt, vocational rehabilitation counselor, that claimant is capable of working, is of little value since it does not appear that Mr. Hosutt has considered claimant's physical and psychological condition together in an assessment of claimant's ability to work.

From all of the evidence, including the medical records and psychological reports, it is clear that claimant has sustained significant hearing loss followed by almost total hearing loss in the left ear and severe hearing loss in the right, along with tinnitus and significant psychological injuries as a result of his physical hearing loss. I find that those conditions, together and in combination, render claimant unable to work. Consequently, after considering all the evidence in this case, I find that claimant is permanently and totally disabled as a result of his injury at work. I order employer/insurer to pay claimant permanent total disability benefits in the amount of $513.32 per week from the date that claimant was permanently and totally disabled. Apparently, claimant's work for URS ended on September 7, 2001, according to his deposition testimony on November 11, 2002. Claimant sought work following the end of his employment with URS, but was unable to obtain employment until he worked for the Oklahoma Turnpike Authority for, at most, for two months. Following his work for the Oklahoma Turnpike Authority he received six to eight weeks of unemployment benefits. Claimant did not testify nor was any other proof submitted concerning the particular time frame that claimant worked for the Oklahoma Turnpike Authority. However, claimant testified that during that period he cut brush and drove a snow plow during one storm. Based upon claimant's testimony, I cannot find that his work at the Oklahoma Turnpike Authority involved substantial gainful employment because of his inability to perform those functions for any extended period of time. Indeed, it appears that his loss of hearing, tinnitus, and psychological condition rendered it difficult for him to perform that employment. Nevertheless, from his testimony he worked that job at most for two months and then obtained unemployment compensation for, at most, an additional two months. Consequently, I find that claimant is entitled to permanent total disability benefits of $513.32 per

week beginning September 8, 2001, and continuing thereafter. However, employer/insurer are allowed a credit for the time that claimant worked for and was paid by the Oklahoma Turnpike Authority and for the time that he received unemployment benefits for a total credit of four months or 16 weeks of compensation (§287.170.3, RSMo).

Claimant has sought future medical care in this case. It is clear that future medical care may be awarded in a workers' compensation case. *Gill v. Massman Construction Co.,* 458 S.W.2d 878 (Mo.App. 1970). The proof required for future medical care is the same standard required in workers' compensation cases generally – "reasonable probability." *Modlin v. Sun Mark, Inc.* 699 S.W.2d 659 (Mo.App. 1985). Probable has been defined to mean that which appears to be founded in reason and experience which inclines the mind to believe but leaves room for doubt. *Welker v. MFA Central Cooperative,* 380 S.W.2d 481 (Mo.App. 1964).

It is clear from the medical testimony claimant has met his burden of proof that claimant is in need of future medical care. Employer/insurer have agreed to provide claimant such future medical care as is necessary for claimant's hearing loss and I order employer/insurer to provide such future medical care as is necessary to cure and relieve claimant from the effects of his hearing loss and tinnitus including hearing aids and any medications that would be necessary to treat said condition. Additionally, it is clear from Drs. Long, Halfaker, and Aiken that claimant would benefit from medications and counseling or therapy (limited in time by Dr. Halfaker and unlimited by Dr. Aiken). Consequently, I order employer/insurer to provide claimant such medical care as is necessary to cure and relieve him from the effects of his psychological injury of major depression and anxiety disorder.

I find that claimant's attorney, Jeremy Brown, is entitled to an attorney's fee of 25 percent of all amounts awarded herein for claimant's permanent total disability which shall constitute a lien upon this award.

Date: May 17, 2007

/s/ Robert H. House
Robert H. House
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia “Pat Secrest
Patricia "Pat" Secrest
***D**irector*
Division of Workers' Compensation