

**SAMPLE ACCEPTABLE  
PETITIONER'S OPENING BRIEF  
WORKERS' COMPENSATION CASE**

(updated January 1, 2011)

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[Note: this page (the "cover") must be blue paper  
of at least 65 lb. weight]

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of )  
John Doe; Claimant. )  
)  
JOHN DOE, ) WCB Nos. 99-0000; 98-0000  
)  
Petitioner, )  
v. ) CA A000000  
)  
SAIF CORPORATION; X )  
CORPORATION; Y )  
CORPORATION; and Z, INC., )  
)  
Respondents. )

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PETITIONER'S OPENING BRIEF

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Judicial Review from the Workers' Compensation Board  
from the Opinion and Order dated June 28, 1999  
and the Order on Review dated January 7, 2000

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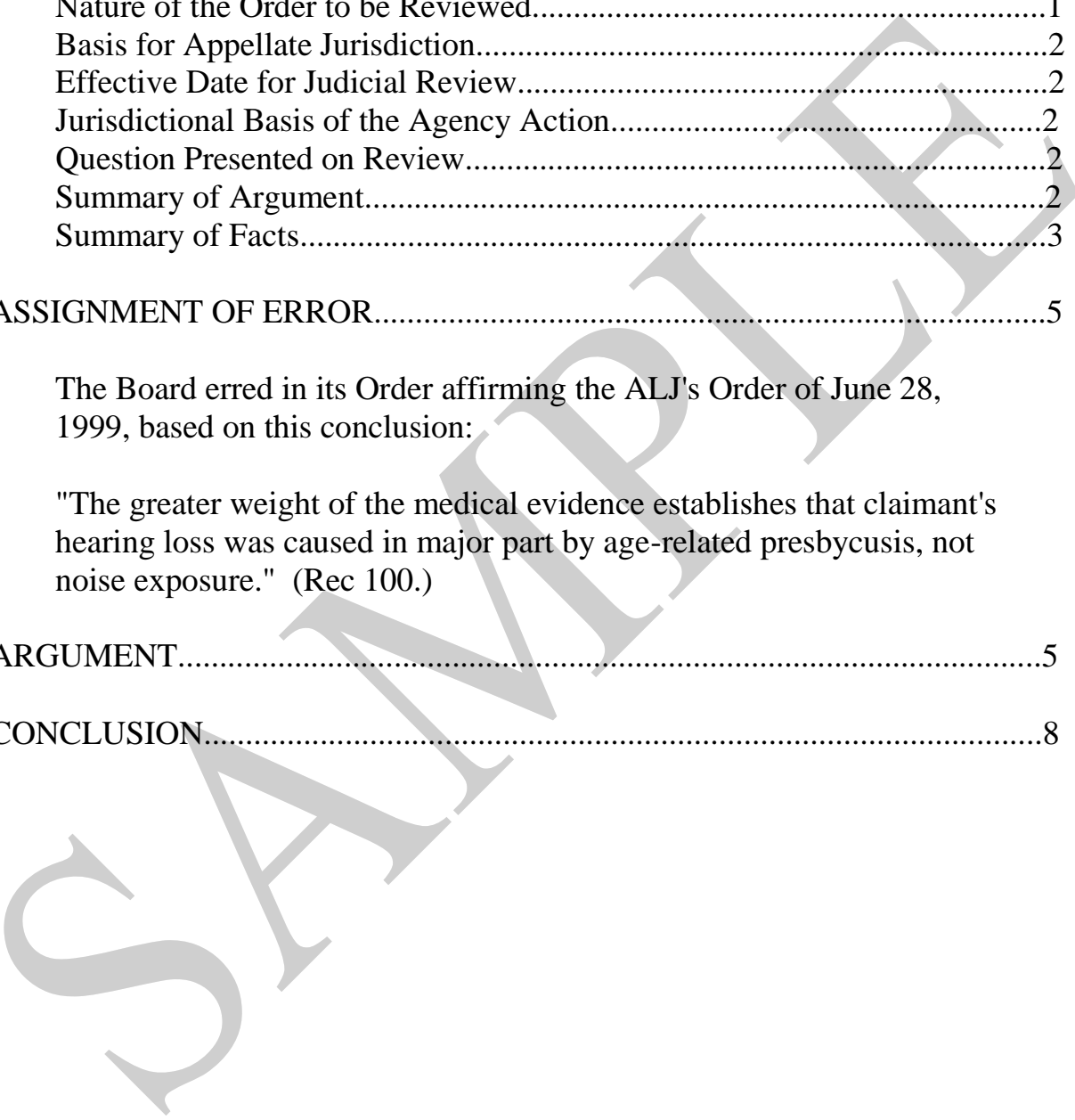
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The Board erred in its Order affirming the ALJ's Order of June 28, 1999, based on this conclusion:

"The greater weight of the medical evidence establishes that claimant's hearing loss was caused in major part by age-related presbycusis, not noise exposure." (Rec 100.)

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## **PETITIONER'S BRIEF**

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### **STATEMENT OF THE CASE**

#### **The Nature of the Case and Relief Sought**

Petitioner is a workers' compensation claimant whose claim for hearing loss was denied by respondent SAIF Corporation (SAIF) for respondent X Corporation (employer) and denied by respondent Z Corporation for respondent Y Corporation (employer). (Hereinafter respondents shall be referred to collectively as "SAIF"). SAIF and Z, Inc. based their denials on their positions that petitioner's work, specifically the noise petitioner was exposed to at work, was not the major cause of his hearing loss. Petitioner (hereinafter "claimant") seeks reversal of the Workers' Compensation Board's Order on Review of January 7, 2000, affirming the Administrative Law Judge's Opinion and Order of June 28, 1999, which had approved Z, Inc.'s denial of October 9, 1998 and SAIF's denial of October 28, 1998.

#### **Nature of the Order to be Reviewed**

The order to be reviewed is an agency order, the Order on Review of the Workers' Compensation Board dated January 7, 2000, affirming the Administrative Law Judge's Opinion and Order of June 28, 1999, in a contested case.

**Basis for Appellate Jurisdiction**

This court has jurisdiction pursuant to ORS 656.294(8), ORS 656.298 and ORS 183.482(7) and (8).

**Effective Date for Judicial Review**

The Workers' Compensation Board entered its Order on Review on January 7, 2000. The petition for judicial review was filed February 3, 2000.

**Jurisdictional Basis of the Agency Action**

The Board had jurisdiction to issue its order under ORS 656.295.

**Question Presented on Review**

The question on review is: Did the Board err in affirming the ALJ's Opinion and Order affirming SAIF's and Z, Inc.'s denials, finding that claimant's noise exposure at work was not the major contributing cause of his hearing loss, but the major cause was age-related presbycusis?

**Summary of Argument**

By finding age-related presbycusis hearing loss to be the major cause of claimant's hearing loss, the Board's decision is inconsistent with OAR 436-035-0250 and is, therefore, legal error. OAR 436-035-0250 states a clear policy that, to consider compensable any hearing loss, it must be above and beyond the anticipated age-related loss due to the "presbycusis factor." Therefore, in evaluating the major cause of such hearing loss, presbycusis may not be considered

as a competing cause, because the compensable loss under consideration is, by definition, that loss which exceeds the "presbycusis factor."

### **Summary of Facts**

The Board adopted and based its decision on the ALJ's findings, which are as follows:

"The claimant, 59 years old at this time, was employed by X Corporation and its successor, Y Corporation, between [dates] (claimant's testimony). During most of that time, he worked much of the time around equipment, particularly the debarker, that produced very loud noise, as high as 110 decibels (claimant's testimony). There was no evidence that during the same period of time the claimant was regularly exposed to off-the-job high noise levels. When he started to work for X Corporation, the claimant demonstrated slight to mild low frequency hearing loss (Exhibits 40, 41). In 1976, Dr. Bridget Beta saw the claimant at the request of Dr. Ralph Alpha for evaluation of a perforated eardrum (Exhibit 5). In addition to a report on the perforated eardrum, Dr. Beta reported to Dr. Alpha that the claimant demonstrated 'an underlying binaural sensorineural loss of occupational origin' (Exhibit 5). The claimant testified that he was not told of any occupationally caused hearing loss before he received Dr. Alpha's report. Audiograms administered to the claimant every year from July 19, 1977 to April 13, 1992 demonstrated a loss of hearing inconsistent with the pattern for noise-induced hearing loss (Exhibits 15, 27, 28).

"On June 28, 1998, the claimant filed a claim for hearing loss (Exhibit 16). Dr. Gregory Gamma examined the claimant on July 1 relative to hearing loss (Exhibit 20). Dr. Gamma recorded a history by the claimant of significant noise exposure at X Corporation (Exhibit 20). Based on preliminary audiologic studies, Dr. Gamma reported that the claimant's hearing loss was an atypical pattern for noise exposure (Exhibit 20). After a more complete audiologic examination, Dr. Gamma reported his impression of the claimant's condition as 'noise-induced hearing loss' (Exhibit 22).

"Dr. Denice Delta, an otolaryngologist, examined the claimant in August 1998, had an audiogram administered and has reviewed the claimant's medical records, including those following his discharge from the Army and before his employment at X Corporation (Exhibits 27, 40). Based on that examination and those records, Dr. Delta's opinion is that the claimant has a sensorineural hearing loss that is not seen in noise-induced hearing loss; that the claimant has had the same flat type hearing loss 'for many years,' which apparently progressed after 1963 but in a pattern definitely 'not one of occupational noise'; that the claimant apparently has had a progressive degenerative disease of the inner ear that began over 36 years ago and the major contributing cause of his hearing loss is not his employment at X Corporation (Exhibits 27, 40).

"Edmund Epsilon, a Ph.D. and clinical audiologist, has reviewed the records in this case, including the claimant's military records prior to his employment for X Corporation, and reported his opinion that the claimant's audiometric pattern is inconsistent with noise-induced hearing loss; that the claimant's hearing loss as documented from 1977 to 1992 was approximately what one would expect just from the aging process (presbycusis); that the claimant's pre-employment hearing loss in combination with subsequent presbycusis represents the major contributing cause of his hearing loss (Exhibits 28, 41).

"Dr. Zoe Zeta, also an otolaryngologist, reviewed the claimant's file, including audiograms extending from 1977 to 1992 and reported that based on the small change in his hearing after 1977, occupational noise exposure did not contribute to any worsening of his hearing after 1977; that the claimant's hearing loss involved the lower frequencies to a moderate degree, which is not characteristic of noise-induced damage (Exhibit 36).

"Eric Eta, a licensed audiologist retired since 1993 whose employment did not involve any occupational hearing evaluations after 1973, testified at the hearing and stated that he evaluated noise exposure at most Eden County mills in 1972 and 1973; that the debarker probably produced the loudest ongoing noise, as much as 110 decibels; that, in his opinion and considering all possible causes, the claimant's employment exposure probably was the major

contributing cause of his hearing loss. Mr. Eta was unable to calculate the presbycusis factor in the claimant's hearing loss, but testified that, as to that factor, everyone is different. He also stated that, although the claimant's audiogram results are atypical for noise exposure, again, everyone is affected differently by noise exposure.

"On October 9, 1998, on behalf of Y Corporation, Z Corporation denied compensability of the claimant's hearing loss (Exhibit 29). On October 28, on behalf of X Corporation, SAIF Corporation denied compensability of and responsibility for the claimant's hearing loss (Exhibit 31.)"

(Rec 14-16.)

## **ASSIGNMENT OF ERROR**

### **Preservation of Error**

The Board erred in its Order affirming the ALJ's Order of June 28, 1999, based on this conclusion:

"The greater weight of the medical evidence established that claimant's hearing loss was caused in major part by age-related presbycusis, not noise exposure."

(Rec 80.)

### **Standard of Review**

The Court of Appeals reviews the Board's interpretation of law for errors of law. ORS 183.482(8)(a).

## **ARGUMENT**

In adopting and affirming the ALJ's decision, the Board supplements the ALJ's reasoning by stating:

"However, it is immaterial whether claimant's presbycusis is a 'preexisting condition' within the meaning of ORS 656.005(24). Here, claimant must prove that work exposure was the major contributing cause of his hearing loss. \* \* \* The greater weight of the medical evidence establishes that claimant's hearing loss was caused in major part by age-related presbycusis, not noise exposure."

(Rec 80.)

However, careful consideration of the status presbycusis has been given in the administrative rule governing hearing loss reveals that a hearing loss claim must be judged by the extent to which the loss exceeds the normal, expected age-related presbycusis loss. Therefore, in considering the question of major cause in a work-related hearing loss claim, presbycusis may not be considered among the competing causes, because the work-related hearing loss, by definition, only occurs in excess of normally occurring presbycusis loss. OAR 436-035-0250(4)(b) provides:

"Hearing loss due to presbycusis shall be based on the worker's age at the time of the audiogram. Consult the Presbycusis Correction Values Table below. Find the figure for presbycusis hearing loss. Subtract this figure from the sum of the audiogram entries. These values represent the total decibels of hearing loss in the six standard frequencies which normally results from aging. [Table not included. See ED. NOTE.]" [The ED. NOTE provides that the tables and formula(s) referenced in this rule are not printed in the OAR compilation. Copies are available from the agency.]

A review of the other provisions of OAR 436-035-0250 reveals an intent to compensate workers for "loss of normal hearing which results from an on-the-job injury or exposure" subject to an offset for hearing loss existing before the injury.

Section (4) of the rule is used to determine the monaural percentage of impairment for the baseline audiogram; presbycusis is evaluated based on the worker's age at the time of the audiogram.

The record here shows that claimant was subject to such "baseline" testing; and, after his period of significant exposure, was notified that he had experienced a "significant shift since baseline," – that is, a loss of hearing in excess of what was normally expected. (Exs 7, 9, 10, 14 and 15.)

The application of this principle of evaluating a hearing loss by subtracting the "presbycusis factor" is also evidence in the record of Denice Delta, M.D., the audiogram taken on August 31, 1998. (Ex 27/5.)

The rule states a clear intent to compensate workers for hearing loss **after the loss existing as a result of presbycusis has been taken into account and subtracted or offset**. Therefore, the remaining amount of hearing loss is, by definition, compensable, if shown to be work-related. Or, put another way, the extent of presbycusis loss may not be considered as a competing cause when evaluating the compensable loss from a high-noise work environment because it has already been factored into the calculation of the extent of loss from work exposure.

The Board's decision allows presbycusis as a competing cause and plays it against the work exposure by weighing the causes of the total loss rather than

determining the net loss resulting from the work exposure after taking into account the "presbycusis factor." This allows insurers to "have their cake and eat it too." Rather than determining the amount of loss compensable by taking into account the presbycusis factor, the Board's approach allows eliminating any claim whatsoever for hearing losses related to high-noise work environments if the workers is old enough to allow for more than half of his total overall loss to be calculated as presbycusis. Adopting such an approach flies in the face of the clear intent of the rule and is, therefore, legal error.

### **CONCLUSION**

For all of the reasons set forth above, the Workers' Compensation Board's Order on Review of January 7, 2000 should be reversed, and this matter should be remanded for another hearing before an Administrative Law Judge to determine claimant's hearing loss in excess of the appropriate presbycusis factor, consistent with OAR 436-035-0250.

Respectfully submitted,

**BLACK, WHITE & BLUE**

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Of Attorneys for Petitioner

**EXCERPT OF RECORD**

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OPINION AND ORDER OF THE ALJ

[A copy of the opinion and order of the Administrative Law Judge (ALJ) was included with this brief. *See* ORAP 5.50.]

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ORDER ON REVIEW OF THE  
WORKERS' COMPENSATION BOARD

[A copy of the order on review of the Workers' Compensation Board was included with this brief. *See* ORAP 5.50.]

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**CERTIFICATION OF COMPLIANCE  
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1,905 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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Of Attorneys for Petitioner

## PROOF OF SERVICE

I certify that on the 3rd day of April, 2000 the original and twenty (20) copies of the foregoing Petitioner's Brief were deposited in the United States Post Office at Anycity, Oregon, with first class postage prepaid thereon addressed to:

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I further certify that on the 3rd day of April, 2000 two (2) copies of the foregoing Petitioner's Brief were deposited in the United States Post Office at Anycity, Oregon, with first class postage prepaid thereon addressed to:

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