

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

Injury No.: 01-168328

Employee: Richard A. Jones

Employer: GST Steel Company

Insurer: GS Technologies Operating Company

Date of Accident: May 15, 2001

Place and County of Accident: Kansas City, Jackson County, Missouri

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. We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated May 16, 2007.

Preliminaries

The issues stipulated at trial were whether the Commission had jurisdiction to hear and rule on the underlying workers' compensation claim; and the nature and extent of permanent disability resulting from the employee's alleged exposure to noise in the workplace.

The administrative law judge determined and concluded that proper notice of employer's bankruptcy was not given to employee because the notice mailed by the bankruptcy court never reached the employee; therefore, the administrative law judge found that the requirement under section 287.865.5 RSMo, that employee file a timely proof of claim, was waived. The administrative law judge found that employee suffered 10% permanent partial disability to the body as a whole referable to the tinnitus; based on stipulation of the parties that employee suffered 12.825% permanent partial disability due to binaural hearing loss; and that employee suffered a total disability of 63.085 weeks, which is approximately 15.77% to the body as a whole.

A timely Application for Review with the Commission was submitted alleging that the award issued by the administrative law judge finding waiver of the notice requirement was erroneous because employee failed to file a proof of claim with a court of competent jurisdiction over the employer's bankruptcy as required by section 287.865 RSMo; and that the notice requirement is jurisdictional, and therefore, cannot be waived.

For the reasons set forth in this award and decision, the Commission reverses the administrative law judge's award.

Summary of Facts

The findings of fact and stipulations of the parties were recounted in the award of the administrative law judge; therefore, the pertinent facts will merely be summarized below.

The parties stipulated that employee sustained an injury by occupational disease on the alleged date of injury, May 15, 2001, while under the employ of employer. The parties stipulated that employer was self-insured at the date of injury and that employer's liability is covered by the Missouri Private Sector Individual Self Insurer's Guarantee Corporation as employer is insolvent.

Employer filed for bankruptcy in February of 2001. Employee had actual knowledge of employer's bankruptcy. The bankruptcy court mailed creditors notice that they must file proofs of claim by July 27, 2001. In June of 2001, employee was sent notice to his address at 2803 Whitney Rd., Independence, Mo 64057. Employee did not file a proof of claim with the bankruptcy court.

Findings of Fact and Conclusions of Law

Upon careful review of the entire record, the Commission determines and concludes that the evidence supports a finding that employee was sent adequate notice of employer's bankruptcy and need for filing a proof of claim; however, failed to file a proof of claim with the bankruptcy court as required under section 287.865.5 RSMo.

Section 287.865.5 RSMo states:

Upon creation of the insolvency fund pursuant to the provisions of section 287.867, the corporation is obligated for payment of compensation under this chapter to insolvent members' employees resulting from incidents and injuries to the extent of covered claims existing prior to the issuance of an order of liquidation against the member employer with a finding of insolvency which has been entered by a court of competent jurisdiction in the member employer's state of domicile or of this state under the provisions of sections 375.950 to 375.990, RSMo, in which the order of liquidation has not been stayed or been the subject of a writ of supersedeas or other comparable order; or prior to the date of determination by the board of directors that the member employer has fully expended all surety bonds, insurance or reinsurance, and all other available assets and is not able to pay compensation benefits at that time. All incidents giving rise to claims for compensation under this chapter must occur during the year in which such insolvent member is a member of the guaranty fund and was assessable pursuant to the plan of operation, except as provided for certain claims existing prior to August 28, 1992, pursuant to the provisions of subsection 7 of this section, and the employee must make timely claim for such payments according to procedures set forth by a court of competent jurisdiction over the delinquency or bankruptcy proceedings of the insolvent member.

Under section 287.865.5 RSMo, employee must file a proof of claim with the bankruptcy court in order for employee to recover compensation from the Guarantee Corporation. The administrative law judge found that the requirement to file a proof of claim was waived because employee did not receive adequate notice regarding the necessity of filing the claim. The administrative law judge points to *In re: Wire Rope Corporation of America, Inc.*, 300 B.R. 1 (BANKR. W.D. Mo. 2003), to support his finding. However, the facts in *Wire Rope*, differ notably from the facts in this case. In *Wire Rope*, the employer failed to apprise injured workers of its bankruptcy by failing to list the injured workers on its schedules as creditors. The court in *Wire Rope* found that because employer did not provide adequate notice of the bankruptcy proceeding or the need to file a proof of claim, that the injured workers were not precluded from receiving benefits. *Id* at 10. The court required that the Guarantee Corporation provide proper notice to the injured workers whose claims had been denied and that the Guarantee Corporation file proofs of claim on their behalf. *Id*. The key difference in the *Wire Rope* case is that the injured workers were never listed in the employer's schedules as creditors. The injured workers were absent from the list of creditors and undoubtedly were not provided notice of the need to file their claims. On the contrary, in the case at hand, employee was listed on employer's schedule as one of its creditors and proper notice was sent to employee.

The Guarantee Corporation presented evidence that employee was sent notice of employer's bankruptcy as well as the deadline for filing proof of claim; and the administrative law judge found that employee was sent timely notice. Employee never alleged that he was not sent notice or that the notice was sent to the wrong address; he simply testified that he did not recall receiving the notice. Therefore, the administrative law judge's conclusion that the notice never reached employee is not supported. The administrative law judge's conclusion that employee never received the notice is nothing more than mere conjecture. There is nothing in the record that indicates that the notice was not sent to the correct address for employee. No evidence was presented that employee had moved or was no longer living at the address at the time the notice was sent in June of 2001. Consequently, we find that the bankruptcy court sent adequate notice of employer's bankruptcy as well as the deadline for filing a proof of claim to employee.

Furthermore, employee had actual notice of employer's bankruptcy. Employee testified that he first learned of the bankruptcy in December of 2000. By employee's own admission, he had knowledge of the bankruptcy and did nothing for the duration of its proceeding. At best, employee should have filed a proof of claim when the Guarantee

Corporation filed its answer in May of 2004 alleging its affirmative defense of the employee's failure to timely file a proof of claim. The bankruptcy case did not come to a close until 2007, some six years after employee was first sent notice of employer's bankruptcy and the need for filing a proof of claim. However, at no point did employee file a proof of claim as required under section 287.865.5 RSMo. Employee's failure to file a timely claim in the bankruptcy court precludes employee from recovering compensation from the Guarantee Corporation.

Conclusion

Based on the foregoing, the Commission concludes and determines that the Guarantee Corporation is not liable to pay employee benefits as employee failed to file a proof of claim with the bankruptcy court as required under section 287.865.5 RSMo.

The award and decision of Administrative Law Judge Rebecca S. Magruder, issued May 16, 2007, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 2nd day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the award and decision of the administrative law judge should be affirmed. The award of the administrative law judge is well written, well reasoned, and well supported.

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.

The administrative law judge correctly weighed and evaluated the testimony and properly applied the law in reaching his conclusions.

I agree with the conclusion of the administrative law judge that because the notice mailed by the bankruptcy court never reached the employee the requirement that employee file a timely proof of claim under section 287.865.5 RSMo, was waived.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

AWARD

Employee: Richard A. Jones

Injury No. 01-168328

Dependents: N/A

Employers: GST Steel Company

Insurers: GS Technologies Operating Company

Additional Party: N/A

Hearing Date: February 8, 2007

Checked by: RSM/cg

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: May 15, 2001.
5. State location where accident occurred or occupational disease was contracted: Employer's premises, Kansas City, Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did accident or occupational disease arise out of and in the course of the employment? Yes.
8. Was claim for compensation filed within time required by Law? Yes.
9. Was employer insured by above insurer? Yes.
10. Describe work employee was doing and how accident occurred or occupational disease contracted: The exposure to loud noise over years of employment.
11. Did accident or occupational disease cause death? No. Date of death? N/A
12. Part(s) of body injured by accident or occupational disease: Ears and head, body as a whole.
13. Nature and extent of any permanent disability: 15.77 percent permanent partial disability to the body as a whole.
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? None.
16. Value necessary medical aid not furnished by employer/insurer? None.
17. Employee's average weekly wages: \$1,013.85.

18. Weekly compensation rate: \$675.90/\$314.26.

19. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

63.085 weeks for permanent partial disability from employer: \$19,825.09

TOTAL: \$19,825.09

23. Future requirements awarded: N/A

Said payments to begin upon receipt of 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: Mr. Frank Eppright.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard A. Jones

Injury No. 01-168328

Dependents: N/A

Employers: GST Steel Company

Insurers: GS Technologies Operating Company

Additional Party: N/A

Hearing Date: February 8, 2007

Checked by: RSM/cg

At the hearing the parties stipulated to the following:

1. That on or about May 15, 2001, GST Steel Company was an Employer operating under the provisions of the Missouri Workers' Compensation law and that their liability under said law was fully insured by the authority to self insure;
2. That GST Steel's liability under the Missouri Workers' Compensation law is now covered by the Missouri Private Sector Individual Self Insurers' Guarantee Corporation as GST Steel is insolvent;
3. That on or about May 15, 2001, Richard Jones was an Employee of GST Steel and was working under the provisions of the Missouri Worker's Compensation law;
4. That on or about May 15, 2001, Richard Jones sustained injury by occupational disease arising out of and in the course of his employment;
5. That a Claim for Workers' Compensation was filed within the time prescribed by law;
6. That his average weekly wage was \$1,013.85 and that the applicable compensation rate for temporary disability benefits is \$675.90 per week, and for permanent partial disability benefits, \$314.26 per week;
7. That no medical aid or temporary total disability benefits have been provided by the Employer or the Guarantee Fund.

The issues to be determined by this hearing are as follows:

1. Whether the Division of Workers' Compensation of the Department of Labor and Industrial Relations has jurisdiction to hear and rule on the underlying Workers' Compensation claim;
2. The nature and extent of permanent disability resulting from the Claimant's exposure to noise in the workplace.

Claimant's evidence consisted of the rating report of Dr. Brent Koprivica, as well as numerous medical records. Employer's evidence consisted of the rating report and curriculum vitae of Dr. Michael Hughes, as well as Hometown Hearing and Audiology certified records.

With regard to the jurisdictional issue, the Employer offered Exhibits 1 and 2, Exhibit 1 being a certified copy of a "Notice" requiring filing of a proof of claim in the Employee's bankruptcy proceeding by July 27, 2001 and attached documents; and Exhibit 2, which contains a list of creditors in the bankruptcy proceeding.

GST and the Guarantee Corporation assert that the Missouri Division of Workers' Compensation has no jurisdiction of this claim because the Employee/Claimant failed to file a proof of claim with a court of competent jurisdiction; i.e., the bankruptcy court, pursuant to §287.865.5. That statute reads as follows:

"Upon creation of the insolvency fund pursuant to the provisions of §287.867, the corporation is obligated for payment of compensation under this chapter to insolvent members' employees resulting from incidents and injuries to the extent of covered claims existing prior to the issuance of an order of liquidation against the member employee with a finding of insolvency which has been entered by a court of competent jurisdiction in the member employer's state of domicile or of this state under the provisions of §375.950 to §375.990, RSMo, in which the order of liquidation has not been stayed or been the subject of a writ of supersedeas or other comparable orders; or prior to the date of determination by the board of directors and the member employer has fully expended all surety bonds, insurance or reinsurance, and all other available assets and is not able to pay compensation benefits at that time. All incidents giving rise to claims for compensation under this chapter must occur during the year in which

insolvent member is a member of a guarantee fund and was assessable pursuant to the plan of operation, except as provided for certain claims existing prior to August 28, 1992, pursuant to the provisions of Subsection 7 of this section, **and the employee must make timely claim for such payments according to the procedures set forth by a court of competent jurisdiction over the delinquency or bankruptcy proceedings of the insolvent member.**" (Emphasis added.)

This statute does provide that, in order for the Guarantee Corporation to be liable to pay compensation benefits, the employee *must* make a timely claim in the bankruptcy court. Claimant admitted at the hearing that he did not file a notice of claim with the bankruptcy court.

He also admitted that he had actual knowledge of his Employer's bankruptcy as early as December of 2000, but denied receiving the notice of the requirement to file a proof of claim. The Guarantee Corporation presented evidence at the hearing by way of Exhibits 1 and 2 that the "notice requiring filing of proofs of claim by July 27, 2001," hereinafter "Notice," and a "Form 10 Proof of Claim" were mailed by the bankruptcy court on August 8th, 2001, to a Richard Jones at the following address: "2803 Whitney Rd., Independence, MO 64057." This mailing was not by certified mail but was by first class mail.

I find in accordance with the documentary evidence of the Employer; i.e., Exhibits 1 and 2, that the bankruptcy court did, in fact, send "Notice" and the proof of claim form to a Richard Jones at the aforementioned address by first class mail, and, in accordance with the Claimant's testimony, I find that the Claimant did not file a proof of claim with the bankruptcy court. However, Claimant also testified, and I find in accordance with that testimony, that he has no memory of receiving the aforementioned documents or ever even seeing them until shortly before the Workers' Compensation hearing in this case at his Workers' Compensation attorney's office. The Missouri Division of Workers' Compensation file contains several addresses given by the Claimant, none of which includes the address the bankruptcy court sent the "Notice" to.

The Employee's first claim for compensation, which was filed with the Division of Workers' Compensation on March 28, 2003, lists his address as 3356 Crisp Ave., Independence, MO 64052. His amended claim for compensation filed with the Division of Workers' Compensation on April 20, 2004, lists Mr. Jones' address as 1804 S.E. Kenwood Dr., Blue Springs, MO 64014. A change of address form filed with the Division of Workers' Compensation by the Eppright Law Office shows a new address of 18503 E. 9th Street Terrace North, Independence, MO 64056. This was received by the Division of Workers' Compensation on January 2, 2007.

There was no evidence presented at the hearing as to where the Claimant resided in early June of 2001, the time period in which the bankruptcy court sent their "Notices" by first class mail to the creditors.

I found the Claimant to be a credible witness. I found his testimony persuasive, and I believe that he never received the "Notice" sent by the bankruptcy court in June of 2001, regarding the requirement that he file a proof of claim by July 27, 2001. I have no reason to doubt the fact that the bankruptcy court mailed the "Notice" and their "Form 10 Proof of Claim" by first class mail to the Whitney address. I do not find, however, that the "Notice" actually reached the Claimant. Within the medical records I did find a notation that on April 17, 2001, Claimant asked that a refund check be mailed to him at the 2803 Whitney Rd. address. (Exhibit 5) However, in Exhibit H, there is evidence that Claimant and his wife were having a garage sale and that the sale of his house was going through and that he and his wife were moving to the lake. The date of this entry is May 30, 2001. I have no idea where the Claimant was living at that time, and based on the evidence presented, I cannot find that he lived at that address in early June of '01, when the "Notice" was mailed.

Furthermore, there was no evidence as to why the bankruptcy court would have sent a "Notice" of the necessity to file a proof of claim to Richard Jones when his initial claim for compensation was not filed with the Division of Workers' Compensation until March 28, 2003. There was no

evidence presented by the Guarantee Corporation as to any basis for their sending "Notice" to Richard A. Jones in June of 2001. While the claim, which was filed with the Division of Workers' Compensation in '03, did allege an occupational disease occurring over a period of 15 years of noise exposure resulting in bilateral hearing and further alleged that the Claimant was exposed to this occupational hazard up to and including the last day he worked at GST Steel of May 15, 2001, there was no official "Notice" to the Employer of the Claimant's hearing loss until the filing of the claim.

Under the Missouri Workers' Compensation law, §287.197, a claim for occupational deafness due to occupational exposure cannot even be filed with the Division of Workers' Compensation until the employee has been separated from the occupational hazard for at least six months.

The Guarantee Corporation argues that the requirement that the employee file a proof of claim with the bankruptcy court is jurisdictional. The Guarantee Corporation also admits §287.865.5 as originally enacted did not specify its jurisdictional nature. However, in the 2005 revision, the Guarantee Corporation points out that the legislature clarified its intent as follows: "Failure of the claimant to provide such information shall bar the Division from invoking jurisdiction over any matter for which an employee may otherwise be entitled to benefits under this chapter." The Employer argues that this is not a substantive change in the rights to employees but rather is procedural and, therefore, I'm assuming is arguing that the law should be applied retroactively. Basically the Guarantee Fund argues that the requirement that employees file a proof of claim in the bankruptcy court is clear on the face of this statute and that the 2005 amendment simply makes the jurisdictional requirement clear.

Both Guarantee Corporation and the Claimant argue the applicability and relevance of In RE: Wire Rope Corporation of America, Inc., 300 B.R. 1 (BANKR. W.D. Mo. 2003) and In RE: Wire Rope Corporation of America, Inc., 302 B.R. 646 (BANKR. W.D. Mo. 2003). While GST does concede that Wire Rope, as in this case, did file a petition in bankruptcy and made the same arguments that GST is making in this case; i.e., that the Division of Workers' Compensation has no jurisdiction because proof of claims were not filed by the Workers' Compensation claimant in that case, GST concedes that the Guarantee Corporation was not permitted to rely upon the employee's failure to file proof of claim because the employer, Wire Rope, failed to give adequate notice to the employees with such claims. The bankruptcy judge ordered Wire Rope to amend its schedule to add previously unnamed Workers' Compensation claimants as unsecured creditors, and also ordered the Guarantee Corporation to file proofs of claim on behalf of all the company's pre-petition Workers' Compensation claimants and found that the failure of the Guarantee Corporation to do so would constitute a waiver of the requirement that the claimant file a proof of claim. GST argues that the court and Wire Rope did not rule the employees were not required to file a proof of claim in the ordinary course or that the requirements of §287.865.5

were inappropriate, inapplicable, unconstitutional or failed to satisfy the requirements of due process, rather, GST argues the court found that employees whose claims had been denied had not been given proper notice and ordered that such notice be given, and that the Guarantee Corporation should file proofs of claim on their behalf, within the context of that bankruptcy proceeding.

I find that proper "Notice" was not given in this case as well, due to the fact that I have found the "Notice" mailed by the bankruptcy court (of the necessity of filing a proof of claim) never reached the Claimant. I therefore find that the requirement under §287.865.5 that a claimant must file a timely proof of claim in the bankruptcy court is waived due to inadequate "Notice" of the necessity of filing such proof of claim. Thus, the issue of whether or not §287.865.5's requirement that a proof of claim be filed by an employee is jurisdictional is moot. I find that that requirement is waived as to this Employee because he did not receive adequate "Notice" regarding the necessity of filing such a claim. See Wire Rope, Supra.

With regard to the nature and extent of disability issue in this case, I make the following findings of fact and conclusions of law: Claimant is a 58-year-old white male born on November 5, 1948; he was employed at GST Steel from June 1967 through May 15, 2001; he worked around heavy, loud machinery and air compressors, which

were also loud and often had high-pitched air leaks, which he felt caused his hearing loss and tinnitus; as a result of this hearing loss and tinnitus, I find that the Claimant can't hear a phone because of ringing in his ears; he has difficulty hearing television because of the ringing in his ears; he has difficulty hearing his grandchildren because of the ringing in his ears; he gets irritated and people get irritated with him because of his hearing loss and ringing in his ears; I find that the ringing in his ears drowns out other sounds and that it bothers him especially in bed and at quiet times; I find that the ringing in his ears never really goes away.

The Claimant was examined and evaluated by Dr. P. Brent Koprivica, who in his October 22, 2003 report opined that Claimant had a combined hearing loss and tinnitus of 18.27 percent of the body as a whole (12.825 percent binaural hearing disability, or 23.085 weeks of disability; plus 12.5 percent permanent partial disability or 50 weeks of compensation for the tinnitus). Claimant was also rated by Dr. Michael Hughes, who gave a rating for the hearing loss but not for the tinnitus. The parties agreed that Dr. Koprivica had correctly calculated the degree of hearing loss at 12.85 percent, in accordance with the Division rule found at 8 C.S.R. 50-5.060, evaluation of hearing impairment. The parties also agreed that the Employer's expert, though using the same numbers used by Dr. Koprivica, applied an incorrect offset under Subsection 22, based on an older version of 8 C.S.R. 50-5.060. Therefore, the only dispute with regard to disability in this case is referable to the disability assessment for tinnitus.

Both physicians diagnosed tinnitus, but Dr. Koprivica assessed disability at 12.5 percent of the body as a whole due to the tinnitus. Dr. Hughes, on the other hand, did not assess any disability due to the tinnitus.

I find based on the evidence presented that the Claimant has 10 percent permanent partial disability to the body as a whole, referable to the tinnitus. I further find, based on the stipulation of the parties, that the Claimant has 12.825 percent permanent disability due to the binaural hearing loss, which equates to 23.085 weeks of compensation. I therefore find that the Claimant has a total disability of 63.085 weeks, which is approximately 15.77 percent to the body as a whole, 23.085 weeks attributable to the binaural hearing loss and 40 weeks attributable to the tinnitus. Claimant is, therefore, entitled to permanent disability in the amount of \$19,825.09.

Date: _____

Made by: _____

Rebecca S. Magruder
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation