Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 04-032818

Employee: Derril Portell

Employer: GKN Aerospace

Insurer: Zurich American Insurance Company

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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 9, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 9, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

_____
John J. Hickey, Member

Attest:

_____
Secretary

AWARD

Employee: Derril Portell

Injury No.: 04-032818

Dependents: N/A

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

Employer: GKN Aerospace

Additional Party: Second Injury Fund

Insurer: Zurich American Insurance Company

Hearing Date: October 9, 2008

Checked by: KOB:dwp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

- Was the injury or occupational disease compensable under Chapter 287? No.

3. Was there an accident or incident of occupational disease under the Law? No.

- Date of accident or onset of occupational disease: alleged January 7, 2004.

- State location where accident occurred or occupational disease was contracted: Saint Louis, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? No.

- 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 underwent surgery for a degenerative left knee condition which he attributed to his work.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: N/A.

- Nature and extent of any permanent disability: N/A.

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? N/A.

Employee: Derril Portell Injury No.: 04-032818

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: $ 1,156.44

19. Weekly compensation rate: $662.55 / $347.05

20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: $ 0.00

22. Second Injury Fund liability: No

Total: $ 0.00

23. Future requirements awarded: None.

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Derril Portell Injury No.: 04-032818

Dependents: N/A

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

Employer: GKN Aerospace

Additional Party: Second Injury Fund

Insurer: Zurich American Insurance Company

Hearing Date: October 9, 2008 Checked by: KOB:dwp

PRELIMINARIES

The matter of Derril Portell ("Claimant") proceeded to hearing to determine whether Claimant is entitled to benefits on account of a work-related accident or disease. Attorney Chris Wagner represented Claimant. Attorney Ken Alexander represented GKC Aerospace ("Employer") and its insurer, Zurich American Insurance Company. Assistant Attorney General Carol Bernard represented the Second Injury Fund. Five separate claims were tried concurrently: an alleged knee/back case arising on or about January 7, 2004 (Injury No. 04-032818); an alleged back injury arising on an accident date of May 27, 2004 (Injury No. 04-062038); an accidental back case with an alleged date of accident of August 20, 2004 (Injury No. 04-089871); an alleged repetitive exposure hand injury case arising on or about August 27, 2004 (Injury No. 04-088102); and a hearing loss case arising as of January 1, 2006 (Injury No. 06-133365).

With respect to the alleged knee/back case, the parties stipulated that as of January 7, 2004, Claimant was an employee of Employer earning an average weekly wage of $1,156.44, which qualified him for rates of compensation of $662.55 for total disability benefits, and $347.05 for permanent partial disability benefits. Employer paid no temporary total disability benefits, but did pay medical benefits totaling $1,928.20. Venue, notice, and timeliness of claim are not at issue.

The parties presented the following issues to be determined by hearing: 1) Did Claimant sustain occupational disease; 2) Did Claimant's injury arise out of and in the course of employment; 3) Is Claimant's medical condition causally related to the alleged occupational disease; 4) What is the nature and extent of Claimant's disability; 5) Is Claimant permanently and totally disabled; and lastly 6) What is the liability of the Second Injury Fund?

FINDINGS OF FACT

Based on the substantial and competent evidence of record, including the relevant medical records, documents, Claimant's testimony, and the testimony of other witnesses, I make the following findings of fact:

Claimant is a married 57-year-old man who last worked in January 2006, and retired effective March 2006, after 27.6 years of employment with Employer or its predecessors. Claimant worked 5 or 6 days per week, up to 10 or 12 hours per day. As a sheet metal and bonding mechanic, Claimant had a physical job which involved standing on concrete and climbing on platforms. He performed drilling, riveting and assembling or aircraft parts, usually standing at a table within a 200 square foot area. A few times a week he climbed 15 to 20 steps to the office or cafeteria. Once or twice a week Claimant had to walk to the other side of the building to get a tool or part, although in the past that occurred much more often. He sat during breaks, and his safety shoes had a "cush insole" that made him feel as if he was "walking on air."

In 1979, Claimant fell of a hay truck, injured his left knee, and underwent surgery to repair damaged ligaments. He had a good recovery, and testified credibly he did not have further problems until 2002. Claimant was diagnosed with diabetes the early 2000's, and claimed it was under control until he had surgery in 2005. Now, he occasionally takes diabetes medicine.

In 2002, Claimant began to have problems in his knee and back, which he attributed the to years of climbing in and out of airplanes, up ladders, and being on his feet while engaging in work for Employer. On June 11, 2002, Claimant told Dr. Moore, his primary care doctor, he hurt his left knee while deep sea fishing, and the exam showed fullness. On July 18, 2002, Claimant presented to Dr. William K. Harris with a history of left knee pain and low back pain. The MRI ordered by Dr. Harris showed "some significant chondromalacia changes and osteochondral defect of lateral tibial plateau, degenerative changes of the lateral medial meniscus." The lumbar spine had degenerative changes at L4-5, and L5-S1 with spinal/nerve root canal stenosis and disc protrusion at L5-S1. Claimant had left knee complaints throughout 2003, but did not make back complaints after the initial visit.

Although he recommended the procedure in 2002, Dr. Harris performed a therapeutic arthroscopy with chondroplasty and synovectomy on January 7, 2004, for significant osteoarthric changes throughout the knee. Claimant returned to full time work as of February 14, 2004. In May 2004, Claimant experienced an increase in symptoms, and sought care several times at the emergency room. As of June 2004, Dr. Harris offered the option of a total knee arthroplasty replacement. At his deposition, Dr. Harris offered the opinion the work activities were not a substantial factor in causing the condition, but agreed the work could aggravate a degenerative condition.

On June 18, 2004, Claimant saw orthopedic surgeon Craig Ruble, who noted Claimant had a valgus deformity, crepitus, tenderness and limited range of motion of the left knee. Dr. Ruble noted it "is entirely possible" standing on concrete at work could have "significantly contributed to his knee degenerative changes," but his prior surgery "would predispose him to degenerative changes as well." Dr. Ruble recommended Vioxx, ice, and physical therapy.

On May 27, 2004, Claimant was working when he got a catch in his back and felt something snap. This event is the basis of the claim in Injury No. 04-062038. He testified he could not move for a few minutes, but when he did move he felt pain. He left work and saw his own doctor, who diagnosed a "pinched nerve." About a week later, Employer sent Claimant to Concentra and Dr. Suthar, which was the extent of the authorized treatment. He did receive treatment on his own from Dr. Albana, including an MRI and several epidural shots. On August 20, 2004, Claimant had a recurrence of back pain. He could not recall exactly what happened, whether he was bending over or doing something of that sort, but he felt pain. This event is the basis of the claim in Injury No. 04-089871. Claimant ultimately underwent a lumbar fusion on February 25, 2005, and a duraplasty soon thereafter to repair a dural leak. For over one year, Claimant followed up with Dr. Albana, who reported Claimant had pain relief from surgery, but was left with problematic paresthesias and was unable to work. Claimant was off work from February to October 2005 following surgery. He tried to work in the Fall and Winter of 2005, but ultimately stopped working in January 2006 due to post-surgical back pain and swelling.

Currently Claimant's left knee gets swollen and is painful. He cannot do a lot of bending, walking or standing due to his back, and must lay down for two or three hours a day to deal with his pain. He takes up to three pain pills a day to control his symptoms.

Dr. Christopher Kostman is an orthopedic surgeon who specializes in joint surgery of the extremities. He evaluated Claimant, took a history consistent with the evidence at hearing, and testified on Employer's behalf. His exam was positive for mild effusion, tenderness, and a genu valgum deformity (knock-knee) of the left knee. Dr. Kostman diagnosed unilateral advanced degenerative arthritis of the lateral compartment of the left knee, or "post-traumatic arthritis." On the issue of causation, Dr. Kostman offered a credible explanation of why work was not a substantial factor in causing Claimant's condition. Given the common finding of medial compartment arthritis in the uninvolved right knee, the existence of arthritis in the lateral compartment of the left knee indicates the trauma necessitating the prior surgical intervention to the lateral compartment is a substantial factor in developing that condition. In his experience, Dr. Kostman has seen many patients develop the insidious onset of pain well after a trauma. Dr. Kostman felt one's daily activity level can affect the symptoms of arthritis, but did not feel one's activities or profession can change the progressive course of arthritis.

Dr. Thomas Musich, a family doctor, evaluated Claimant, issued reports dated October 13, 2005 and December 8, 2006, and testified by deposition on behalf of Claimant. He testified Claimant's employment was a substantial factor in the development of degenerative joint disease of the left knee, the subsequent surgery, and the resulting permanent partial disability of 50% of the left knee. He reached a similar conclusion with respect to the back up to 2002, with additional disability due to the alleged trauma of May 27, 2004. At first, Dr. Musich did not separate the overall back disability of 60% between the occupational 2002 occupational disease and the 2004 work accident, but on questioning by Employer's attorney, he said 75% of the overall disability was related to the work accident. Dr.

Musich did not offer a clear or detailed explaination of how work was a substantial factor in the knee and/or back condition. Furthermore, he was unaware of several essential facts, including Claimant's prior left knee surgery, cushioned shoes, left knock-kneed deformity, and types and levels of work activities. Dr. Musich gave further opinions on Claimant's permanent total disability, finding it was mostly due to his back surgery, and Second Injury Fund issues.

Dr. Daniel Kitchens, a neurosurgeon, reviewed all relevant medical records, examined Claimant, and testified by deposition on behalf of Employer. He opined Claimant's work activities, such as standing or walking on a hard concrete floor did not lead to, contribute to, or in any way alter the natural aging of his lumbar spine. He did not address issues regarding the knee.

ADDITIONAL FINIDNGS OF FACT AND RULINGS OF LAW

Based on the substantial and competent evidence of record, including the relevant medical records, documents, Claimant's testimony, and the testimony of other witnesses, I make the following additional findings of fact and rulings of law:

- Claimant's work is not a substantial factor in causing the degenerative condition of his left knee and back.

It is Claimant's contention his nearly thirty year employment as a riveter caused an occupational disease of the left knee and back. Although the parties identified separate issues (Did Claimant sustain occupational disease; Did Claimant's injury arise out of and in the course of employment; and is Claimant's medical condition causally related to the alleged occupational disease), the core question is whether Claimant's work is a substantial factor in causing the degenerative condition of his left knee and back. Thus, the first three issues identified by the parties at the start of the hearing will be addressed together. The substantial and competent credible evidence establishes Claimant does not have compensable injuries to the left knee and back.

As with all Workers' Compensation claims, it is Claimant's burden to establish all essential elements in order to recover benefits. In *Kuykendall v. Gates Rubber Co*., 207 S.W.3d 694, 704 (Mo.App. S.D.,2006), the court discussed the key legal elements of an occupational disease claim:

"Occupational diseases are compensable under the Missouri Workers' Compensation Act, § 287.067.1 & .2." *Kent v. Goodyear Tire and Rubber Co.,* 147 S.W.3d 865, 867 (Mo.App.2004). "The statute requires that the condition be an 'identifiable disease arising with or without human fault and in the course of the employment.' " *Id.* (quoting § 287.067). "Subsection 2 of ... § 287.067 adopts the causation standard for occupational disease claims as stated in § 287.020.2; the employee's work must be 'a substantial factor' in causing the medical condition." *Id.* (quoting § 287.020.2). "Thus, for an injury to be compensable under the Missouri Workers' Compensation Act, the work performed must have been a substantial factor in causing the medical condition or disability." *Id.* at 867-68. "The claimant [also] bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease." *Jacobs v. City of Jefferson,* 991 S.W.2d 693, 696 (Mo.App.1999).

" 'Arising out of' and 'in the course of' employment are two separate tests, and both must be met before an employee is entitled to compensation." *Simmons v. Bob Mears Wholesale Florist,* 167 S.W.3d 222, 225 (Mo.App.2005) (quoting *Abel v. Mike Russell's Std. Serv.,* 924 S.W.2d 502, 503 (Mo. banc 1996)). "To meet the test of an injury 'arising out of' the employment, the injury must be a natural and reasonable incident of the employment, and there must be a causal connection between the nature of the duties or conditions under which employee is required to perform and the resulting injury." *Id.* " 'In the course of employment' refers to the time, place and circumstance of an employee's injury." *Id.*

Furthermore, the claimant must establish, generally through expert testimony, the probability that the occupational disease was caused by conditions in the work place. *Kelley v. Banta & Stude Construction Co. Inc*., 1

S.W.3d 43, 48 (Mo.App. E.D.1999), *as cited in Townser v. First Data Corp*., 215 S.W.3d 237, 241-242 (Mo.App. E.D. 2007). Such conditions need not be the sole cause of the disease, so long as they are a substantial contributing factor. *Id.* A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. *Id.* Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. *Id.* Thus, Claimant must present credible factual and medical evidence to meet his burden.

In this case, there is little dispute as to the facts. Claimant worked for more than 27 years in a job which required him to stand on a concrete floor during working hours. He frequently stepped up to and down from a platform, and occasionally walked across the building to retrieve parts or climbed steps. He did not frequently squat, kneel, crawl, jump or climb ladders, if at all. He wore cushioned work shoes. Claimant had surgery to his the lateral portion of his left knee in 1979, and did well until symptoms arose in 2002. There is no evidence Claimant had an accident involving his left knee. Currently, Claimant has a degenerative disease of his left knee, primarily in the lateral compartment.

The issue of whether the conditions of the workplace caused the condition of Claimant's knee turns on the expert testimony. Predictably, there are conflicting opinions on causation. Dr. Musich, Claimant's expert, concluded work was a substantial factor in causing the knee and some back injury. For Employer, Dr. Kostman explained why work was not a factor. Dr. Ruble noted it was "entirely possible" standing on a concrete floor could have significantly contributed to Claimant's degenerative changes, but the prior surgery would have also predisposed him as well. Dr. Harris, the treating doctor, did not think work was a substantial factor, but agreed standing on concrete would aggravate degenerative symptoms.

Of the experts to opine on causation, Dr. Kostman offers the most credible, well-reasoned and factually-sound explanation as to the cause of Claimant's left knee condition. Noting the unilateral nature of the problems, Dr. Kostman explained why Claimant's prior trauma and surgery involving the lateral compartment of the left knee, along with the left genu valgum deformity, are the cause of the arthritis now affecting the knee. He also credibly explained that one's daily activities can aggravate the symptoms of arthritis, but do not affect the physical course of the disease. Dr. Harris' opinion that work, while not a substantial factor, could aggravate symptoms is consistent with Dr. Kostman's. The credible testimony of Dr. Kostman establishes Claimant's work is not a substantial factor in his disease.

By contrast, the opinion of Dr. Musich that the knee and back problems are work related is ill-founded in the evidence, conclusory, and not believable. Dr. Musich jumped to the conclusion the injuries were compensable without offering any explanation as to why. He also lacked knowledge of several key facts, such as the prior surgery, the nature of the work, and the fact Claimant wore cushioned shoes. His attempts to explain why the prior surgery did not impact his opinion were implausible.

Although Dr. Ruble, and Dr. Harris to a lesser degree, suggests standing on concrete aggravated the degenerative condition, such opinion does not make this claim compensable. Dr. Ruble's statement standing could have significantly contributed to his knee degenerative changes is somewhat speculative and is not accompanied by a sound explanation. Besides, there is a distinction between an activity that aggravates an underlying condition by making it more symptomatic, and an activity that actually alters the course of an underlying condition. In workers' compensation, pre-existing but non-disabling condition does not bar recovery under the Workers' Compensation Law if a work related accident causes the condition to escalate to the level of disability. *Gennari v. Norwood Hills Corporation*, 322 S.W.2d 718, 722-723 (Mo. 1959). Aggravation of a pre-existing condition is a compensable injury *if the claimant establishes a direct causal link* between her job duties and the aggravated condition. *See Smith v. Climate Engineering*, 939 S.W.2d 429, 435 (Mo.App. E.D. 1996), overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003). Work must have been a "substantial factor" causing the aggravated condition. § 287.020.2. *Avery v. City of Columbia*, 966 S.W.2d 315, 322 (Mo.App. W.D. 1998). Claimant's evidence on aggravation does not meet this standard. The credible evidence show that work, at most, triggered symptoms, but was not a substantial factor in escalating or causing the degenerative condition of the knee.

Claimant also claimed he suffered an occupational disease of the low back as a result of his many years of

work. There is little, if any, competent evidence to support this claim. Dr. Kitchen's testimony to the contrary is competing and credible.

The credible, substantial, and competent evidence establishes Claimant did not suffer from an occupational disease of the left knee and/or low back arising out of and in the course of his employment that was substantially caused by his employment. Rather, he suffered from an ordinary disease of life substantially caused by his prior injury and surgery, as well as the bow-legged nature of his left leg.

- Nature and Extent of Disability; Total Disability; and Second Injury Fund Liability.

The party claiming benefits under the Workers' Compensation Law of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), *citing Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where there is a failure of proof on one element, the entire claim fails. Having found against Claimant on the cornerstone issues of occupational disease/arising out of/medical causation, the remaining issues are moot, and will not be addressed.

CONCLUSION

Claimant's left knee condition did not arise out of, and is not substantially caused by, his work activities, but rather traces its cause to ordinary life, a prior surgery, and a deformity of the left leg. The claims for benefits from Employer and the Second Injury Fund are denied.

Date: _____ Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 04-062038

Employee: Derril Portell

Employer: GKN Aerospace

Insurer: Zurich American Insurance Company

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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 9, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 9, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

_____
John J. Hickey, Member

Attest:

_____
Secretary

AWARD

Employee: Derril Portell

Dependents: N/A

Employer: GKN Aerospace

Additional Party: Second Injury Fund

Insurer: Zurich American Insurance Company

Injury No.: 04-062038

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

Hearing Date: October 9, 2008 Checked by: KOB:dwp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

- 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: May 27, 2004.

- State location where accident occurred or occupational disease was contracted: Saint Louis, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? 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:
As Claimant was turning away from work cabinet, he felt pain in his back.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: N/A.

- Nature and extent of any permanent disability: N/A.

15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? $839.03

Employee: Derril Portell Injury No.: 04-062038

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: $1,156.44

19. Weekly compensation rate: $662.55 / $347.05

20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: $ 0.00

22. Second Injury Fund liability: No

Total: $ 0.00

23. Future requirements awarded: None.

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Derril Portell

Injury No.: 04-062038

Dependents: N/A

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

Employer: GKN Aerospace

Additional Party: Second Injury Fund

Insurer: Zurich American Insurance Company

Hearing Date: October 9, 2008

Checked by: KOB:dwp

PRELIMINARIES

The matter of Derril Portell ("Claimant") proceeded to hearing to determine whether Claimant is entitled to benefits on account of a work-related accident. Attorney Chris Wagner represented Claimant. Attorney Ken Alexander represented GKC Aerospace ("Employer") and its insurer, Zurich American Insurance Company. Assistant Attorney General Carol Bernard represented the Second Injury Fund. Five separate claims were tried concurrently: an alleged back/knee arising on or about January 7, 2004 (Injury No. 04-032818); an alleged back injury arising on an accident date of May 27, 2004 (Injury No. 04-062038); an accidental back case with an alleged date of accident of August 20, 2004 (Injury No. 04-089871); an alleged repetitive exposure hand injury case arising on or about August 27, 2004 (Injury No. 04-088102); and

a hearing loss case arising as of January 1, 2006 (Injury No. 06-133365).

With respect to the first accidental back injury case, the parties stipulated that as of May 27, 2004, Claimant was an employee of Employer earning an average weekly wage of $1,156.44, which qualified him for rates of compensation of $662.55 for total disability benefits, and $347.05 for permanent partial disability benefits. Employer paid no temporary total disability benefits, but did pay medical benefits totaling $839.03. Venue, notice, and timeliness of claim are not at issue.

The parties presented the following issues to be determined by hearing: 1) Did Claimant sustain an accidental injury; 2) Did Claimant's injury arise out of and in the course of employment; 3) Is Claimant's medical condition causally related to the alleged occupational disease; 4) What is the nature and extent of Claimant's disability; 5) Is Claimant permanently and totally disabled; and lastly 6) What is the liability of the Second Injury Fund?

FINDINGS OF FACT

Based on the substantial and competent evidence of record, including the relevant medical records, documents, Claimant's testimony, and the testimony of other witnesses, I make the following findings of fact:

Claimant is a married 57-year-old man who last worked in January 2006, and retired effective March 2006, after 27.6 years of employment with Employer or its predecessors. Claimant worked 5 or 6 days per week, up to 10 or 12 hours per day. As a sheet metal and bonding mechanic, Claimant had a physical job which involved standing on concrete and climbing on platforms. He performed drilling, riveting and assembling or aircraft parts, usually standing at a table within a 200 square foot area. A few times a week he climbed 15 to 20 steps to the office or cafeteria. Once or twice a week Claimant had to walk to the other side of the building to get a tool or part, although in the past that occurred much more often. He sat during breaks, and his safety shoes had a "cush insole" that made him feel as if he was "walking on air."

In 1979, Claimant fell of a hay truck, injured his left knee, and underwent surgery to repair damaged ligaments. He had a good recovery, and testified credibly he did not have further problems until 2002. Claimant was diagnosed with diabetes the early 2000's, and claimed it was under control until he had surgery in 2005. Now, he occasionally takes diabetes medicine. He was diagnosed with carpal tunnel and epicondylitis of the left upper extremity, and had surgery with Dr. Brown in 2000. He had a hernia repair in 2002.

In 2002, Claimant began to have problems in his knee and back, which he attributed the to years of climbing in and out of airplanes, up ladders, and being on his feet while engaging in work for Employer. On July 18, 2002, Claimant presented to Dr. William K. Harris with a history of left knee pain and low back pain. The MRI of the lumbar spine ordered by Dr. Harris showed degenerative changes at L4-5, and L5-S1 with spinal/nerve root canal stenosis and disc protrusion at L5-S1. Dr. Harris discussed the possibility of spinal blocks, but Claimant did not make back complaints after the initial visit, and treatment of the left knee took priority. The treatment and symptoms related to Claimant's left knee, including the surgery of January 7, 2004, are more fully discussed in the Award for Injury No. 04-032818.

On May 27, 2004, Claimant was working when he got a catch in his back and felt something snap. This event is the basis of the claim in the instant case. He testified he could not move for a few minutes, but when he did move he felt pain.

Employer sent Claimant to Concentra, where doctors diagnosed a lumbar strain with sciatica, and prescribed medications, exercise and modified activities. He said he saw his own doctor, who diagnosed a "pinched nerve." On June 11, 2004, at Employer's direction, Claimant saw Dr. Suthar, who took a comprehensive

history and performed a detailed examination. Dr. Suthar diagnosed spondylolisthesis, acute lumbar radicular syndrome and degenerative disk disease, all at the L5-S1 level. He did not feel the problem was work related because he did not find causation for the current complaints and symptoms given the mechanism of the injury, and Claimant was unhappy with such explanation. Dr. Suthar explained while work may increase his risk for such problems, Claimant's condition could be the result of a chronic ongoing degenerative process, his weight, or his spondylolisthesis, which may be congenital or the result of his prior car accident. Despite the fact he did not find a causal connection between the mechanism of injury and the symptoms, Dr. Suthar felt Claimant had a true lumbar radicular syndrome, and was in need of treatment.

Beginning August 2, 2004, Claimant sought treatment on his own from Dr. Albana, who ordered an MRI and nerve test, and administered several epidural steroid injections. The history recorded in Dr. Albana's record is one of pain starting on May 27, 2004, with no history of previous episodes, which is contrary to the evidence of the 2002 complaints. On August 20, 2004, Claimant had a recurrence of back pain, although he could not recall exactly what he was doing when he felt the pain. This event is the basis of the claim in Injury No. 04-089871. Claimant ultimately underwent a lumbar fusion with Dr. Albana on February 25, 2005. Due to complications from surgery, Claimant also underwent a duraplasty soon thereafter to repair a dural leak. For over one year, Claimant followed up with Dr. Albana, who reported Claimant had pain relief from surgery, but was left with problematic paresthesias. As of August 16, 2005, Dr. Albana felt Claimant was unable to work. Claimant was off work from February to October 2005 following surgery. He tried to work in the Fall and Winter of 2005, but ultimately stopped working in January 2006 due to post-surgical back pain and swelling.

Dr. William Harris testified by deposition on behalf of Employer. In July 2002, he examined Claimant for his complaints of radicular back pain, diagnosed degenerative changes, and discussed the possibility of spinal blocks. Thereafter, follow up visits focused on Claimant's knee problems, and he provided no further treatment for the back. In response to Claimant's counsel's hypothetical question on cross-examination, Dr. Harris stated it was possible a twist such as described by Claimant could have precipitated the need for later surgery, and agreed work on airplanes could aggravate a degenerative arthritic condition.

Dr. Daniel Kitchens, a neurosurgeon, took an extensive and accurate history, reviewed all relevant medical records, examined Claimant, and testified by deposition on behalf of Employer. He diagnosed degenerative disc disease and spondylisthesis, or a spinal misalignment, at L5-S1. He opined Claimant's work activities, such as standing or walking on a hard concrete floor did not lead to, contribute to, or in any way alter the natural aging of his lumbar spine. Furthermore, the surgery performed for spondylolisthesis and degenerative disc changes, was not necessary with regard to his work incident, and the incident did not cause, create or aggravate the spondylolisthesis and degenerative disc changes.

Dr. Thomas Musich, a family doctor, evaluated Claimant, issued reports dated October 13, 2005 and December 8, 2006, and testified by deposition on behalf of Claimant. He testified Claimant's work trauma of May 27, 2004 was a substantial factor in the development of severe low back pain and radiculopathy that resulted in symptomatic spondylolisthesis and spondlolysis along with multilevel spinal stenosis and radiculopathy. He also stated the trauma necessitated the surgery. At first, Dr. Musich did not separate the overall back disability of 60% between the occupational 2002 occupational disease and the 2004 work accident, but on questioning by Employer's attorney, he said 75% of the overall disability was related to the work accident. Dr. Musich gave further opinions on Claimant's permanent total disability, finding it was mostly due to his back surgery, and Second Injury Fund issues. He also opined Claimant was permanently and totally disabled due to a combination of injuries.

ADDITIONAL FINDINGS OF FACT AND RULINGS OF LAW

Based on the substantial and competent evidence of record, including the relevant medical records, documents, Claimant's testimony, and the testimony of other witnesses, I make the following additional

findings of fact and rulings of law:

- Accidental Injury Arising Out of and in the Course of Employment.

The claimant has the burden to establish that he has sustained an injury by accident arising out of and in the course of her employment, and the accident resulted in the alleged injuries. *Choate v. Lily Tulip, Inc*., 809 S.W.2d 102, 105 (Mo.App. 1991) overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003). "Accident" is statutorily defined, in part, as an unexpected or unforeseen identifiable event or series of events happening suddenly and violently that produce "objective symptoms of an injury." § 287.020.2 RSMo. The credible evidence establishes while Claimant was at his work station performing his job, he twisted, became unable to move freely, and had an unforeseen, sudden onset of pain. There is no evidence to the contrary. Claimant has established he suffered an accidental injury arising out of and in the course of employment.

- Causation.

In every workers' compensation case, the claimant has the burden of proof on all essential elements of the claim, including medical causation between the accident and the injury of which the employee complains. *Groce v Pyle*, 315 S.W. 2d 482 (Mo. App.W.D. 1958; *Goleman v MCI Transporters*, 844 S.W. 2d 463 (Mo. App.W.D. 1992). Causation is established by medical testimony. *Elliott v. Kansas City, Mo., School Dist.,* 71 S.W.3d 652, 657- 58 (Mo.App.2002). Proof that work is one of a number of possible causes for the injury and disability is not sufficient to form the basis for an award of compensation. *Russell v Southwest Grease and Oil Co*., 509 S.W.2d 776 (Mo. App. W. D. 1974). The claimant must prove that the accident was a substantial factor in causing the disability. *See*, *Cahall v Cahall*, 963 S.W.2d 368 (Mo. App. E.D. 1998). Thus, Claimant must convince this finder of fact the minor twisting event of May 2004 is a substantial factor in causing the injury and resulting disability.

Claimant has not presented sufficient credible evidence to establish the appropriate causal connection between the May 27, 2004, and the medical condition of which he now complains. Claimant had back complaints long before the 2004 twisting incident. By all accounts, the twisting action was minor, and Claimant was not carrying or holding anything at the time. Claimant had a history of back complaints, and diagnostic testing confirmed a preexisting condition. All medical and expert evidence establishes he had a degenerative condition, with no acute defect or finding. The surgery he underwent was to correct degenerative disc disease and spondylisthesis. The facts do not support the conclusion the accident was a substantial factor in causing the disability.

While proof of causation turns on expert testimony, the expert opinions in this case conflict. After carefully weighing all the evidence, I find Dr. Kitchens provides the most logical, well explained and supported opinion on causation. He had a good grasp of the facts, a solid understanding of the medical, and a reasonable explanation of his conclusion that work was not a substantial factor in Claimant's back condition. Dr. Suthar, a treating doctor, concurs with Dr. Kitchen's conclusion on causation while acknowledging Claimant's degenerative condition as one in need of treatment. By contrast, Dr. Musich gives the expected conclusion without offering much credible support therefore. Dr. Harris testified the accident precipitated symptoms and work in general could aggravate the degenerative condition, but his testimony on this issue is uncertain. Even if the May 2004 event triggered symptoms, it is not a substantial factor in causing the condition, injury, need for surgery or disability from which Claimant now suffers.

The evidence that the work accident of May 27, 2004, is not a substantial factor in causing Claimant's medical condition is more credible and convincing than the evidence to the contrary. Claimant has not met his burden of proof to establish the causal connection between his work accident and his disabling condition.

- Permanent Partial and/or Total Disability

A claimant must show a disability resulted from the injury and the extent of such disability. *Smith v. National Lead Co*., 228 S.W.2d 407, 412-13 (Mo.App.1950); *See also Hunsperger v. Poole Truck Lines, Inc*., 886 S.W.2d 656, 658 (Mo.App. E.D. 1994). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770,773 (Mo.App. 1983). However, speculation, conjecture or personal opinion cannot form a basis for an award of compensation in any area of required proof. *Toole v. Bechtel Corp*., 291 S.W.2d 874 (Mo. 1986).

While the overwhelming weight of the credible evidence establishes no causal connection between Claimant's May 27, 2004 work accident, and the degenerative back condition for which he underwent surgery, it is conceivable an accident such as Claimant's could have resulted in a soft tissue injury with some resultant partial disability. However, none of the experts gave such an opinion, and there is no other credible evidence on which to base such a finding. An award of permanency for a sprain or strain would be based on nothing but impermissible speculation, conjecture or personal opinion. Claimant shall not recover any permanent partial disability benefits.

The failure to prove permanent partial disability on the primary injury is fatal to the permanent total disability claim, as well as the claim against the Second Injury Fund. Proof of the disability associated with the primary claim is essential for the recovery of total disability benefits. For a permanent total claim against the Second Injury Fund, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). Claimant shall not recover permanent total benefits, or any benefits from the Second Injury Fund.

CONCLUSION

Claimant did not prove the work accident of May 27, 2004, is a substantial factor in causing the condition of his low back. All other issues are moot. The claims against Employer and the Second Injury Fund are denied.

Date: _____ Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 06-133365

Employee: Derril Portell

Employer: GKN Aerospace

Insurer: Zurich American Insurance Company

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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 9, 2009. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 9, 2009, 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 15th day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____

William F. Ringer, Chairman

_____

Alice A. Bartlett, Member

_____

John J. Hickey, Member

Attest:

_____

Secretary

AWARD

Employee: Derril Portell

Dependents: N/A

Employer: GKN Aerospace

Additional Party: Second Injury Fund

Injury No.: 06-133365

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

Insurer: Zurich American Insurance Company

Hearing Date: October 9, 2008 Checked by: KOB:dwp

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: January 1, 2006

- State location where accident occurred or occupational disease was contracted: Saint Louis, Missouri

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? 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 was exposed to harmful noise at work.

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Binaural hearing and body as a whole (tinnitus).

- Nature and extent of any permanent disability: 10.5 weeks hearing loss, 1% body as a whole for tinnitus.

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? N/A.

Employee: Injury No.:

17. Value necessary medical aid not furnished by employer/insurer? N/A.

- Employee's average weekly wages: $1,000.00

19. Weekly compensation rate: $666.67 / $365.08

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

14.8 weeks of permanent partial disability from Employer:	$ 5,403.18

22. Second Injury Fund liability: No

Total:	$ 5,403.18

23. Future requirements awarded: None.

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: Christopher Wagner

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Derril Portell	Injury No.:	06-133365
Dependents:	N/A	Before the	
Employer:	GKN Aerospace	**Division of Workers' Compensation**	
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri	
Insurer:	Zurich American Insurance Company	Jefferson City, Missouri	
Hearing Date:	October 9, 2008	Checked by:	KOB:dwp

PRELIMINARIES

The matter of Derril Portell ("Claimant") proceeded to hearing to determine whether Claimant is entitled to benefits on account of an work related injury. Attorney Chris Wagner represented Claimant. Attorney Ken Alexander represented GKC Aerospace ("Employer") and its insurer, Zurich American Insurance Company. Assistant Attorney General Carol Bernard represented the Second Injury Fund. Five separate claims were tried concurrently: an alleged back/knee arising on or about January 7, 2004 (Injury No. 04-032818); an alleged back injury arising on an accident date of May 27, 2004 (Injury No. 04-062038); an accidental back case with an alleged date of accident of August 20, 2004 (Injury No. 04-089871); an

alleged repetitive exposure hand injury case arising on or about August 27, 2004 (Injury No. 04-088102); and a hearing loss case arising as of January 1, 2006 (Injury No. 06-133365).

With respect to the hearing loss case, the parties stipulated that as of January 1, 2006, Claimant was an employee of Employer earning an average weekly wage of $1,000.00, which qualified him for rates of compensation of $667.67 for total disability benefits, and $365.08 for permanent partial disability benefits. Employer paid no temporary total disability benefits, or medical benefits. Venue, notice, and timeliness of claim are not at issue.

The parties presented the following issues to be determined: 1) Did Claimant sustain an occupational hearing loss; 2) Did Claimant's hearing loss arise out of and in the course of employment; 3) Is Claimant's hearing loss causally related his work; 4) What is the nature and extent of Claimant's disability; 5) Is Claimant permanently and totally disabled; and lastly 6) What is the liability of the Second Injury Fund?

FINDINGS OF FACT

Based on the substantial and competent evidence of record, including the relevant medical records, documents, Claimant's testimony, and the testimony of other witnesses, I make the following findings of fact:

Claimant is a married 57-year-old man who last worked in January 2006, and retired effective March 2006, after 27.6 years of employment with Employer or its predecessors, performing essentially the same type of work. He began working for McDonnell Douglas on April 1, 1975, and the last five years or so of his employment, beginning in 2001, was with GKN. Claimant worked 5 or 6 days per week, up to 10 or 12 hours per day. As a sheet metal and bonding mechanic, Claimant had a physical job. Over the course of his career, Claimant was exposed to loud noise operating and being around industrial equipment, and underwent hearing tests periodically. At trial, it was obvious Claimant was hard of hearing. Communicating with Claimant was so taxing due to his hearing loss, the parties agreed to submit his prior discovery depositions in lieu of his live trial testimony.

Claimant had a number of physical injuries prior to his retirement in 2006. In 1979, Claimant fell of a hay truck, injured his left knee, and underwent surgery to repair damaged ligaments. He had a good recovery, and testified credibly he did not have further problems until 2002. Claimant was diagnosed with diabetes the early 2000's, and claimed it was under control until he had surgery in 2005. He occasionally takes diabetes medicine. Dr. Brown performed left carpal tunnel and epicondylitis surgery in 2000. Claimant had a hernia repair in 2002.

In 2002, Claimant began to have problems in his knee and back which he attributed to the years of work for Employer. On July 18, 2002, Claimant presented to Dr. William K. Harris with a history of left knee and low back pain. An MRI of the lumbar spine showed degenerative changes at L4-5, and L5-S1 with spinal/nerve root canal stenosis and disc protrusion at L5-S1. Dr. Harris discussed the possibility of spinal blocks, but Claimant did not make back complaints after the initial visit, and treatment of the left knee took priority. Eventually, Dr. Harris performed surgery on the left knee. The treatment and symptoms related to Claimant's left knee, including the surgery of January 7, 2004, are more fully discussed in the Award for Injury No. 04-032818.

On May 27, 2004, Claimant was working when he got a catch in his back and felt something snap. This event is the basis of the claim in Injury No. 04-062038. He testified he could not move for a few minutes, but when he did move he felt pain. Claimant received authorized care, but the authorized doctors concluded the problems were not work related. On August 20, 2004, Claimant had an episode of increased pain that is the basis of the claim in Injury No.: 04-089871. On his own, Claimant sought treatment, and ultimately underwent a lumbar fusion with Dr. Albana on February 25, 2005. Due to complications from

surgery, Claimant also underwent a duraplasty soon thereafter to repair a dural leak. For over one year, Claimant followed up with Dr. Albana, who reported Claimant had pain relief from surgery, but was left with problematic paresthesias. As of August 16, 2005, Dr. Albana felt Claimant was unable to work. Claimant was off work from February to October 2005 following surgery. He tried to work in the Fall and Winter of 2005, but ultimately stopped working in January 2006 due to post-surgical back pain and swelling.

After he had been separated from his exposure to industrial noise for the time required by statute, Claimant filed the instant claim for hearing loss due to industrial exposure to loud noises. In February and March, 2008, Claimant underwent the statutorily required series of hearing tests, and Dr. John W. McKinney evaluated the data, took a history, and performed an examination. Based on all the information available to him at the time, Dr. McKinney concluded Claimant had binaural hearing loss of 21.5%, which is most likely from industrial noise exposure. Because Claimant complained of occasional high pitched tinnitus occurring in both ears, he assigned permanency consistent with his standard medical opinion on tinnitus: .5% PPD of the body as a whole for each ear, or 1.0% permanent partial disability of the whole person for the complaint of tinnitus. Finally, Dr. McKinney thought Claimant would benefit from hearing aids

On cross examination, Employer's attorney presented Dr. McKinney with evidence of what purports to be the results of audiograms from July 16, 2001 and July 16, 2003, the first of which pre-dates Claimant's employment with Employer. Dr. McKinney calculated a preexisting binaural loss in 2001 of 15.5%. Therefore, he could only attribute 6.0% binaural hearing loss to the exposure at Employer alone. He also stated the significant cause of his tinnitus could have been his preemployment hearing loss.

Dr. William Harris testified by deposition on behalf of Employer. In July 2002, he examined Claimant for his complaints of knee and radicular back pain, and diagnosed degenerative changes. On January 7, 2004, Dr. Harris performed a therapeutic arthroscopy with chondroplasty and synovectomy. By June, he discussed the possible need of a total knee replacement. Currently, Claimant's knee gets swollen and painful. He cannot do a lot of bending, walking or standing. He lies down and takes medication to deal with the pain.

Dr. Christopher Kostman, an orthopedic surgeon, evaluated Claimant, took a history consistent with the evidence at hearing, and testified on Employer's behalf. His exam was positive for mild effusion, tenderness, and a genu valgum deformity (knock-knee) of the left knee. Dr. Kostman diagnosed unilateral advanced degenerative arthritis of the lateral compartment of the left knee, or "post-traumatic arthritis." He did not find the condition work related, and therefore did not assign permanent disability.

Dr. Daniel Kitchens, a neurosurgeon, took an extensive and accurate history, reviewed all relevant medical records, examined Claimant, and testified by deposition on behalf of Employer. He diagnosed degenerative disc disease and spondylisthesis, or a spinal misalignment, at L5-S1. He opined Claimant's work activities, such as standing or walking on a hard concrete floor did not lead to, contribute to, or in any way alter the natural aging of his lumbar spine. Furthermore, the surgery performed for spondylolisthesis and degenerative disc changes, was not necessary with regard to his work incident, and the incident did not cause, create or aggravate the spondylolisthesis and degenerative disc changes.

Dr. Thomas Musich, a family doctor, evaluated Claimant, issued reports dated October 13, 2005 and December 8, 2006, and testified by deposition on behalf of Claimant. He testified Claimant had permanent partial disability of 50% of the left lower extremity at the knee and overall back disability of 60%. He also assigned PPD of 25% of the left wrist attributable to his carpal tunnel surgery, and 25% of the anterior abdominal wall due to his hernia surgery. He gave work restrictions, found his disabilities to be a hindrance to routine activities of daily living, and opined as to synergistic combination. Dr. Musich further testified Claimant was permanently and totally disabled due to a combination of injuries. Dr. Music did not consider Claimant's hearing loss in his analysis.

Susan Shea, a rehabilitation counselor, evaluated Claimant, considered his social/ vocational history, and reviewed his medical records. Among the factors she considered was Claimant's self report of "hearing loss since his

back surgery took place." However, in reaching the conclusion Claimant was permanently and totally disabled, Ms. Shea did not specifically consider Claimant's hearing loss. Rather, she factored in, among other issues, his pain, lack of transferable skills to less demanding work, inability to sit or stand, education or lack thereof, and narcotic usage. The permanent total disability was due to a combination of factors.

ADDITIONAL FINDING OF FACT AND RULINGS OF LAW

Based on the substantial and competent evidence of record, including the relevant medical records, documents, Claimant's testimony, and the testimony of other witnesses, I make the following additional findings of fact and rulings of law:

- Claimant sustained compensable hearing loss while employed by Employer .

Claimant seeks to recover compensation for the hearing loss he suffered due to exposure to industrial noise. Missouri statutes provide compensation for work-related hearing loss. Section 287.067.3 provides "[l]oss of hearing due to industrial noise is recognized as an occupational disease…" and § 287.197 addresses the testing and rating guidelines for occupational deafness. Under Section 287.197.8, an employer is liable for "the entire occupational deafness to which his employment has contributed; but if previous deafness is established by a hearing test or other competent evidence…the employer shall not be liable for previous loss so established….". In addition, tinnitus, although often accompanying hearing loss, is a separate compensable injury. *Poehlein v. Trans World Airlines, Inc*., 891 S.W.2d 505, 507 (Mo.App. E.D. 1994).

There is competent evidence of Claimant's hearing loss. Claimant testified he was around loud noise throughout his career, before and during his employment with Employer began in late 2001. He demonstrated and testified to profound hearing lost at trial. Dr. McKinney, an otolaryngologist, testified credibly on Claimant's diagnosis of the occupational disease of hearing loss, indicated the loss arose out of and in the course of his employment, established the causal connection between the industrial noise and the hearing loss, and accurately calculated the resultant disability. His testimony was uncontroverted.

Based on a comprehensive physical and vocational examination, as well as the required audiograms, Dr. McKinney calculated a binaural hearing loss of 21.5%, which is most likely from industrial noise exposure. Based on evidence of previous deafness is established by a hearing test, Dr. McKinney adjusted for the previous loss of 15.5%, and opined Employer was liable for 6% binaural loss of hearing. In addition, he diagnosed, found causation regarding, and rated the tinnitus at 1% of the body as a whole. Dr. McKinney's calculations and analysis is well-supported and credible.

I find Employer liable for 14.8 weeks of permanent partial disability compensation on account of his occupational deafness and tinnitus.

- Permanent Total Disability and the Liability of the Second Injury Fund.

Claimant seeks to recover lifetime permanent total disability benefits from the Second Injury Fund based on evidence he is unable to compete in the open labor market on account of a combination of his various disabilities. In order for Claimant to recover against the Second Injury Fund, he must prove that his last injury, the 2004 hearing loss Injury, combined with his pre-existing permanent partial disabilities, to result in permanent total disability. "The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment." Dunn. v. Treasurer of Missouri as Custodian of Second Injury Fund 2008 WL 4402741, 4 (Mo.App. E.D.) (Mo.App. E.D.2008)

(internal quotation omitted).

The first question that must be addressed is whether Claimant is permanently and totally disabled. If so, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a *combination* of the preexisting injuries and conditions and Claimant's compensable hearing loss. The Fund compensates injured employees when a current work-related injury combines with a prior disability to create an increased combined disability. *Casteel v. General Council of Assemblies of God*, 257 S.W.3d 160, 161 (Mo.App. S.D. 2008). In order for a last injury to combine with the preexisting disabilities, it must contribute in some way to the permanent total disability.

There is competent evidence Claimant is unable to compete in the open labor market. Claimant, Dr. Musich and Susan Shea so testified. However, evidence the compensable hearing loss combines with the preexisting disabilities to cause the total disability is lacking. First, the nature and extent of the compensable loss of hearing, plus the tinnitus, is minimal. Not only did Claimant have significant physical disabilities and conditions prior to his last day of work (the date of injury for purposes of the hearing loss claim), he also had preexisting hearing loss. The comparatively small additional hearing loss cannot have a substantial impact on Claimant's ability to work or not as of the date of last injury. Second, none of the evidence which supports a finding of permanent total disability factors in Claimant's hearing loss. Dr. Musich and Ms. Shea base their opinions of permanent total disability on the physical problems alone, all of which preexisted Claimant's last day of employment, and the date of injury and disability for his last injury, the hearing loss. With such minor disability attributable to the last injury, and a lack of evidence the hearing loss is somehow instrumental in Claimant's total disability, there is no credible evidence Claimant is permanently and totally disabled due to a combination of his last injury and the preexisting disabilities. In otherwords, the evidence establishes Claimant would be totally disabled with or without the hearing loss. With such a lack of combination, the permanent total disability claim against the Second Injury Fund fails.

There is liability for permanent partial disability benefits from Second Injury Fund when the primary injury meets the thresholds set forth in statute. Because the primary injury does not meet the thresholds, there is no liability for permanent partial disability benefits.

CONCLUSION

Claimant suffered compensable binaural hearing loss of 6.5%, plus tinnitus, and Employer shall compensate him accordingly. However, there is insufficient credible evidence that the compensable hearing loss combined with the significant prior disabilities to result in permanent total disability. The claim against the Second Injury Fund is denied.

Date: _____ Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton*'s effect thereon.

This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton*'s effect thereon.

Because the elements of proof overlap, the first four issues identified (Did Claimant sustain an occupational hearing loss; Did Claimant’s hearing loss arise out of and in the course of employment; Is Claimant’s hearing loss causally related his work; What is the nature and extent of Claimant’s disability) are addressed together under one heading.

If the employee's last injury in and of itself rendered the employee permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.,* 107 S.W.3d 240, 248 (Mo. banc 2003). There is no evidence to support such a finding in this case.

Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or reemployment.