

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

Injury No.: 13-074707

Employee: Joseph Abt

Employer: Mississippi Lime Company

Insurer: Ace American Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 29, 2016. The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued December 29, 2016, 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 6th day of April 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

VACANT

Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF
WORKERS' COMPENSATION

FINAL AWARD

Employee: Joseph Abt Injury No. 13-074707
Dependents: N/A
Employer: Mississippi Lime Company
Additional Party: N/A
Insurer: Ace American Insurance Co.
Appearances: Robert Meyers, attorney for the employee.
Matthew Mocherman, attorney for the employer-insurer.
Hearing Date: September 28, 2016 Checked by: LCK/sm

SUMMARY OF FINDINGS

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? On or about January 7, 2013.
5. State location where accident occurred or occupational disease contracted: Ste. Genevieve County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did the 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 the employer insured by above insurer? Yes.
11. Describe work the employee was doing and how accident happened or occupational disease contracted: The employee was exposed to industrial noise that caused loss of hearing in the left ear.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left ear.
14. Nature and extent of any permanent disability: 3% permanent partial disability of the left ear.
15. Compensation paid to date for temporary total disability: \$0
16. Value necessary medical aid paid to date by employer-insurer: \$0
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$1,554.14
19. Weekly compensation rate: \$827.75 for temporary total disability and permanent total disability. \$433.58 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$637.36 for permanent partial disability.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the employee shall be subject to a lien in the amount of 15% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Robert Meyers.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On September 28, 2016, the employee, Joseph Abt, appeared in person and with his attorney, Robert Meyers for a hearing for a final award. The employer-insurer was represented by their attorney, Matthew Mocherman. Present for the employer was Safety Director Rick Donovan. The parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Mississippi Lime Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Ace American Insurance Company c/o TPA ESIS, Inc.
2. On or about January 7, 2013, Joseph Abt was an employee of Mississippi Lime Company and was working under the Workers' Compensation Act.
3. The employer had notice of the employee's alleged occupational disease.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage was \$1,554.14. His rate for temporary total disability is \$827.75 and for permanent partial disability is \$433.58.
6. The employer-insurer has not paid any medical aid.
7. The employer-insurer has not paid any temporary disability.
8. Venue is appropriate in Ste. Genevieve County and the venue is proper for the hearing in St. Francois County as it is an adjoining county to Ste. Genevieve County.

ISSUES:

1. Occupational disease.
2. Medical causation.
3. Nature and extent of permanent partial disability.

EXHIBITS:Employee Exhibits:

- Exhibit 1: Mississippi Lime audiology records
Exhibit 2: Medical records of Dr. Susan O'Donnell
Exhibit 3: Medical records of Synergy ENT Specialists
Exhibit 4: Deposition of Dr. David Mason, PhD, including his C.V. and reports

The employer-insurer objected to certain portions of Employee Exhibit 4 including any testimony regarding the causation of the condition of tinnitus and hearing loss; and any testimony regarding the extent of disability as a result of the alleged tinnitus. There was no objection to the CV. With regard to his initial report, the employer-insurer objected to lack of foundation that David Mason is not qualified to testify as an expert based on Section 490.065 RSMo. The

employer-insurer objected to the addendum report based on the seven-day rule. The employer-insurer objected to his opinions based on lack of foundation as not being qualified to testify as an expert pursuant to Section 490.065 RSMo; that his opinions were not offered within a reasonable degree of medical certainty as required by Section 287.190.6 RSMo and that his opinions on the three issues are outside the scope of his expertise.

The objections to Exhibit 4 were taken under advisement. The parties made arguments as to the admissibility in their proposed Awards. Based on a review of Employee Exhibit 4; the decision of the Court of Appeals in *Landers vs. Chrysler Corporation* 963 S.W. 2d. 691 (Mo. App. 2009); and the decision of the Labor and Industrial Relations Commission in Injury Number 02-151330 *Sidney Hudson v. RHI America, Pacific Employer Ins. Co., c/o Crawford & Company*, 2007 WL 455584; in Injury Number 10-113135 *Gary Lawson vs. Mississippi Lime Company*; and in Injury Number 12-103979 *Earl Resinger vs. Mississippi Lime Company*, I find that Dr. Mason is qualified to testify as an expert as to causation and the nature and extent of the alleged injuries. The employer-insurer's objections are overruled, and Employee Exhibit 4 in its entirety is admitted into evidence.

Employer-Insurer Exhibits:

Exhibit A: Deposition of Dr. Mikulec including his C.V. and report.

Exhibit B: Deposition of Dr. Mikulec including his C.V. and report.

Judicial Notice of the contents of the Division's file for the employee was taken.

WITNESS:

Joseph Abt

BRIEFS:

The employee's proposed Award was received on October 20, 2016. The employer-insurer's proposed Award was received on October 27, 2016.

STATEMENT OF THE FINDINGS OF FACT:

The employee testified that he is 64 years old. He goes deer hunting about once a year and shoots his 30.06 once or twice. He used to go turkey hunting and usually fired his 12 gauge shotgun once. He has not gone turkey hunting the last four years. He participates in shooting matches about 20 times a year. He usually shoots 3-4 boards with a 12 gauge shotgun. He has worn noise cancelling headphones since the mid 1970's but has always worn some type of hearing protection since he was in high school. He started working at Mississippi Lime on January 22, 1973. He was on the carpentry crew for about 10 years and worked in different areas of the plant. He then worked as a crane operator and a maintenance man. He worked in both of the employer's plants every day. When he first started working there was no hearing protection required but he wore some form of hearing protection at all times. He religiously wore hearing

protection since he started working at Mississippi Lime even when it was not required. The employees were first required to wear hearing protections in certain areas of the plant in the 1990s.

The employee testified that everywhere at Mississippi Lime was extremely loud and noisy. In some places it's louder than others but the biggest majority of the plant is noisy. He worked as a maintenance person 25% of the time. As a maintenance worker he wore hearing protection 75-90% of the time. When he first started operating the crane they were using hand signals, and he would not have to take off his earplugs. Around the late 1980's or early 1990's, they changed from hand signals to using radios. After that 75% of the time he did not use hearing protection because he had to hear the radio for the safety of others. Due to the extreme heat from the kiln he always kept the left-sided crane door open and had fans blowing air in due to the heat. There were loud noises from the kiln and crane; and loud noises from machines and motors, rock feed-ins, lime loading, and dryer screws.

The employee testified that prior to working at Mississippi Lime he had no problems with ringing, buzzing or tones in his head. He started having problems with humming about 12 years before he stopped working and started having ringing at least 7-8 years before he left. After that started when the crew leader gave him the job assignments in the morning, he could not understand him if someone was talking or making noise. He had to ask the other employees what was said. He could not hear his supervisor at the meetings to start the day due to loss of hearing and the ringing combined. Sometimes on cranes he could not hear what was said on the radio and had to ask them to repeat it. The ringing and buzzing kept getting louder. During that time he never sought medical treatment for hearing loss or ringing. He never spoke to his family physician, Dr. O'Donnell, about problems with ringing or hearing loss prior to leaving Mississippi Lime.

The employee had a hearing test in September of 2000 which showed mild to moderate hearing loss of 30-60 decibels. There was evidence of a mild to moderate hearing loss in one or more frequencies from 500 to 8000 Hertz which may result in difficulty understanding some speech even in ideal quiet listening situations. In November of 2001 the hearing test results showed moderate hearing loss of 45-60 decibels. It was noted that there was evidence of a moderate hearing loss in one or more frequencies from 500 to 8000 Hertz which may result in difficulty understanding some speech even in ideal quiet listening situations. The employee had hearing tests in October or November of 2002, 2003, 2004, 2005, 2006, and 2007 which showed mild to moderate hearing loss of 30-60 decibels. There was evidence of a mild to moderate hearing loss in one or more frequencies from 500 to 8000 Hertz. The type of loss may result in difficulty understanding some speech even in ideal quiet listening situations.

In November of 2008 and 2009, the employee's hearing tests showed mild speech range hearing loss and moderate high pitch hearing loss in the 3000 to 6000 range in the right ear. The left ear showed moderate speech range hearing loss and high pitch hearing loss. The hearing tests in November of 2010 and October of 2011 showed right ear mild speech range hearing loss

and moderate high pitch hearing loss in the 3000 to 6000 range. The left ear showed moderate speech range hearing loss and high pitch hearing loss.

The employee had an employer physical examination on August 15, 2012. Also performed was a hearing test that showed right and left upper frequency hearing loss but no evidence of disease of either ear. The speech frequency showed mild in the left ear and normal in the right.

The employee testified that his last date of employment with Mississippi Lime was on January 7, 2013.

In December of 2013, the employee was seen by David Mason, PhD, who is an audiologist. He performed three hearing evaluations. Dr. Mason noted bilateral tinnitus present. During face-to-face conversation in a quiet room the employee seemed to have mild difficulty communicating. The employee stated that he asked for a lot of repetition in everyday listening situations. The hearing evaluation showed a sloping mild to moderately severe hearing loss above 1000 Hertz and the left ear showed a mild to moderately severe hearing loss for test frequencies above 500 Hertz. The hearing loss for speech was mild at the left ear and borderline normal for the right ear. His speech discrimination ability in quiet was moderately impaired. Based on the Missouri Workers' Compensation Laws, it was Dr. Mason's opinion that the employee's corrected hearing impairment was 0% for the right ear, 3% for the left ear, and 0.5 % for the binaural average. His tinnitus was evaluated by questionnaire. He had a constant abnormal tinnitus for more than 10 years that he rated in the severe range. Dr. Mason rated the impairment due to tinnitus at 10%. There was no evidence he was trying to exaggerate the degree of hearing loss and the hearing loss was consistent with an industrial noise-induced hearing loss.

Dr. Mikulec evaluated the employee on February 28, 2014. Dr. Mikulec's deposition was taken on May 29, 2014. He is a medical doctor and is an associate professor at St. Louis University, specializing in ear surgery and related issues. Dr. Mikulec obtained his medical degree, his internship in general surgery and his residency in otolaryngology. Dr. Mikulec completed a fellowship in otolaryngology at Harvard focused on the treatment of diseases of the ear and related structures. He is board certified as an ENT and in Neurotology and Otology. Dr. Mikulec does two days a week of clinical work seeing patients for complaints related to hearing, tinnitus, and holes in the eardrum, tumors of the ear, dizziness, and etc. and one to two days per week doing surgery on ear-related issues. He spends approximately one day a week on administrative/research tasks including depositions.

The employee reported to Dr. Mikulec that he worked in various capacities at Mississippi Lime and "religiously" wore ear plugs from the beginning of his employment. Dr. Mikulec reviewed the audiograms of the employee taken during his employment at Mississippi Lime which started in 2000. Dr. Mikulec stated that there was no threshold shift from 2000 until he retired in 2013. He reviewed the David Mason's report from December of 2013 which showed a 0% age corrected hearing impairment for the right ear and 3% for the left ear.

The employee reported to Dr. Mikulec of being in a quiet environment since retirement. He reported humming in his ears for the past ten years and ringing for the last 5-6 years. The tinnitus is present about 80% of the time and is more bothersome at night. He uses a box fan for masking at night. The employee reported his tinnitus does not limit his daily activities in any way.

The employee had three audiograms performed in February and March of 2014. Based on the Missouri Workers Compensation parameters, it was Dr. Mikulec's opinion that the employee had a 0% hearing loss in the right ear and a 14.5% hearing loss of left ear. Since David Mason calculated a 3% hearing loss in the left ear in December of 2013 his hearing loss on the left deteriorated rapidly. It was Dr. Mikulec's opinion that hearing loss in the left ear was not related to an occupational noise exposure. The deterioration suggested an underlying medical or genetic cause of hearing loss. It was his opinion that the employee has 0% hearing loss in his left ear related to occupational noise exposure. It was his opinion that the employment at Mississippi Lime was not the prevailing factor in causing the hearing loss in the left ear. Given the hearing asymmetry, the employee should be evaluated for an acoustic neuroma as an underlying cause of his hearing loss. The possible causes for sudden or dramatic hearing loss include an acoustic neuroma which can be diagnosed by MRI.

It was Dr. Mikulec's opinion that since the left ear is deteriorating very rapidly in absence of any noise exposure that noise exposure cannot be a factor. During the 10 or 12 years the employee was tested by the employer when he was in noise exposure his hearing never shifted according to OSHA standards. After he retired there was a dramatic change in his hearing. It was Dr. Mikulec's opinion that it is extraordinarily unlikely that noise exposure at Mississippi Lime is the cause of the hearing loss in the left ear. It was his opinion that the hearing loss is due to an underlying medical cause. It was his opinion that the hearing loss was caused outside of his exposure to occupational noise, because the hearing deteriorated in the absence of occupational noise.

Dr. Mikulec stated that the exact cause of tinnitus is not known, but has been reported in cases of industrial noise exposure or head trauma even though certain individuals exposed to high levels of industrial noise or significant trauma do not report tinnitus. The presence or absence of tinnitus is generally based on the patient history taken at face value. Diagnosis of tinnitus is based upon the subjective report of the patient. It cannot be objectively measured as to the degree of tinnitus. The degree of bother can be estimated to the degree which interferes with the patient's life and previous attempts at treatment. Hearing loss is one of the most common causes and is the cause in this case. It was Dr. Mikulec's opinion that since the employee has no compensable hearing loss according to Missouri criteria and has minimal bother from his tinnitus, there is a 0% disability related to tinnitus.

It was Dr. Mikulec's opinion that the tinnitus in the right ear was unrelated to his occupational noise exposure. The tinnitus is due to hearing loss which is due to normal aging process according to Missouri criteria. The employee does have hearing loss in his right ear but it is not compensable. He does have hearing loss that would be compensable except it was his opinion that it was due to an underlying medical condition.

Dr. Mikulec stated that the employee has no occupationally related hearing loss in the right ear. It was his opinion that the tinnitus in the left ear was not due to his occupational noise exposure since there is clear evidence of a non-occupational degenerative condition in the left ear causing tinnitus. Hearing loss causes tinnitus and the cause of the hearing loss is an underlying medical condition not from noise exposure at Mississippi Lime. It was his opinion that the prevailing factor of the tinnitus is not his employment at Mississippi Lime. Regardless of causation, it was his opinion that the employee had tinnitus but did not have any permanent partial disability associated with that condition because the employee told him that it does not limit his activity in any way. In his clinical practice, the significant majority of patients with tinnitus have not been subjected to industrial noise. It was his opinion that the employee's tinnitus was not causally related to occupational noise exposure. Hearing loss is the most common cause of tinnitus. He has hearing loss in both ears which is due to normal aging particularly the right ear. In the left ear there is an underlying medical process causing the hearing loss. The hearing loss is the proximate cause of the tinnitus.

On May 19, 2014 the employee was seen by Jennifer Taylor, a Doctor of Audiology at Synergy ENT Specialists for a hearing evaluation. She stated that the audiometry test for the right ear showed hearing within normal range sloping to a mild sensor neural hearing loss at 250 to 2000Hertz decreasing to a severe loss that rises to a mild loss at 3000 to 8000Hertz. Testing for the left ear revealed hearing within normal limits sloping to a mild sensor neural hearing loss at 250 to 1000Hertz decreasing to a severe to moderate loss at 1500 to 8000Hertz. Speech reception thresholds indicated normal speech reception for the right ear and a mild loss for the left ear. Word recognition testing suggested a slight difficulty with speech understanding ability bilaterally.

Dr. Gould ordered an MRI of the brain that was performed at Mercy Hospital on May 30, 2014 with a history of bilateral hearing loss, left greater than right, and ringing in the ears.

The employee testified that based on his conversation with Dr. Mikulec, Dr. Gould ordered an MRI of the head which was negative for a neuroma.

Dr. Mason issued a supplemental report on July 17, 2014. He reviewed the deposition of Dr. Mikulec and stated it was very confusing. He reviewed an audiogram that was performed on May 19, 2014. The average threshold for the left ear was 42 decibels whereas he had previously measured the average at 38 decibels. He had taken three measurements whereas the May 19, 2014 audiogram was only one measurement. His average would be expected to be lower due to taking the best of three measurements. He did not feel there was a significant difference in the test results and noted that OSHA defines a significant shift as greater than 10 decibels.

Dr. O'Donnell issued a letter dated August 14, 2014 and stated that the employee had bilateral hearing loss based on the May 19, 2014 test at Synergy ENT Specialists. An MRI that was performed showed no abnormality that could account for the hearing loss.

Dr. Mason's deposition was taken on October 23, 2014. His CV indicated that he had a BA in Speech Pathology; an MA in Audiology and a PhD in Hearing Science. He has been in

private practice as an audiologist since 2003. He taught graduate level classes at the Central Institute for the Deaf in 2003, and undergraduate level audiology and hearing science classes at St. Louis University in 2008-2009. From 1983 to 2003 he was an audiologist and Assistant Professor at the Central Institute for the Deaf in St. Louis; and was Interim Head of Audiology from 1995-1998. He was an audiology consultant to Union Pacific Railroad from 1988-1990.

Dr. Mason testified that he has an audiology practice and performs hearing tests and provides hearing aids to his patients. The employee told him that he worked at Mississippi Lime for 40 years. After the first 20 years, hearing protection was required. Dr. Mason was not sure whether or not the employee wore hearing protection there and if he did, he was not sure what kind. He did not know how often the employee went hunting and did not know if he wore ear protection. That information could be relevant in making a determination about causation. He stated that hunting is not the prevailing factor of the employee's condition.

Dr. Mason testified that his findings, conclusions, and ratings in his initial report were made within a reasonable degree of auditory certainty. After issuing his initial report, he reviewed Dr. Mikulec's report and deposition, the hearing tests from Dr. Gould and Dr. Schulman, and the hearing tests performed at Mississippi Lime. He was confused because Dr. Mikulec's audiogram results were out of line with Dr. Mason's results and the results from the May 19, 2014 audiogram. Dr. Gould and Dr. Schulman's hearing loss records measured the same as he did within the variability of the test. Dr. Mason stated that the discrepancy between his audiogram results in December of 2013 and the results of the test taken on May 19, 2014 was within four decibels. The results of Dr. Mikulec's tests were possibly temporary or else were wrong.

Dr. Mason testified that he took a history of the employee's job activities including not wearing an earplug while operating the crane due to having to listen to the radio. A person that worked in an area where one side of his head was exposed to the harmful noise and the other side was in the interior away from the noise could create a difference in hearing loss between his ears.

Dr. Mason testified that when a company requires hearing protection and is performing annual hearing tests, there is a risk for hearing loss. Annual hearing tests are required if the noise level is above 85-90 decibels. Industrial noise is one of a number of things that can cause both hearing loss and tinnitus. He has never been to Mississippi Lime to take measurements and has never reviewed any measurements. When Dr. Mason was asked whether the harmful noise exposure at Mississippi Lime was the prevailing factor in the cause of his hearing loss and tinnitus, he testified that "I think the hearing loss, the primary cause or the prevailing cause would be the noise exposure at work."

Dr. Mason testified that there was no way to objectively diagnose or measure tinnitus and someone could cheat on his tinnitus questionnaire. Dr. Mason always gives a rating of 10% for abnormal tinnitus regardless of the results of the tone matching test or the person's subjective complaints. Tinnitus is caused by damage to some part of the ear. People with hearing loss typically have tinnitus and people without hearing loss generally do not.

After he reviewed the MRI of the brain, reports from Dr. O'Donnell and Audiologist Taylor and the deposition of Dr. Mason, Dr. Mikulec prepared a supplemental report on December 3, 2014. Dr. Mikulec was deposed on July 14, 2005. He and Dr. Mason agree that the employee has a 0% hearing loss in the right ear based on Missouri standards. The employee does have hearing loss which is not compensable. Dr. Mikulec performed Missouri hearing loss calculations based on the May 19, 2014 audiogram which showed an impairment of 7% in the left ear and 0% in the right ear. The 7% is greater than the 3% age correct hearing impairment noted by Dr. Mason in December of 2013. Dr. Mikulec stated hearing loss that fluctuates cannot be due to occupational noise exposure and that noise exposure does not cause such a progressive or fluctuating hearing loss. The exact cause of the hearing loss cannot be definitely determined.

Based on the available evidence, it remained his medical opinion that occupational noise exposure is not the prevailing cause of the hearing loss. His opinion is based on multiple reasons. There was no evidence that the noise exposure exceeded allowable OSHA limits; the employee reported that he wore ear plugs religiously; there was no threshold shift that occurred during employment; the hearing on the left either worsened or fluctuated since retirement which meant that an underlying medical condition was responsible for the loss; and the employee had a long history of shooting right-handed with high powered weapons which preferentially exposes the left ear to blast trauma and has been showed to cause asymmetric decrease in hearing in military recruits and shooters despite the use of hearing protection.

Dr. Mikulec stated that fluctuation of hearing could be attributable to a medical condition (such as an autoimmune or viral etiology) or patient participation. The equipment he used in testing was properly calibrated which ruled that out as a fluctuation source.

Based on the additional information, it was Dr. Mikulec's opinion that irrespective of the percentage of hearing loss, the preponderance of the evidence strongly supports that occupational noise exposure did not cause the loss. The results of the MRI ruled out acoustic neuroma or brain tumor as a potential cause of the hearing loss. When asked if he were aware that employee had to work in the cab of a crane where he customarily had the window down on his left side for safety reasons whether that could affect his opinion, he stated that his opinion is based on the information that was provided to him. He would not comment on what he has not been given.

It was Dr. Mikulec's opinion that the employee's non-occupational hearing loss is the direct cause of his tinnitus. It was Dr. Mikulec's opinion that if hearing loss is non-occupational or hearing is normal according to Missouri criteria, tinnitus cannot be due to occupational noise exposure because the tinnitus is the direct result of the hearing loss. There is no evidence of limitation of daily activities due to tinnitus.

The employee testified that he has humming and ringing about 80% of the time which has affected his life at work and at home. At home, he asks his wife what she said a couple of times. He tries to avoid large crowds but when he is out in public he tries to read the lips of people. Sometimes he cannot understand what they say. His left side is worse than the right due to the crane door being open all the time with no hearing protection. He has a limited social life due to trouble hearing people. It is embarrassing because he does not know what people are saying or

asking. He would just as soon stay at home. He did not go to his recent 45th class reunion because it was going to be noisy with a band.

The employee testified that he thought the noise level at Mississippi Lime took his hearing and caused his tinnitus. He has had to learn to live with the tinnitus for the last 12 years. He uses a box fan to sleep at night and has to turn his television way up. To his knowledge he has no health issues that have affected his hearing.

RULINGS OF LAW:

Issue 1. Occupational Disease and Issue 2. Medical causation.

It is disputed that on or about January 7th of 2013 that the employee sustained an occupational disease arising out of and in the course of his employment and that the employee's injury was medically causally related to the alleged occupational disease.

Under Section 287.067.2 RSMo, an injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The “prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Under Section 287.067.4 RSMo, loss of hearing due to industrial noise is recognized as an occupational disease and is hereby defined to be a loss of hearing in one or both ears due to prolonged exposure to harmful noise in employment. Harmful noise means sound capable of producing occupational deafness.

Tinnitus is a compensable work related injury separate and apart from accompanying hearing loss. See *Thatcher vs. Trans World Airlines*, 69 S.W. 3d 533 (Mo.App.2002); *Poehlin vs. Trans World Airlines, Inc.* 891 S.W. 2d 505 (Mo.App.1994); *Lawrence vs. Anheuser-Busch Companies, Inc.* 310 S.W. 3d 248 (Mo. App. 2010).

The burden of proof is on the employee to prove all material elements of his claim. See *Marcus v. Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo. 1968) and *Walsh v. Treasurer of the State of Missouri*, 953 S.W.2d 632,637 (Mo. App. 1997). The employee has the burden to prove that his injuries arose out of and in the course of employment. See *Smith v. Donco Construction*, 182 S.W.3d 693 (Mo. App. 2006). Medical causation that is not a matter of common knowledge or experience must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause of the condition. See *Bond v. Site Line Surveying*, 322 S.W.3d 165, 170 (Mo. App. 2010). The employee has the burden of proof that he suffered a work-related injury and the alleged occupational disease was the prevailing factor in causing both the resulting medical condition and disability. See *Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d (Mo. App. 2012) and *Bond v. Site Line Surveying*, 322 S.W.3d 165 (Mo. App. 2010). A work injury is compensable only if the alleged occupational disease was the prevailing factor in causing both the resulting medical condition and disability. See *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo. App. 2008).

Tinnitus

Dr. Mikulec stated that the exact cause of tinnitus is not known, but has been reported in cases of industrial noise exposure or head trauma. Hearing loss is one of the most common causes. It was Dr. Mikulec's opinion that the employee's non-occupational hearing loss is the direct cause of his tinnitus, and that the tinnitus in the right ear and left ear are not due or related to his occupational noise exposure. It was his opinion that the prevailing factor of the tinnitus was not his employment at Mississippi Lime and that the tinnitus was not causally related to the occupational noise exposure. It was his opinion that the employee did not have any permanent partial disability associated with tinnitus because he was minimally bothered by it and it did not limit his activity.

Dr. Mason testified that industrial noise is one of a number of things that can cause both hearing loss and tinnitus. People with hearing loss typically have tinnitus and people without hearing loss generally do not. When Dr. Mason was asked whether the harmful noise exposure at Mississippi Lime was the prevailing factor in the cause of his hearing loss and tinnitus, he testified that "I think the hearing loss, the primary cause or the prevailing cause would be the noise exposure at work." Dr. Mason rated the impairment from tinnitus at 10% which is the rating he gives for abnormal tinnitus regardless of the results of the tone matching test or subjective complaints.

I find that Dr. Mikulec's opinion is more persuasive than the opinion of Dr. Mason on the tinnitus condition.

Dr. Mason did not give an opinion either in his report or in deposition testimony regarding the cause of the tinnitus; and did not give an opinion that the tinnitus was work-related or that his exposure to noise at work was the prevailing factor in causing both the resulting medical condition of tinnitus and disability from the tinnitus. I find that there was not competent medical evidence to satisfy the employee's burden of proof of a direct medical causal connection between the occupational noise exposure and the tinnitus condition. I find that the employee has failed to meet his burden of proof that the tinnitus condition is medically causally related to the occupational noise exposure.

Based on a thorough review of all of the evidence, I find that the employee failed to satisfy his burden of proof on the issues of occupational disease and medical causation with regard to tinnitus. I find that the employee did not meet his burden of proof that the occupational noise exposure was the prevailing factor in causing both the medical condition of tinnitus and the disability. I find that the occupational exposure was not the prevailing factor in causing the tinnitus and disability. I further find that the employee did not sustain a compensable work-related tinnitus that arose out of and in the course of his employment, and the employee's tinnitus condition, injury, disability, is not medically causally related to his employment. The employee's claim for tinnitus is denied.

Hearing Loss:

The employee's testimony regarding his noise exposure at work and the problems with his hearing is credible and persuasive

In December of 2013, it was Dr. Mason's opinion that the employee's corrected hearing impairment was 0% for the right ear, 3% for the left ear, and 0.5 % for the binaural average.

In February of 2014, it was Dr. Mikulec's opinion that the employee had a 0% hearing loss in the right ear and a 14.5% hearing loss of the left ear. He stated that since December of 2013 the employee's hearing had deteriorated rapidly in the left ear. It was Dr. Mikulec's opinion that the hearing loss was not related to an occupational noise exposure but was instead from an underlying medical or genetic cause. It was his opinion that the employee has 0% hearing loss in his left ear related to occupational noise exposure. It was his opinion that the employment was not the prevailing factor in causing the hearing loss in the left ear.

The employee had an audiology test in May of 2014. Dr. Mason issued a supplemental report on July 17, 2014 after reviewing the additional tests and the opinion of Dr. Mikulec. He did not feel that there was a significant difference in the test results from December of 2013 and May of 2014. Dr. Mason testified that Dr. Mikulec's audiogram results were out of line with his December of 2013 results and the results from the May 19, 2014 audiogram. The results in December of 2013 compared to the May of 2014 results were within four decibels. It was Dr. Mason's opinion that Dr. Mikulec's test results were possibly temporary or wrong. Dr. Mason testified that when a company requires hearing protection and is performing annual hearing tests there is a risk for hearing loss. It was Dr. Mason's opinion that the primary or prevailing cause of the employee's hearing loss was the noise exposure at work.

After reviewing additional medical records and deposition of Dr. Mason, Dr. Mikulec issued a supplemental report in December of 2014 and was again deposed in July of 2015. Based on the May of 2014 audiogram, it was his opinion that the employee had a 7% hearing loss in the left ear and 0% hearing loss in the right ear which was higher than Dr. Mason's calculation five months earlier. It was Dr. Mikulec's opinion that fluctuating hearing loss cannot be due to occupational noise exposure. It was his continued opinion that the occupational noise exposure is not the prevailing cause of the employee's hearing loss.

Based on the evidence, I find that the opinion of Dr. Mason is very persuasive and is more persuasive than the opinion of Dr. Mikulec.

Based on the evidence, I find that the employee's prolonged occupational exposure to harmful noises during his employment with Mississippi Lime Company was the prevailing factor in causing the resulting medical condition and disability of loss of hearing to the left ear. I find that the employee sustained a compensable work-related occupational disease and injury to his left ear that arose out of an in the course of his employment. I find that the employee's hearing loss in the left ear is medically causally related to the employee's occupational disease.

Issue 3. Nature and Extent of Permanent Partial Disability.

The compensability of job-related hearing loss is governed by Section 287.197 RSMo and 8 CSR 50–5.060. Loss of hearing due to industrial noise for compensation purposes shall be confined to the frequencies of 500, 1000, and 2000 cycles per second. Loss of hearing ability for frequency tones above 2000 cycles per second are not considered as constituting disability for hearing.

It was Dr. Mason’s opinion that the employee’s corrected hearing impairment was 0% for the right ear, 3% for the left ear, and 0.5 % for the binaural average. It was Dr. Mikulec’s opinion that the employee had a 0% hearing loss in the right ear and a 14.5% hearing loss in the left ear but none was related to occupational noise exposure.

Dr. Mikulec and Dr. Mason both agree that the employee did not have a compensable occupational hearing loss in the right ear. I find that the rating by Dr. Mason for the binaural average is not applicable. The award of permanent partial disability shall be based upon loss of hearing to the left ear only.

I find that as a direct result of occupational disease the employee sustained a 3% permanent partial disability of the left ear at the 49 week level. The employer-insurer is ordered to pay to the employee a total of 1.47 weeks of compensation at the rate of \$433.58 per week for a total award of permanent partial disability of \$637.36.

ATTORNEY’S FEE:

Robert Meyers, attorney at law, is allowed a fee of 15% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation