

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

Injury No.: 02-151330

Employee: Sidney O. Hudson  
Employer: RHI America  
Insurer: Pacific Employer Insurance Co.  
c/o Crawford & Company

Date of Accident: April 12, 2002

Place and County of Accident: Callaway County

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 July 14, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Vicky Ruth, issued July 14, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9<sup>th</sup> day of February 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

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

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

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

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Sidney O. Hudson

Injury No. 02-151330

Dependents: N/A  
Employer: RHI America  
Additional Party: None  
Insurer: Pacific Employer Insurance Co.,  
c/o Crawford & Company  
Hearing Date: April 13, 2006

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

**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? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: N/A.
5. State location where accident occurred or occupational disease was contracted: N/A.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?  
Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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:  
The claimant worked in the dry press department as a press mechanic.
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: Alleged: ears (tinnitus).
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$329.42 for PPD.
20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None.
22. Second Injury Fund liability: N/A.

TOTAL: N/A.

23. Future requirements awarded: N/A.

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

Employee: Sidney O. Hudson

Injury No: 02-151330

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: RHI America

Additional Party None

Insurer: Pacific Employer Insurance Co.,  
c/o Crawford & Company

This workers' compensation claim was heard before the undersigned administrative law judge on April 13, 2006. One witness, Sidney Hudson, testified live at the hearing. Several other witnesses, including Dr. Mason and Dr. McKinney, testified by means of depositions admitted at the hearing. The deadline for the submission of briefs or proposed awards was set as May 1, 2006. At the request of the claimant, the deadline was extended to May 15, 2006. Both the claimant and the employer submitted a brief or proposed award.

### **STIPULATIONS**

The parties stipulated that the claimant was an employee of RHI America on April 12, 2002; that the employer was operating under the provisions of the Missouri workers' compensation law; that the employer was insured by Pacific Employer Insurance Co., c/o Crawford & Company, for all periods relevant hereto; that the Division of Workers' Compensation has jurisdiction in this matter; that venue is proper; that if compensable, the claimant is entitled to a compensation rate of \$329.42, for permanent partial disability (PPD) benefits. The parties agreed that temporary total disability (TTD) benefits are not an issue in this case. The parties also agreed that no medical aid has been provided.

### **ISSUES**

The issues to be resolved in this case are as follows:

1. Whether the employer's failure to timely file an answer to the Claim for Compensation operates to admit causation of the employee's medical condition;
2. Medical causation and liability; and
3. Nature and extent of permanent partial disability.

## FINDINGS OF FACT

Sidney Hudson, the claimant, testified on his own behalf at the hearing. All other witnesses testified by deposition. The claimant indicated that he began working for A.P. Green Refractories in 1988. He continued to work there until the plant closed in April 2002. The claimant acknowledged that sometime in the late 1990s, his employer became RHI America and remained so until the plant closed.

The claimant testified that while at both A.P. Green and RHI America, he worked in the dry press department as a press mechanic. He described a variety of loud noises in the press department, including noises from steel balls pounding against bins, the sound of cars pulled on a chain, the release on the air pressure and the clanging of the presses. He described an environment that was very loud and noisy. The claimant also testified that normal conversation was often not possible in the press areas and that in those areas he had to talk loudly or shout to be heard. The claimant explained that although he began wearing hearing protection in the late 1990s, he did not wear it all of the time.

The claimant testified that he has a constant, locust-like ringing in his ears. He first noticed this several years ago. He hears it constantly, but notices it most as he falls asleep. The claimant denied any past history of ear diseases or ear surgeries. He has never been treated for hearing loss. The claimant indicated that the tinnitus was a constant whistle. He testified that the ringing in his ears affects his ability to hear the television or radio. It also affects his ability to talk on the telephone, and to hear conversations distinctly, particularly in noisy environments. At times, the ringing affects his ability to go to sleep.

The claimant indicated that he used to hunt rabbits and deer, using either a .22 rifle or a 12-gauge shotgun. He has not, however, hunted within the past three or four years. He acknowledged that he uses a chainsaw annually to cut approximately 7 truckloads of wood. He denied using hearing protection with either activity.

Before working for A.P. Green and later RHI America, the claimant worked for Harbison Walker Refractories for 11 years. At Harbison Walker, he was regularly exposed to loud noise. The claimant did not wear hearing protection there. In addition, the claimant worked in construction for four years.

When his employment with RHI America ended, the claimant was self-employed, and worked with sheet rock and constructed metal buildings. The claimant returned to Harbison Walker in November 2003, where he has worked ever since. He is again working in the press department. The claimant acknowledged that this environment is noisier than the one he worked in at A.P. Green, and later RHI America, because it is smaller with more presses and metal roofing.

In addition to his own testimony at the hearing, the claimant submitted the deposition testimony of Dr. David Mason. Dr. Mason testified that he is an audiologist and holds a Masters degree in audiology and a Ph.D. in Hearing Science. Dr. Mason testified that as an audiologist, he has treated people with tinnitus. Dr. Mason stated that he had an opportunity to examine the claimant and that he took a history of his thirty-year employment in brick refractories. According to Dr. Mason, the claimant described the work environment as a high noise area.

Dr. Mason indicated that, between September 21, 2004, and October 15, 2004, hearing evaluations were conducted on the claimant in accordance with the statute; Dr. Mason testified that no compensable hearing loss was found as a result of those tests. Dr. Mason did note that the claimant complained of tinnitus or ringing in the ears. Dr. Mason also explained that the claimant filled out a tinnitus questionnaire, and based on this, Dr. Mason concluded that the claimant had abnormal tinnitus that he valued at a 10% impairment. Dr. Mason also testified that the claimant's tinnitus was related to the noise he was subjected to at work for 30 years. On cross-examination, Dr. Mason conceded that he is not a medical doctor. He also agreed that the evaluation of tinnitus is subjective, and that one must rely on the credibility of the claimant.

The employer and its insurer submitted the deposition of Dr. John McKinney. Dr. McKinney testified that he is a board-certified ENT (Ear, Nose, and Throat) physician. Dr. McKinney evaluated the claimant on October 1, 2004, at which time he also took the claimant's employment and social history. Dr. McKinney noted that the claimant gave a past history of hunting deer and rabbit, as well as use of a chainsaw to cut seven truckloads of wood per year. Dr. McKinney explained that the noise from the chainsaw use could be a contributing factor for the claimant's tinnitus. Dr. Mason's examination showed a fairly normal ear exam. The doctor noted that audiometric evaluations were performed. Based on this evaluation, Dr. Mason determined that the claimant had a 0% hearing loss according to the Missouri Workers' Compensation statute.

Dr. McKinney also noted that the claimant complained of tinnitus. Dr. McKinney explained that tinnitus cannot be

tested objectively and is a subjective complaint of the patient. Dr. McKinney testified that based on the claimant's complaints, he has a 1% disability of the body as a whole. Dr. McKinney further explained that "the presence of tinnitus in workers in industry does not prove that the origin of the condition of tinnitus is secondary to industrial noise." Dr. McKinney testified that while it is possible that the claimant's tinnitus occurred from industrial noise exposure, he could not say the tinnitus is related to his work within a reasonable degree medical probability.

On cross-examination, Dr. McKinney acknowledged that noise exposure above certain levels puts one at risk for hearing loss. He also explained that individuals with hearing loss are at greater risk for tinnitus. Dr. McKinney then admitted that such levels of noise would generally put one at greater risk for tinnitus, but he explained that in the claimant's case, there were other environmental factors aside from work that were possible contributors to his tinnitus. Dr. McKinney stated that it is impossible to quantify whether the claimant's work was more likely than not the cause of his tinnitus. Although Dr. McKinney did not determine that the claimant's tinnitus was caused by his work environment, he did testify that in his opinion, the claimant has a 1% impairment due to his tinnitus.

## CONCLUSIONS OF LAW

### 1. Effect of an Untimely Answer

The claimant contends that medical causation is not an issue in this case because causation is admitted by the employer's failure to file an answer in timely manner. The Claim for Compensation was filed on or about May 14, 2003, and the Division of Workers' Compensation mailed acknowledgement of the Claim on May 16, 2003. The employer's Answer was filed on or about January 22, 2004. Thus, the Answer was not filed within the prescribed 30 days. <sup>[1]</sup>

The employer argues that assuming that the employer's Answer was untimely, any such failure did not serve to admit the issue of medical causation. The employer contends that this issue is controlled by *Jackson v. Midwest Youngstown Inds.*, <sup>[2]</sup> which holds that an employer's failure to file a timely answer does not result in an admission of causation. <sup>[2]</sup> Observing that the issue of whether an injury arises out of and in the course of employment is ultimately a question of law, the court ruled that the provision in 8 CSR 50-2.010(13), indicating that the statements in a claim shall be taken as admitted for failure to file a timely answer, did not include an admission of the legal question of whether the claimant's injury arose out of and in the course of his employment. According to the court in *Jackson*, this is a question of law that cannot be admitted by the failure to file a timely answer. Therefore, the question of medical causation is not removed for the Administrative Law Judge's consideration by 8 CSR 50-2.010(13).

I conclude that, under the *Jackson* case, the employer's failure to timely file its Answer does not result in an admission of the legal question of whether the claimant's injury arose out of and in the course of his employment.

### 2. Medical Causation for Occupational Disease

The claimant offered the testimony of Dr. Mason, an audiologist licensed in the State of Missouri. The employer objected to the admission of Dr. Mason's testimony on the grounds that as an audiologist, and not a medical doctor, Dr. Mason lacks the expertise to testify relating to the cause of the claimant's condition or the nature and degree of his disability. The employer relies on the case of *Piper v. Missouri Pacific Railroad Company*, <sup>[3]</sup> a FELA case from 1993, in which the court held that while an audiologist may be able to testify as to the types, quality, duration, and loudness of sounds necessary to cause hearing loss, an audiologist "is not a medical doctor and does not have the medical expertise to assess the medical factors required to make a diagnosis that noise was the cause of the plaintiff's hearing problems." <sup>[4]</sup> The court did note that there appears to be a split of authority in other jurisdictions concerning the propriety of allowing audiologists to testify on causation of hearing problems.

The claimant, however, relies on a more recent case, *Landers v. Chrysler Corporation*, <sup>[5]</sup> that specifically address the use of expert testimony in Missouri workers' compensation cases. This case involved a Chrysler Corporation employee who was injured when a sky hook struck him on the top of the head. At the hearing on his workers' compensation claim, the

claimant had two clinical psychologists, Dr. Thomas Fitzgerald and Dr. Richard Wetzel, testify on his behalf as to causation and the nature and extent of his disability. The administrative law judge relied on the testimony of the psychologists, and found that the claimant had 50% disability referable to the body as a whole as a result of the injury. The Labor and Industrial Relations Commission affirmed.

On appeal, the court affirmed the findings of the Commission. In its discussion of the issue, the court noted that the majority of states accept that a psychologist may give expert testimony regarding the causation of a brain injury. The court also noted that Missouri courts have recognized that medical personnel, other than medical doctors, may be qualified to testify to matters within the limited and precise range of their medical specialties.

Based on my review, I conclude that the employer's objection to the admission of Dr. Mason's testimony should be overruled. Thus, Dr. Mason, an audiologist, may testify regarding the causation and the nature and extent of the claimant's injury.

The employee bears the burden of proving all essential elements of his Claim.<sup>[6]</sup> Thus, the employee has the burden of proving that he or she was injured as a result of an accident that "arose out of" and "in the course of" his or her employment.<sup>[7]</sup> The employer does not have the burden of proving that the claimant's injuries were incurred in a non-work related activity; rather, it is the claimant's responsibility to prove that the injury was work-related.<sup>[8]</sup> The claimant must prove a direct casual connection between the conditions under which the work is performed and the alleged injury or occupational disease.<sup>[9]</sup>

In a case involving complex medical issues, proof by competent medical evidence is required.<sup>[10]</sup> The quantum of proof is reasonable probability.<sup>[11]</sup> Where the opinions of medical experts are in conflict, the fact-finding body determines which opinion is the most credible.<sup>[12]</sup> Thus, where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.<sup>[13]</sup>

In this case, the claimant has failed to prove that the tinnitus he complains of is medically causally related to his employment with RHI America. The claimant offered the testimony of Dr. Mason, an audiologist. Dr. Mason stated that "I would say the tinnitus was related to the noise that [the claimant] listened to for thirty years on the job." Dr. Mason did not address the other possible contributing factors in his evaluation of the claimant, and made no assessment as to their effect. In addition, Dr. Mason did not provide testimony that RHI America was specifically a substantial factor in the development of the claimant's tinnitus. Instead, Dr. Mason testified that "I would say the tinnitus was related to the noise that he listened to for thirty years on the job." Dr. Mason's testimony on this point is not sufficient to establish a causal connection between the claimant's complaints and his employment at RHI America.

The employer provided the testimony of Dr. McKinney, a medical doctor and ENT (Ear, Nose, and Throat) specialist. Dr. McKinney's testimony was more credible than that of Dr. Mason. Dr. McKinney concluded that it is not possible to conclude with any probability that the claimant's tinnitus was noise-induced. The doctor conceded that it is possible, but emphasizes that it is his opinion that it cannot be determined more likely than not that the claimant's employment was the cause of his alleged tinnitus. Dr. McKinney pointed out that he has treated many patients for complaints of tinnitus where there is no history of a noisy work environment, which further supports his opinion that the work environment is only a possible source of the many possible sources of tinnitus.

To say that it is possible is not sufficient for the claimant to establish a casual connection between his alleged tinnitus and his employment with RHI America. The claimant must show reasonable probability that there is a casual connection between his employment and the tinnitus. I conclude that the claimant has failed to prove that his tinnitus is medically causally related to his employment with RHI America.

## **DECISION**

The claimant has failed to prove that his complaints of tinnitus are medically causally related to this employment with RHI America. Therefore, the claimant's Claim for Compensation fails and all other issues are rendered moot. Any objections not expressly ruled on in this award are overruled.

Date: July 14, 2006

Made by: /s/Vicky Ruth  
Vicky Ruth  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/Patricia "Pat" Secrest  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*

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[1] 8 CSR 50-2.010(8).

[2] 849 S.W.2d 709 (Mo.App. 1993).

[3] 847 S.W.2d 907 (Mo.App. E.D. 1993).

[4] *Piper*, at 909.

[5] 963 S.W.2d 275 (Mo.App. E.D. 1997).

[6] *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App.E.D. 1990).

[7] Section 287.120.1, RSMo 2000; *Trammel v. S & K Industries, Inc.*, 784 S.W.2d 209 (Mo.App. 1989); *Barnes v. Ford Motor Co.*, 708 S.W.2d 198 (Mo.App. 1986) *Westerhold v. Unitog-Holden Mfg. Co.*, 707 S.W.2d 456 (Mo.App. 1986).

[8] *Johnson v. City of Kirksville*, 855 S.W.3d 396 (Mo.App. 1993).

[9] *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo.App. 1991).

[10] *Downs v. ACFI Industries, Inc.*, 460 S.W.2d 293 (Mo.App. 1970).

[11] *Fischer*, at 199.

[12] *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo.App. 1984).

[13] *George v. Shop 'N Save Warehouse Foods*, 855 S.W.2d 460 (Mo.App. 1993); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992).