

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

Injury No.: 99-087285

Employee: Rick Ehrhard  
Employer: Western Waterproofing  
Insurer: Travelers Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Dismissed)

Date of Accident: February 17, 1999

Place and County of Accident: St. Louis

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 24, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued May 24, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Rick Ehrhard

Injury No.: 99-087285

Dependents: N/A  
Employer: Western Waterproofing  
Additional Party: N/A  
Insurer: Travelers Insurance Company  
Hearing Date: March 8, 2006

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

Checked by: MDL:tr

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? N/A
3. Was there an accident or incident of occupational disease under the Law? N/A
4. Date of accident or onset of occupational disease: February 17, 1999
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
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:  
Alleged tinnitus as a result of working around jackhammers and water demolition work.
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: Ears and head
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Rick Ehrhard Injury No.: 99-087285

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$677.17
19. Weekly compensation rate: \$451.45/\$294.73
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL:

-0-

23. Future requirements awarded: N/A

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

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

N/A

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Rick Ehrhard	Injury No.: 99-087285
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Western Waterproofing	Department of Labor and Industrial Relations of Missouri
Additional Party:	N/A	Jefferson City, Missouri
Insurer:	Travelers Insurance Company	Checked by: MDL:tr

### **PRELIMINARIES**

A hearing was held on March 8, 2006, at the Division of Workers' Compensation in the City of St. Louis. Prior to the hearing, Claimant's counsel requested a continuance for the purpose of obtaining a vocational assessment, however, this request was denied by Chief Administrative Law Judge Kohner. Rick Ehrhard (Claimant) was represented by Mr. Dennis Barbour. Western Waterproofing (Employer) and its Insurer Travelers Co. were represented by Mr. Robert Hendershot. The Second Injury Fund was represented by Assistant Attorney General Da-Niel Cunningham.

The parties stipulated that Claimant was an employee of Employer; venue is proper in the City of St. Louis; and the claim was timely filed. The parties further stipulated that Claimant was earning an average weekly wage of \$677.17 resulting in rates of compensation of \$451.45 for total disability benefits and \$294.73 for permanent partial disability benefits. Employer has paid no benefits.

The issues for resolution by hearing are: Did Claimant sustain an occupational disease arising out of and in the course

of employment; is the named Employer responsible under the Act for benefits pursuant to the last exposure rule; is Employer liable for temporary total disability benefits for the period of December 24, 2000 through January 4, 2006; what is the nature and extent of Claimant's permanent partial disability; is Claimant permanently and totally disabled; and is the Second Injury Fund liable to Claimant?

### **SUMMARY OF EVIDENCE**

All evidence presented has been reviewed. Only testimony necessary to support this award will be summarized.

Claimant worked for Employer beginning in late 1986 as a laborer, working on various concrete restoration projects around St. Louis County, including the Pierre Laclede Garage Project. As a laborer, he worked 40 hours per week, operating a 30-pound Ingersoll-Rand jackhammer six and one-half hours per day. Claimant usually worked as part of a 5 to 6 man crew, the "Hammerdogs", who were all operating jackhammers.

The Ingersoll-Rand jackhammers were unmuffled, and were operated through the use of loud air compressors. On the Pierre Laclede Project, he worked approximately three levels below grade. This project used an extremely large air compressor, which had to eventually be brought into the building due to complaints from the neighbors. Claimant also worked around water demolition units which ran off of a large diesel compressor.

Claimant first noticed a constant ringing in his ears in 1987, shortly after beginning employment with Employer. The ringing was initially rated by Claimant as being 4 to 5 out of 10, but it had reached an intensity of 10 out of 10 by 1989 to 1990, when Claimant was working around water demolition. Since he first developed tinnitus, it has remained steady and non-fluctuating except when aggravated by loud noises. He described the tinnitus as a high-pitched squeal, loud enough that it overrides normal conversation and interferes with everything.

Claimant last worked for Employer on February 17, 1999. On March 25, 1999, he began employment with Superior Waterproofing. He testified that he operated a jackhammer for two months while working for Superior, as well as a rotor hammer. The noise level at Superior was not as severe as at Employer's. A lot of his work for Superior involved tuckpointing, but he worked near a loud cement mixer. Claimant was employed by Superior until September 2001.

Claimant first filed a claim for tinnitus against Employer on July 28, 1999, while working for Superior Waterproofing. Claimant acknowledged that he does not have compensable hearing loss as defined by the Missouri Workers' Compensation Act.

David Mason, Ph.D. testified on behalf of Claimant. Dr. Mason testified that if Claimant were exposed to loud noises such as jackhammers in a subsequent job, his current levels of tinnitus could be related to that ongoing exposure at the new job.

Dr. Raymond Cohen also testified on behalf of Claimant. Dr. Cohen testified that Claimant's tinnitus was a direct result of his work, and from a direct result of an industrial exposure that he sustained from his work up through February 17, 1999, and that the work is a substantial factor in his disability. Dr. Cohen further testified that after working for Employer Claimant worked for 18 months for Superior Waterproofing, and Claimant's last exposure to industrial noise was with Superior Waterproofing rather than Employer.

### **FINDINGS OF FACT AND RULINGS OF LAW**

Based upon my observations of Claimant at hearing, my comprehensive review of the medical evidence, and the application of Missouri law, I find:

Employer is not responsible for Claimant's disability by operation of the "last exposure rule".

Section 287.063.1 RSMo 2000 states:

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of section 287.067 RSMo. (emphasis added).

Section 287.063.2 RSMo 2000, the so-called "last exposure rule", states:

The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time

of such last exposure.

Section 287.067.7 RSMo 2000, the so-called "90-day rule", states:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

Claimant was employed by Employer from 1986 to February 15, 1999, and was employed by Superior Waterproofing from March 1999 until September 2001. Since Superior Waterproofing was the last employer to expose Claimant to the hazard of the occupational disease for which his claim was made, it is liable for compensation under the law. Claimant last worked for Employer on February 17, 1999. His Claim for Compensation was filed July 28, 1999, and he was already working for Superior Waterproofing at that time. The so called "90 day rule" has no application in this case, because the "90 day rule" only applies to occupational disease due to repetitive motion, and this claim arose from excessive noise, not repetitive motion.

I find Claimant was exposed, while working for Superior Waterproofing to jackhammers and a cement mixer, which are hazards of the occupational disease of tinnitus. Dr. Mason and Dr. Cohen both testified that loud noises such as jackhammers and cement mixers were "exposures" and constituted industrial noise. The Last Exposure Rule is not a rule of causation, but a rule of convenience. It is not necessary to determine which of two Employers produced more exposure.

Because I find Superior Waterproofing rather than Employer is the liable party, and Superior is not named as a party, the remaining issues are moot. Furthermore, the claim against the Second Injury Fund is dismissed.

The Claim for Compensation is denied.

Employee: Rick Ehrhard

Injury No.: 99-087285

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Margaret D. Landolt  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
Director  
Division of Workers' Compensation

