

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 08-124393

Employee: Allen Sparks
Employer: American Airlines (Settled)
Insurer: New Hampshire Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence and considered the whole record. We find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and is in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge, as modified herein.

We issue this separate opinion to substitute our reasoning for the reasoning of the administrative law judge on the issue of the proper application of § 287.420 RSMo to the facts of this case.

Discussion

The Second Injury Fund contends that employee's claim must fail because employee failed to satisfy the notice requirements of § 287.420.² The administrative law judge ruled that employee's claim against the Second Injury Fund is not barred by § 287.420. We agree with the administrative law judge's ruling but we believe it is correct for reasons other than the reasons given by the administrative law judge.

The administrative law judge found that "[t]he Second Injury Fund offered no evidence showing how it had determined that [employee] did not provide his employer with proper notice as set out in the statute." The administrative law judge concluded that "[t]he Second Injury Fund failed to prove that [employee] did not provide his employer with proper notice of the alleged occupational disease." The administrative law judge placed upon the Second Injury Fund the burden of proving the *absence* of statutory notice. We disavow this analysis. We have questions with regard to which party bears the burden of proof when notice is disputed and, if lack of notice is deemed an affirmative defense, we question the Second Injury Fund's right to assert same herein.³ We need not resolve

¹ Statutory references are to the Revised Statutes of Missouri 2008, unless otherwise indicated.

² The issue of notice is properly before us notwithstanding the Second Injury Fund's failure to preserve the issue by its application for review. In its brief, the Second Injury Fund argued that employee failed to prove statutory notice. Employee did not object to the Second Injury Fund's argument regarding notice and, in fact, responded with his own argument in opposition.

³ See *Aramark Educational Services v. Faulkner*, 408 S.W.3d 271 (Mo. App. 2013). Courts have spoken of statutory notice under § 287.420 as a condition precedent to an award of compensation – an element of employee's case in chief. *Id.*, at 277. Procedurally, however, courts seem to have treated notice as an affirmative defense. *Id.*, at 275. Under strict construction, we doubt whether treatment of notice as an affirmative defense is viable. We also note that if failure of notice is properly viewed as an affirmative defense, it may not be available to the Second Injury Fund. The legislature

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these issues, however, because the facts before us clearly establish that employee gave timely notice.

Section 287.420 contains six requirements that must be met by a workers' compensation claimant to notify his employer of an occupational disease or repetitive trauma: (1) written notice, (2) of the time, (3) place, and (4) nature of the injury, and (5) the name and address of the person injured, (6) given to the employer no later than thirty days after the diagnosis of the condition.⁴ The first through fifth requirements are clearly met by employee's claim for compensation. The sixth requirement merits a brief discussion.

For purposes of § 287.420, "a person cannot be diagnosed with an 'occupational disease or repetitive trauma' until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure."⁵ The only diagnostician to diagnose employee with tinnitus and to opine there is a causal connection between employee's development of tinnitus and his work environment was Dr. Koprivica who made the connection after he evaluated employee on February 23, 2011.

Employee gave written notice of his condition of tinnitus to employer on or about November 3, 2010, in the form of his claim for compensation. Thus, employee gave notice to employer before Dr. Koprivica determined employee's tinnitus is work-related. As explained by the court in *Allcorn v. TAP Enterprises, Inc.*, the claim filed on November 3, 2010, in relation to the diagnosis of the condition on February 23, 2011, satisfies the time limit of § 287.420. "This is so because the statute does not require that the notice be given after the diagnosis, but only that it be given 'no later than thirty days after the diagnosis of the condition.'"⁶

Based upon the foregoing, we find employee provided to employer the notice required by § 287.420. The provisions of § 287.420 do not bar employee's claim against the Second Injury Fund. In all other respects, we affirm the award and decision of the administrative law judge.

Award

We affirm the administrative law judge's award and decision, as modified herein.

We approve and affirm 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.

granted the Second Injury Fund the right to use all defenses of an uninsured employer when defending against requests for withdrawal of funds from the Second Injury Fund to pay medical expenses and death benefits owed to a claimant by the uninsured employer. See § 287.220.5 RSMo ("In defense of claims under this subsection, the treasurer...shall have the same defenses to such claims as would the uninsured employer"). The legislature did not explicitly grant the Second Injury Fund the same right in defense of claims seeking recovery from the Second Injury Fund under § 287.220.1 RSMo. See § 287.220.2 RSMo ("In all cases in which a recovery against the second injury fund is sought for permanent total disability, permanent partial disability, or death, the...treasurer shall be entitled to defend against the claim.").

⁴ *Allcorn v. Tap Enterprises*, 277 S.W.3d 823, 828 (Mo. App. 2009).

⁵ *Id.*, at 829.

⁶ *Id.*, at 830.

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We attach a copy of the August 21, 2013, award and decision of Administrative Law Judge Kenneth J. Cain. We affirm and adopt the administrative law judge's findings, conclusions, award and decision to the extent that they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 16th day of September 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

**FINAL AWARD
As to the Second Injury Fund Only**

Employee: Allen Sparks

Injury No: 08-124393

Dependents: N/A

Employer: American Airlines (previously settled)

Insurer: New Hampshire Insurance Company (previously settled)
Sedgwick Claims Management Services

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

Hearing Date: June 26, 2013; final brief filed July 30, 2013

Checked by: KJC/cy

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: November 28, 2008
5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte County, Missouri; an adjoining county to Jackson 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: Employee, while in the course and scope of his employment as an airline mechanic and aviation maintenance technician, was exposed to loud noises. Employee developed tinnitus as a result of being exposed to the loud noises.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: both ears and body as a whole
14. Nature and extent of any permanent disability: 12 percent to body as a whole
15. Compensation paid to date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$1,190 by agreement
19. Weekly compensation rate: \$772.53/\$404.66
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: N/A
Weeks for permanent partial disability: N/A
Weeks for temporary total and temporary partial disability: N/A
22. Second Injury Liability: Yes
No Second Injury Fund differential benefits (See additional findings of fact and rulings of law)
Permanent total disability benefits at the rate of \$772.52 per week effective with August 10, 2011.

TOTAL: Undetermined

23. Future requirements awarded: Undetermined

Said payments to begin as of date of the award 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: Ms. E. Diane Baker

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Allen Sparks

Injury No: 08-124393

Dependents: N/A

Employer: American Airlines (previously settled)

Insurer: New Hampshire Insurance Company (previously settled)
Sedgwick Claims Management Services

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

Hearing Date: June 26, 2013; final brief filed July 30, 2013

Checked by: KJC/cy

The employee settled his case against his employer on November 16, 2011, for \$20,000. The settlement stipulation did not provide the percentage of disability upon which it was based.¹

The remaining parties, the employee and the State Treasurer as Custodian of the Second Injury Fund, entered into various admissions and stipulations. The remaining issues were as follows:

1. Whether the limitation period had expired prior to the filing of the claim;
2. Notice;
3. Whether the employee sustained an occupational disease arising out of and in the course and scope of his employment; and
4. Liability of the Second Injury Fund for compensation, including the extent of the Second Injury Fund's possible liability.

At the hearing, Mr. Allen Sparks (hereinafter referred to as Claimant) testified that he was born on June 6, 1946 and that he graduated from high school in 1965. He stated that he served in the Military Service from 1966 to 1971 or 1972. He stated that he served in Vietnam from 1968 to 1969.

Claimant testified that he later attended college on a part time basis. He stated that he did not obtain a degree. He stated that prior to 1972 he had worked as a mechanic and as a gas station attendant. He stated that in 1972 he began training as a machinist. He stated that he had worked as a machinist or mechanic for most of his adult life.

¹ The settlement was approved by the St. Joseph Office of the Division of Workers' Compensation.

Claimant testified that he worked as a machinist for TWA or American Airlines from 1977 until November 2008, other than for those periods when he was furloughed. The evidence showed that American Airlines purchased TWA around 2000. Claimant also stated that he was a welder and Quality Insurance Inspector for Gray Manufacturing from 1981 to 1985, one of his furlough periods.

Claimant testified that as a machinist and Aviation Maintenance Technician or AMT for the airlines he worked in a hanger around loud jet engine noises and air conditioning units. He described some of the noise as similar to working around a jack hammer. He indicated that employees were not always provided ear protection.

Claimant testified that his employer did some hearing tests, but did not reveal the results of the hearing tests to the employees. He stated that he was never told by his employer that he had a hearing loss. He stated that he first learned of his hearing problems when his wife began complaining about the volume of the television set.

Claimant testified that by the fall of 2008 he was experiencing problems with his hearing at work. He stated that his co-workers had to repeat their words to him and that he was having trouble with background noise. He stated that it sounded like termites were constantly chirping in his ears. He stated that he was having difficulty distinguishing sounds.

Claimant alleged that his preexisting disability resulted from a respiratory impairment. He stated that in July 2004 he was diagnosed with emphysema and chronic obstructive pulmonary disease (COPD). He stated that he was prone to getting pneumonia.

Claimant testified that his COPD affected him at work. He stated that it was difficult to breathe when working in cramped spaces or in a bent over position. He stated that his job required him to work in tight spaces underneath the floors of the airplanes. He stated that he got winded and short of breath when he had to climb the stairs to get into the airplanes. He stated that descending stairs also caused him to become short of breath. He stated that there were about 30 steps to climb to get into a plane and that he sometimes had to climb in and out of planes 40 or 50 times a day.

Claimant also testified that American Airlines was putting enhanced entertainment systems in the planes from 2004 to 2008. He stated that he had to install new wiring in the planes for the new entertainment systems. He stated that he had to install new video monitors in the planes. He stated that he had to install new control consoles. He stated that there were a lot of cables to run. He stated that installing the wires required him to work in the EE section of the plane which was located behind the cockpit door. He stated that the space was about 24 inches wide and about 4 feet high on larger planes and 3 feet high on smaller planes. He complained that it was difficult to breathe while working in the tight quarters.

Claimant testified that he accommodated for his breathing difficulties by using an inhaler 2 to 6 times per day while at work. He stated that he got the younger guys to help him with lifting and carrying. He stated that by 2008 he was using oxygen at night through a tube inserted in his nose. He stated that he experienced some coughing spells at work. He stated that he was getting "winded" when he to do a lot of walking at work.

Claimant testified that in the fall of 2008 he and the other employees believed that American Airlines was going to close the overhead base. He stated that being 62 years old with significant health issues he decided to retire at that time. He indicated that he had hoped to keep working and that he had applied for numerous other jobs since his retirement, but to no avail. He acknowledged that he did get unemployment benefits until August 9, 2011.

Finally, Claimant admitted that his respiratory impairment had continued to deteriorate. He stated that his pulmonologist had now prescribed a portable oxygen machine which he used on a constant basis. He stated that he was no longer able to do any work around the house, such as mowing, plumbing or climbing ladders.

On cross-examination by the Second Injury Fund, Claimant testified that he stopped working at American Airlines on November 28, 2008. He stated that American Airlines closed its operations in Kansas City in 2010, or about 18 months later. He stated that employees first learned of the pending furloughs in October 2008. He stated that 500 employees were laid off at American Airlines in 2008.

Claimant reiterated that he was experiencing numerous problems at work due to his COPD by 2008. He stated that hot and humid and cold weather made his COPD worse, particularly the hot and humid temperatures. He acknowledged that his medical records showed that he was diagnosed with severe COPD in 2004. He admitted that he did not stop smoking until about three months prior to his hearing.

Claimant admitted that he had first noticed problems with tinnitus in the early 1990s and that he did not tell his employer about the problems. He stated that he got his first hearing aids in October 2008. He stated that he did not recall whether he had filled out any forms at work stating that his hearing problems were work related.

Finally, Claimant testified that he had difficulty with dressing due to his COPD. He stated that bending over to put on socks was particularly difficult. He stated that he could only walk about 100 feet without his portable oxygen. He stated that he could walk about ¼ of a mile at a normal pace with his oxygen.

Medical Evidence

The Second Injury Fund offered no medical evidence. Claimant offered the deposition testimony and report of P. Brent Koprivica, M.D., and numerous other medical reports and

records. Dr. Koprivica testified that he was board certified in emergency and in occupational medicine. He stated that he now worked for employees in 98 to 99 percent of his cases, whereas in the past he worked almost exclusively for employers in workers' compensation cases. He stated that he evaluated Claimant on February 23, 2011.

Dr. Koprivica noted Claimant's history. He noted that Claimant was exposed to loud noises while working at American Airlines from 2000 to 2008. He concluded that Claimant's exposure to the loud noises at work was the direct, proximate and prevailing factor in causing Claimant's tinnitus and hearing problems. He concluded that Claimant had sustained a permanent partial disability of 12.5 percent to his body as a whole due to tinnitus.

Dr. Koprivica concluded that Claimant had not sustained a compensable hearing loss under Missouri law when the results from Claimant's audiograms were adjusted for age as required by the statute and regulations.

Dr. Koprivica noted that Claimant had a significant respiratory impairment prior to November 2008. He noted that as early as 2004 Claimant did not have the lung capacity to inhale sufficient air into his lungs or to exhale sufficient air for oxygen needed for his muscles and body organs. He noted that that Dr. Helmut Steth had found that Claimant had organ damage in 2006 due to the respiratory impairment.

Dr. Koprivica concluded that Claimant had sustained a permanent partial disability of 50 percent to the body as a whole due to Claimant's severe respiratory impairment which pre-existed the November 2008 occupational disease. He concluded that Claimant's severe respiratory impairment had impacted Claimant's ability to work prior to November 2008 and that it was a hindrance or obstacle o Claimant's employment or reemployment.

Dr. Koprivica further noted that Claimant's tinnitus precluded Claimant from doing jobs requiring the ability to hear clearly for safety reasons or where accurate hearing was needed such as in dispatcher jobs. He recommended a vocational assessment.

Finally, Dr. Koprivica noted that after reviewing the vocational evaluation of Claimant; that he had concluded that Claimant was permanently and totally disabled and that no employer would be expected to hire Claimant. He concluded that Claimant's permanent total disability was due to the "synergistic" effect of the disability from Claimant's November 28, 2008 occupational disease involving tinnitus and Claimant's preexisting permanent partial disability from the pulmonary condition. He stated that Claimant's tinnitus alone did not render Claimant totally disabled.

On cross-examination by the Second Injury Fund, Dr. Koprivica acknowledged that he was unaware of any doctor placing medical restrictions on Claimant or advising Claimant to stop working prior to November 2008. He stated that he considered it treatment when Claimant was prescribed hearing aids prior to November 2008.

Medical Records

Claimant's medical records were cumulative of the testimony. On September 26, 2008 Claimant was diagnosed with bilateral sensorineural hearing loss in the mild to moderate range on the basis of one test. On November 22, 2010, Pamela A. Nelson, Au.D., noted that Claimant had a binaural hearing loss of 10.75 percent under Missouri law.

Vocational Evidence

The vocational evidence consisted of the report and testimony of Mary A. Titterington. Ms. Titterington testified that she had a Master's degree in guidance and counseling. She stated that she had worked in the counseling or vocational field since 1973. She stated that she had only worked on workers' compensation cases for the last five years and that her case load was evenly divided between employee and employer referrals.

Ms. Titterington noted Claimant's age, educational, employment and medical history. She noted that Claimant scored in the average range of intellectual functioning on intelligence and achievement tests. She stated that the "substantial" variances between his verbal and visual scores on the tests were "suggestive" of a learning disability.

Ms. Titterington concluded that Claimant's COPD excluded him from numerous jobs. She stated that Claimant could not work on any jobs requiring the ability to climb, do heavy lifting, drive or do construction work. She stated that Claimant had to work in a clean environment free of fumes, gases or fabrication particles. She stated that he could not work around dangerous machinery due to his COPD and the dizziness resulting from it

Ms. Titterington indicated that while Claimant could do some light jobs with his COPD; that his tinnitus would preclude him from doing those jobs. She stated that the light jobs Claimant could do with his COPD were as a dispatcher, customer service worker, cashier, telemarketer and in security. She stated, however, that Claimant's tinnitus would preclude him from doing those jobs due to the need to hear clearly and to communicate based on what he had heard.

Ms. Titterington concluded that no employer was going to hire Claimant due to his COPD and hearing problems. She noted in her report that it was not reasonable to expect an employer to hire Claimant for work as it was customarily performed in the open labor market. She indicated that Claimant was unemployable due to a combination of his COPD and his tinnitus and hearing problems.

Other Exhibits

The remaining exhibits were cumulative of the other evidence. Claimant's Exhibit A was a copy of his original claim for compensation. The date of occupational disease listed in the claim was November 28, 2008, Claimant's last day of exposure to the alleged loud noises at work. The claim for compensation was filed on November 3, 2010 and listed both Claimant's employer and the Second Injury Fund as being liable for benefits.

Claimant's Exhibit I was the stipulation for compromise lump sum settlement between Claimant and his employer. The settlement listed the issues in the case as "compensability, conditions complained of (or medical causation), the nature and extent of permanent partial disability or permanent total disability and the liability of the Employer/insurer for future medical care." Notice was not listed as an issue in the case.

Law

After considering all the evidence, including Dr. Koprivica's report and deposition testimony, the other medical reports and records, the vocational evidence, the other exhibits and after observing Claimant's appearance and demeanor, I find and believe that Claimant filed his claim for compensation as to the Second Injury Fund on a timely basis and that the Second Injury Fund failed to prove that Claimant did not provide notice of the alleged occupational disease to his employer as required by the statute.

Claimant further proved that he sustained an occupational disease as defined by Missouri law. He also proved that he was rendered permanently and totally disabled due to a combination of his work-related tinnitus and his preexisting COPD or pulmonary problems. Thus, he proved the Second Injury Fund's liability for permanent total disability benefits. The Second Injury Fund is ordered to pay such benefits to Claimant and to continue to pay such benefits to him for so long as he remains so disabled as set out in the award.

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant offered his testimony and medical and vocational evidence in support of his claim. The Second injury Fund offered no evidence, other than Claimant's discovery deposition. Claimant proved the Second Injury Fund's liability as set out above.

Limitation Period

The applicable statute pertaining to the limitation period provides as follows:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing reactivate or revive the period of time in which a claim may be filed. A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. . .

§ 287.430 RSMo. 2005.

Also, the statute pertaining to occupational diseases provides that:

The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.

§ 287.063 RSMo. 2005.

Section 287.197.7 provides that:

No claim for compensation for occupational deafness may be filed until after one month's separation from the type of noisy work for the last employer in whose employment the employee was at any time during such employment exposed to harmful noise, and the last day of such period of separation from the type of noisy work shall be the date of disability.

§ 287.197.7 RSMo. 2005.

Claimant alleged two separate occupational diseases. One involved hearing loss and the other tinnitus or ringing in his ears. On the hearing loss claim, Claimant was prohibited from filing a claim until after one month's separation from the noisy work. Id. Claimant last worked

on November 28, 2008. Thus, he could not file a claim until December 28, 2008. The latter date is considered the date of disability per the statute. Id.

On the tinnitus claim, the occupational disease statute of limitations applies. The statute does not begin to run on an occupational disease until it is reasonably discoverable and apparent that the exposure at work caused the occupational disease.

The Second Injury Fund had the burden of proof on the affirmative defense. § 287.808 RSMo. 2005. The Second Injury Fund offered no evidence on the limitation period for either the hearing loss or the tinnitus claim. The Second Injury Fund did not address the limitation period in its brief.

Furthermore, while Claimant had to know that he had ringing in his ears; that alone did not establish when it was reasonably discoverable and apparent that his injury was related to some exposure at work. Claimant is not a physician. Claimant is not an expert on hearing impairments. A reasonable person is not an expert on hearing impairments. The Second Injury Fund offered no evidence showing that a reasonable person would have known that exposure to loud noises could or was the cause of his or her tinnitus. The Second Injury Fund offered no evidence showing that the limitation period for Claimant's alleged ringing in his ears began at a date earlier than November 28, 2008 as Claimant alleged in his claim for compensation.

Thus, per the statute, Claimant at a minimum had two years from the date of injury or one year after a claim was filed against his employer to file a claim for compensation against the Second Injury Fund. As noted above, the date of the occupational disease as stated in the claim was November 28, 2008. Claimant filed his claim against both the Second Injury Fund and his employer on November 3, 2010, clearly within two years of the alleged date of the occupational disease. The Second Injury Fund's argument at the hearing that the claim was not filed on a timely basis was without merit.

Notice

The applicable statute pertaining to notice provides as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than

thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

§ 287.430 RSMo. 2005

The statute must be strictly construed. See § 287.800 RSMo. 2006. The statute clearly provides that notice must be given to the employer. It does not provide that any notice of the injury or occupational disease must be given to the Second Injury Fund. *Id.*

Also, again the Second Injury Fund failed to address the notice issue in its brief. The Second Injury Fund offered no evidence showing how it had determined that Claimant did not provide his employer with proper notice as set out in the statute.

The Second Injury Fund failed to call any witnesses to testify in the case on the notice issue. The Second Injury Fund offered no evidence from Claimant's employer on the notice issue. The Second Injury Fund offered no evidence showing that Claimant's employer did not receive proper notice of the alleged occupational diseases.

In addition, the best evidence on the notice issue came directly from Claimant's employer. Claimant's employer indicated in the stipulation for compromise lump sum settlement that there were several issues in the case. Claimant's employer listed the issues in the case. Claimant's employer did not list notice as an issue in the case.

Claimant's employer clearly had superior knowledge than the Second Injury Fund as to whether Claimant had provided notice of the occupational diseases to the employer. Reasonable inferences may be drawn from the evidence. The Second Injury Fund failed to prove that Claimant did not provide his employer with proper notice of the alleged occupational disease.

Occupational Disease

The Second Injury Fund's argument that Claimant had not sustained an occupational disease was without merit. Again, the Second Injury Fund offered no evidence on the issue. Claimant, who made a credible witness, alleged hearing loss and tinnitus. Claimant testified that he worked around loud jet engines, air conditioning units and other loud noises at American Airlines. Dr. Koprivica testified that Claimant's exposure to the loud noises at work was the direct, proximate and prevailing factor in causing Claimant's tinnitus. Dr. Koprivica concluded that Claimant had not sustained a compensable hearing loss.

Dr. Koprivica was credible in his testimony. The evidence supported his testimony. The Second Injury Fund offered no medical evidence or opinions. Claimant proved that his exposure to the loud noises at work was the prevailing factor in causing his tinnitus.

Second Injury Fund Liability

Claimant argued that he was entitled to either permanent partial or permanent total disability benefits from the Second Injury Fund. Permanent partial disability benefits may only be awarded against the Second Injury Fund if the employee's disability meets the threshold disability amounts as set out in the statute. See § 287.220 RSMo. 2005.

The threshold disability amount to establish Second Injury Fund liability for a body as a whole impairment is 12.5 percent to the body as a whole. *Id.* The statute must be strictly construed. § 287.800 RSMO. 2005. Claimant settled his case against his employer for \$20,000.² The settlement stipulation did not show the percentage of disability sustained by Claimant. It did, however, show that the compensation rate for permanent partial disability benefits was \$404.66 per week.

At that rate, a permanent partial disability of 12.5 percent to the body would equal \$20,233. Thus, Claimant did not prove that he sustained a permanent partial disability of 12.5 percent to his body as a whole. He did not prove that the Second Injury Fund could be liable for permanent partial disability benefits. In permanent total disability cases, the threshold disability amounts do not apply. See § 287.220 RSMo. 2005.

Permanent Partial Disability Due to November 2008 Occupational Disease

Claimant alleged hearing loss and tinnitus as the bases for his alleged November 28, 2008 occupational disease. He offered the opinions of Dr. Koprivica and Dr. Nelson, an audiologist, as support for his claim.

Dr. Koprivica concluded that Claimant had not sustained a compensable hearing loss and noted that Dr. Nelson had made a mistake in her calculations. Dr. Nelson concluded that Claimant had sustained a binaural hearing loss of 10.75 percent under Missouri law.

Actually, both experts erred in their opinions. Dr. Koprivica was the one who made the mathematical error. Claimant's best average hearing at 500, 1,000 and 2,000 HZ based on the audiograms used by Drs. Koprivica and Nelson was 40 decibels and not the 30 decibels as found by Dr. Koprivica. (45 decibels at 500 Hz, 35 decibels at 1,000 Hz and 40 decibels at 2,000 HZ equals 120 decibels which when divided by 3 equals 40 decibels and not the 30 decibels used by Dr. Koprivica in his calculations). See § 287.197 RSMo. 2005 and 8 CSR 50-5.060.

² Claimant is bound by the stipulation for settlement with his employer. See Conley v. Treasurer of Missouri, 999 S.W. 269 (Mo. App. E.D.1999) where the Court ruled that parties to a stipulation for settlement could not re-litigate the issues covered by the settlement in a later proceeding. See also Gassen v. Livengood, 134 S.W. 3rd 75 (Mo. App. W.D. 2004) and Totten v. Treasurer of State of Missouri, 116 S.W. 3rd 624 (Mo. App. 2003).

Dr. Nelson's mathematical calculations were correct. Her error was that she failed to follow the statute and the regulations in making her conclusions.³ Thus, neither expert provided an opinion supporting Claimant's allegation that he had sustained a compensable hearing loss under Missouri law.⁴ Claimant failed in his proof.

Claimant did, however, prove that he had sustained permanent partial disability due to tinnitus. Dr. Koprivica rated Claimant's permanent partial disability due to the tinnitus at 12.5 percent to the body as a whole.⁵ Based on the evidence, Claimant proved that he sustained a permanent partial disability of 12 percent to his body as whole due to the tinnitus.

Preexisting Disability and Hindrance or Obstacle

As noted earlier, the Second Injury Fund offered no medical opinions or medical evidence. Claimant offered the disability rating of Dr. Koprivica, who concluded that Claimant had sustained a permanent partial disability of 50 percent to his body as a whole due to a severe preexisting respiratory impairment. Claimant's COPD was initially diagnosed as severe in 2004.

Claimant testified to numerous problems due to his severe COPD as set out earlier. The evidence supported Claimants' testimony and Dr. Koprivica's uncontradicted disability rating. Claimant proved that he had sustained a permanent partial disability of 50 percent to his body as a whole due to his severe COPD prior to his November 2008 occupational disease.

Claimant also proved that the disability from his preexisting severe COPD was a hindrance or obstacle to his employment or reemployment. Both Dr. Koprivica and Ms. Titterington, a vocational expert, so testified. Both were credible in their opinions. The evidence supported their opinions. The Second Injury Fund offered no contradictory medical or vocational opinions. Claimant proved that the disability from his preexisting severe COPD was a hindrance or obstacle to his employment or reemployment.

Permanent Total Disability

³The first step in calculating hearing loss per the statute and regulations is to calculate the lowest measured loss at 500, 1,000 and 2,000 Hz and then to divide by three to determine the average decibel loss. § 287.197 RSMo. 2005 and 8 CSR 50-5.060. Next, a deduction must be made based on age. The statute then provides that "For every decibel of loss exceeding twenty-six decibels an allowance of one and one-half percent shall be made up the maximum of one hundred percent which is reached at ninety-two decibels." Dr. Nelson failed to follow that step.

⁴ At most, Claimant would have sustained a very minimal hearing loss at 500, 1,000 and 2,000 Hz because his best average hearing loss of 40 minus 12 years deducted for age equals 28 decibels. Hearing loss can only be compensable under the statute and regulations if the hearing loss exceeds 26 decibels. The 2 decibels would then have to be factored in the equation to measure his compensable hearing loss.

⁵ As noted earlier, Claimant settled his case with his employer based on a permanent partial disability of less than 12.5 percent to the body as a whole and Claimant was bound by the settlement.

Total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in his present physical condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d 570 (Mo. App. W.D. 570); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996).

Claimant was born on June 6, 1946 and he is now 67 years old. He was 62 years old when he stopped working. He has a high school education with a few college credits obtained nearly 40 years ago.

Claimant's severe pulmonary condition precludes him from doing any of his past work as a machinist or mechanic. His severe pulmonary condition also precludes him from doing numerous other jobs. He cannot work on jobs requiring him to do other than very minimal standing and walking due to his severe pulmonary condition. He cannot work on jobs requiring him to bend, stoop or squat. He can only do a minimal amount of lifting. He cannot climb stairs or ladders. He cannot work on jobs where driving is a main component. He has to work in a clean, temperature regulated environment. He cannot be exposed to dust, fumes or gases. He cannot be exposed to hot and humid temperatures or extremely cold temperatures. His COPD has also resulted in dizziness which further limited his ability to work.

Ms. Titterington indicated that Claimant could do some jobs despite the severity of his COPD. She indicated, however, that Claimant became unemployable when his tinnitus combined with the disability from his COPD. For example, Ms. Titterington indicated that Claimant could do some office jobs such as dispatcher, cashier, telemarketer or jobs in customer service with just his COPD. She stated that he could not do those jobs due to his tinnitus which affected his ability to hear clearly and to communicate properly. She also stated that while he could do some security jobs with just his COPD; that his tinnitus would prevent him from doing those jobs.

In addition, both Dr. Koprivica and Ms. Titterington indicated that Claimant's tinnitus prevented him from working on certain other jobs. Based on their opinions, Claimant could not work around moving equipment or moving vehicles due to his inability to hear clearly. Based on their opinions, Claimant's hearing problems were a safety detriment in some jobs. Based on their opinions, Claimant's speech discrimination was impaired in noisy environments affecting his employability. The evidence supported their opinions.

Dr. Koprivica concluded that Claimant was permanently and totally disabled due to a combination of the disability from Claimant's tinnitus and Claimant's severe preexisting pulmonary condition. Ms. Titterington agreed with Dr. Koprivica's assessment. She concluded that Claimant was unemployable due to his tinnitus and severe pulmonary condition. She concluded that it was not reasonable to expect any employer to hire Claimant to perform work as it was customarily performed in the open labor market.

Again, the evidence supported Dr. Koprivica and Ms. Titterington's conclusions. Claimant proved the Second Injury Fund's liability for permanent total disability benefits. The Second Injury Fund is ordered to pay such benefits to Claimant and to continue to pay such benefits to him for so long as he remains so disabled.

Start Date for Permanent Total Disability Benefits

Claimant last worked on November 28, 2008. Based on the evidence, he proved that the disability from his tinnitus became permanent effective with November 29, 2008. Thus, his employer was liable for 48 weeks of permanent partial disability benefits at the rate of \$404.66 per week, beginning on November 29, 2008 and ending on October 31, 2009. (A permanent partial disability of 12 percent to the body as a whole due to tinnitus equals 48 weeks of benefits).

Claimant, however, received unemployment compensation benefits until August 9, 2011. As Claimant admitted in his brief, he was not entitled to any benefits based on permanent total disability while he was receiving unemployment compensation benefits. See Thorsen v. Sachs Electric, 52 S.W. 2d 611 (Mo. App. W.D. 2001); and § 288.040.1 RSMo. 2005 which provides that in order to receive unemployment benefits an applicant must show that he is able to work and available for work.⁶

Thus, Claimant was not entitled to any Second Injury Fund differential benefits on the basis that he was permanently and totally disabled during the 48 weeks in which he received permanent partial disability benefits from his employer. Based on the evidence, he proved that he became entitled to permanent total disability benefits from the Second Injury Fund effective with August 10, 2011.

Therefore, the Second Injury Fund's liability for such benefits at the rate of \$772.53 per week became effective with August 10, 2011. The Second Injury Fund is ordered to pay all past due benefits owed to Claimant and to continue to pay permanent total disability benefits to him at \$772.53 per week for so long as he remains so disabled.

⁶ Based on the evidence offered at the hearing, Claimant may have in fact been permanently and totally disabled during the period ending on August, 9, 2011, but as Claimant conceded, he was not entitled to any such benefits during that period.

Made by: _____

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation