

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

Injury No.: 07-061758

Employee: Bert Kersey
Employer: Autry Morlan, Inc.
Insurer: MADA Self-Insured Workers' Compensation Fund
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 April 28, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Maureen Tilley, issued April 28, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Bert Kersey

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed and employee should be awarded future medical care and permanent partial disability benefits.

Facts

Employee worked for employer as an auto mechanic. As a mechanic, employee changed power steering pumps, engines, did valve jobs and listened for causes of engine noises.

On July 11, 2007, employee was assigned to investigate the cause of an engine noise on a customer's car. To perform this task, employee used a mechanic's stethoscope, which is designed with a rod and diaphragm to amplify noises to hear them more clearly. As he was probing different engine areas, employee stated that he applied the stethoscope to the alternator when something "popped very loud inside of it." Employee described that because he was using the stethoscope, the pop "sounded like a stick of dynamite going off in [his] ears."

Employee described that he was deafened by the noise and immediately reported the injury to employer. He was instructed by employer to go to urgent care. Dr. Jones' records reflect that employee presented for medical care on July 11, 2007. Dr. Jones recorded that employee "was listening with a stethoscope and got a loud noise through it" and "he now has buzzing and ringing in his ears." Follow-up appointments with Dr. Jones revealed that employee's hearing improved, but he continued to have ringing in his ears and hearing loss at high frequencies.

On August 9, 2007, employee was referred to Dr. Major. Dr. Major's records indicate that employee had been experiencing hearing loss and ringing in both ears following use of a "mechanic's stethoscope when something popped." Dr. Major diagnosed hearing loss and unspecified tinnitus. Dr. Major recommended hearing protection and hearing aids. He further noted that employee needed "recheck annually." Dr. Major prescribed a trial of lipoflavinoids for employee's tinnitus and recommended that he sleep with a fan at night to mask the ringing. Dr. Major also believed that the hearing aids would help mask some of the ringing.

Employee was fitted with hearing aids for both ears. Employee understood that the hearing aids were programmed to help reduce the ringing and humming in both of his ears. Employer paid for his hearing aids.

Employee was later referred to Dr. Mikulec. Dr. Mikulec recorded that employee "has had bilateral tinnitus since the incident in question." Dr. Mikulec went on to note that he believes tinnitus "occurs commonly in adult populations in individuals exposed to and not exposed to industrial noise or head trauma." Dr. Mikulec further opined that the "presence or absence of tinnitus is generally based on patient history taken at base [sic] value." Dr.

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Mikulec testified that “[i]f asked for a medical opinion on tinnitus, [he] repl[ies] 0.5% permanent partial disability of the whole person for the presence of tinnitus in each ear, which may be of an industrial cause.” In employee’s case, though, Dr. Mikulec believed that because employee had “no hearing loss according to Missouri criteria, it is [his] medical opinion that [employee] has 0% disability related to his tinnitus.”

On November 29, 2010, employee was seen for a medical evaluation by Dr. Guidos. Dr. Guidos recorded that employee has a history of hearing loss with associated constant high-pitched ringing and low pitched humming in both ears as a result of a work-related injury that occurred on July 11, 2007. Dr. Guidos went on to state that “[a]t that time, he was listening to an engine with a mechanical stethoscope when the alternator ‘popped,’ making a very loud noise resulting in hearing loss and tinnitus.”

Dr. Guidos opined that employee is at maximum medical improvement from his work related injury of July 11, 2007. She noted, however, that employee continues to have bilateral sensorineural hearing loss and tinnitus which is disabling. Dr. Guidos concluded that employee is “entitled to 15% of the whole person for persistent and constant tinnitus.”

Employee testified that he continues to have problems hearing without the use of his hearing aids. Employee further stated that when he takes his hearing aids out, the “full blast of ringing is there” which makes it difficult to sleep and he uses over-the-counter sleep aids to help him sleep.

The ALJ found that employee failed to meet his burden of proof that the July 11, 2007, work accident was the prevailing factor in causing employee’s tinnitus. The ALJ reasoned that neither Dr. Mikulec nor Dr. Guidos “stated whether the employee’s July 11, 2007, work accident was the prevailing factor or primary reason that the employee had tinnitus.” The ALJ asserted that all other issues were moot and were not to be ruled upon.

Discussion

Section 287.120 RSMo “requires employers to furnish compensation according to the provisions of the Worker’s Compensation Law for personal injuries of employees caused by accidents arising out of and in the course of the employee’s employment.” *Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-59 (Mo. App. 2008).

Section 287.020.2 RSMo defines “accident” as: “[A]n unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.”

Pursuant to § 287.020.3 RSMo, an “injury” is defined to be “an injury which has arisen out of and in the course of employment.” Section 287.020.3 RSMo further states that:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. ‘The prevailing factor’ is defined to be the primary factor, in

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relation to any other factor, causing both the resulting medical condition and disability.

In my opinion, there is no question that an accident occurred at work on July 11, 2007, and that the accident was the prevailing factor in causing employee's tinnitus. The ALJ denied employee's claim based on the fact that no doctor used the specific statutory language that the accident was the "prevailing factor" in causing employee's tinnitus. I find that the ALJ erred in arriving at this conclusion. It is well settled under Missouri Workers' Compensation Law that medical causation can be found in cases that lack a medical expert using the specific statutory language.

In *Mayfield v. Brown Shoe Co.*, 941 S.W.2d 31 (Mo. App. 1997), the court held that "[t]he words a medical expert uses ... are often important, not so much in and of themselves, but as a reflection of what impressions such witness wishes to impart." *Id.* at 36 (citations omitted). The court in *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599 (Mo. App. 1999) cited *Brown* and also provided further guidance on the issue. It held that "[t]he Commission, and not the physician, is the trier of fact in workers' compensation cases. Therefore, even if a testifying physician fails to use the exact words of Section 287.020.3, we will affirm the Commission's award if the substance of the physician's testimony establishes that there is substantial evidence upon which to base the award." *Id.* at 603 (citations omitted).

The only factor presented in evidence for causing the tinnitus was the work accident of July 11, 2007. While it is true that Dr. Guidos did not use the specific "prevailing factor" language, a full and logical reading of her report makes clear that she is of the opinion that employee's tinnitus was caused by the work accident. Dr. Guidos concluded that employee is "entitled to 15% of the whole person for persistent and constant tinnitus." It is clear that Dr. Guidos was referring to 15% permanent partial disability benefits. Dr. Guidos is familiar enough with workers' compensation claims to not state that employee is "entitled" to said benefits if she does not believe that the accident was the prevailing factor in causing employee's tinnitus.

Dr. Mikulec stated that the diagnosis of tinnitus is based on patient history, but he did not even analyze employee's history before concluding that because employee has no disability due to hearing loss, he also has no disability due to tinnitus. This conclusion is illogical considering hearing loss and tinnitus are two separate injuries. For this reason, I do not find Dr. Mikulec's opinion persuasive at all.

The evidence supports employee's contention that he never experienced ringing in his ears until after the July 11, 2007, accident. While the causation of tinnitus in some cases is nearly impossible to determine, in this case it is not. The entire record supports a finding that the accident on July 11, 2007, medically caused employee's tinnitus. For this reason, I disagree with the ALJ and the majority and conclude that the July 11, 2007, work-related accident was the prevailing factor in causing employee's tinnitus.

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Having found that the July 11, 2007, accident was the prevailing factor in causing employee's tinnitus, I further find that the record is clear that employee's tinnitus will require future medical care and that he is permanently and partially disabled as a result of his tinnitus.

Conclusion

In light of the foregoing, I find that employee should be awarded future medical care and permanent partial disability benefits. As such, I would reverse the award of the administrative law judge and award employee the same.

Therefore, I respectfully dissent from the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Bert Kersey Injury No.: 07-061758

Employer: Autry Morlan Inc.

Insurer: MADA Self Insured Workers' Compensation Fund

Hearing Date: February 28, 2011 Checked by: MT/rf

SUMMARY OF FINDINGS

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 alleged accident or onset of occupational disease? 7-11-2007
5. State location where alleged accident occurred or occupational disease contracted: Scott County, Missouri.
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 alleged accident happened or alleged occupational disease contracted: Employee was listening to engine with a stethoscope when there was a load pop.
12. Did accident or occupational disease cause death? No.

13. Parts of body injured by accident or occupational disease: The employee alleged that tinnitus was caused by his accident.
14. Nature and extent of any permanent disability: None.
15. Compensation paid-to date for temporary total disability: None.
16. Value necessary medical aid paid to date by employer-insurer? \$4,693.14
17. Value necessary medical aid not furnished by employer-insurer? None.
18. Employer's average weekly wage: \$507.97
19. Amount of compensation payable? None.
20. Weekly compensation rate: \$338.64 for TTD and PPD.
21. Method wages compensation: By agreement.
22. Second Injury Fund liability: N/A
23. Future Requirements Awarded: None.

FINDINGS OF FACT AND RULINGS OF LAW

On February 28, 2011, the employee appeared along with his attorney, Stephen L. Taylor, for a Hearing for a Final Award. The employer appeared by its attorney, Jared Vessell. At the time of the Hearing the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a Summary of the Evidence and the Findings of Fact and Rulings of Law, are set forth below as follows:

UNDISPUTED FACTS:

1. Covered Employer: That on July 11, 2007 the employer, Autry Morlan Inc., was operating under and subject to the provisions of the Missouri Workers' Compensation Act.
2. Covered Employee: That on July 11, 2007 Bert Kersey was an employee of Autry Morlan Inc. and was working under and subject to the Missouri Workers' Compensation Act.
3. Notice: That the employer had notice of the employee's work injury that occurred on July 11, 2007.
4. Statute of Limitation: That the employee's claim was filed within the time allowed by law.
5. Average Weekly Wage and Rate: That the average weekly wage for the injuries that occurred July 11, 2007 was \$507.97 and the rate of compensation for purposes of permanent partial and permanent partial disability is \$338.64.
6. Temporary Total Disability Paid: Employer/Insurer has paid \$0.00 as temporary total disability benefits for 0 week of disability.
7. Previously Incurred Medical: There is no claim for previously incurred medical for the purposes of this hearing.
8. Mileage or other Medical (287.140 RSMo): There is no claim for mileage or other medical expenses under 287.140 RSMo for the purposes of this hearing.
9. Additional TTD or TPD: There is no claim for additional TTD or TPD benefits for the purposes of this hearing.
10. Permanent Total Disability: There is no claim for PTD benefits for the purposes of this hearing.

ISSUES:

Several issues were identified.

1. Accident: There is a dispute as to whether the employee sustained an accident arising out of and in the course of his employment.
2. Medical Causation: There is a dispute as to whether the employee's injury was medically causally related to the accident.
3. Permanent Partial Disability: employee is claiming permanent partial disability benefits as a result of the accident arising out of and in the course of his employment.

4. Additional or Future Medical: Employee is claiming additional and future medical aid.

Several Exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical Records
 - A1. Ferguson Medical Group
 - A2. SEMO ENT Consultants

- B. Dr. Annamaria Guidos 287.210(7) Packet
 - B1. Copy of December 14, 2010 letter
 - B2. Dr. Annamaria Guidos – IME
 - B3. Dr. Annamaria Guidos – C.V.
 - B4. Ferguson Medical Group
 - B5. SEMO ENT Consultants
 - B6. Dr. Anthony Mikulec

Employer's Exhibits

1. Dr. Anthony Mikulec - IME
2. Dr. Anthony Mikulec – C.V.

SUMMARY OF THE EVIDENCE:

Testimony of Mr. Bert Kersey

Employee testified that he was born April 18, 1958. He stated that he lives at Highlands Ranch, Colorado and has lived there two years. Employee testified that he graduated from Charleston Missouri High School in 1976. He indicated that he had training afterwards and has auto and body mechanic certificates. Employee testified that he is single and divorced. He testified that he has one child, Felicia, who is 25 years of age and not dependent upon him. He also testified that he had not served in the military. Employee testified that prior to living at his present address he had lived on H Highway in Sikeston, Missouri for two years and prior to that he had lived at Highlands Ranch, Colorado for five years. Prior to that time he lived in Littleton, Colorado for five years. Prior to that, he had been in Cape Girardeau, Missouri for four years. Prior to that he had been in Silver Saddle, Colorado and prior to that, the first thirty-two years of his life was spent in Charleston, Missouri.

Employee testified to his work history as follows: From 1976-1979 he worked at his father's business, Bill's Body Shop, doing auto body work in Charleston, Missouri. From 1979-1980 he worked at CB Forms as a printer in East Prairie, Missouri. From 1980-1986 Employee worked again at Bill's Body Shop doing body repair. From 1986-1990 Employee worked for his mother at Bessie's Restaurant in Charleston, Missouri as Assistant Manager. He said those duties

included doing a little bit of everything. From 1990-1991 Employee worked at Silver Saddle Auto Body in Englewood, Colorado doing auto body repair. He moved back to Missouri and again worked at Bessie's Restaurant from 1991-1996 as Assistant Manager because of his mother's ill health. From 1997-1999 Employee worked at Auto Works International as a repair technician in Colorado. From 1999-2000 he worked at Body's By Brown doing auto repair in Colorado. In 2000, he worked at Car's Collision in Lakewood, Colorado again doing auto repair. From 2000-2001 Employee worked at Euro Collision in Centennial, Colorado doing auto repair. He testified that he did receive an injury to his hand while at this employment. From 2001-2006 he returned and worked at Car's Collision in Lakewood, Colorado doing auto body repair. He returned to Missouri in 2006 and went to work for Autry Morlan General Motors Dealer in Sikeston, Missouri doing mechanic work. This consisted of working on car engines and related engine parts. It was during this time that the present injury occurred. Employee then went to work in 2007 until 2008 at Blackwell Baldwin Automobile Dealer in Poplar Bluff, Missouri again doing auto body repair. In 2008 he moved back to Colorado and worked again at Car's Collision doing auto body repair work where he is presently employed.

Employee testified that he had an injury to his right hand while working at Euro Collision in 2000. He indicated that he did subsequently have surgery but there was no claim filed and no settlement on the claim. When asked about other prior injuries he testified that he had no other prior injuries whatsoever. He also testified that he had no prior workers' compensation claims. He also testified that he had no injuries outside of work, either.

Employee testified that he was working as an auto body repairman at Autry Morlan Inc. in Sikeston, Missouri on July 11, 2007. He indicated that his hours were from 8:00 a.m. to 5:00 p.m. Monday through Friday. He testified that he came to work at 8:00 a.m. on the date of the accident and his job was to check out engine noise on an automobile. He testified that he had a mechanics stethoscope on when a loud explosion occurred in the alternator that he was listening to which deafened him.

Employee testified that he reported this immediately to his foreman, Gary Christian, who took him to Brenda Wells, the secretary and H.R. person at the dealership, who sent him to Ferguson Medical Group Urgent Care. Employee testified that he was treated at Ferguson Medical Group by Dr. Gordon Jones who examined him with symptoms that he could hardly hear and had "buzzing and ringing" in his ears. Employee testified that the doctor provided a hearing test and told him to avoid loud noises and to come back in a week.

Employee testified that he returned to Dr. Jones on July 23, 2007 who again examined him and told him to come back in one week. Employee testified he saw Dr. Jones again on July 30, 2007 and another hearing test was conducted. Employee testified that he still had the same symptoms. He testified that the doctor told him to again come back in two weeks. Employee testified that he was sent by the workers' compensation carrier claims representative to Dr. Troy Major at Southeast Missouri ENT Consultants in Cape Girardeau on August 9, 2007. Employee testified when he saw Dr. Major that his symptoms remained the same. Employee testified that the doctor examined him and conducted a hearing test. Employee testified that the doctor prescribed lipoflavonoids and recommended that he return in 3-4 weeks. Employee also testified that he was

seen by Dr. Rebecca McDonald on that date. Dr. McDonald performed a hearing test and gave him hearing aids for his left and right ears and set the programs on the hearing aids. Employee testified that the use of the hearing aids was for hearing high pitches and to reduce the ringing and buzzing in both ears. Employee testified when he next saw the physicians at Southeast Missouri ENT Consultants on July 29, 2008, where he had an evaluation. Employee testified his symptoms were loss of hearing, ringing and buzzing in his ears. Employee testified that he had another hearing test. He also testified that he had a second hearing test on July 30, 2008 and a third hearing test again on July 31, 2008. Employee testified that the treatment consisted of adjusting the hearing aids with a recommendation that he follow up every quarter.

Employee testified that he was sent by the insurer to see Dr. Anthony Mikulec on November 13, 2008. Dr. Mikulec performed an examination of Employee and Employee testified that it was recommended he continue using his hearing aids.

Employee testified that his hearing aids were paid for by the employer/insurer and that all treatment had been paid for by the employer/insurer and that the continuing follow up treatment and repairs had been paid for by the employer/insurer. When asked for how long the hearing aids were prescribed, Employee testified that they were for the rest of his life. He also testified that although it was recommended he have checkups every quarter he would have them as often as he was in Missouri. Employee testified that his last check up was in 2010 and it was paid for by the employer/insurer.

Employee testified that when he was at Southeast Missouri ENT Consultants in 2008 he was treated by Jackie Napoli who examined him and adjusted his hearing aids and he was then seen a second time in 2008 when the hearing aids were repaired. Employee testified when he was seen in 2010 at Southeast Missouri ENT Consultants it was by Dr. Hurt in August who examined and adjusted his hearing aids. This visit was also paid for by the employer/insurer. Employee testified that during 2008, 2009, 2010 and up until the present he continues to suffer hearing loss, ringing and buzzing in his ears. When asked if the flavinoids had helped with the ringing and buzzing he answered, "No."

When Employee was asked if he had ever had any of these types of symptoms before July 11, 2007 he answered, "No."

Employee was asked what sort of problems the symptoms caused for him. He answered that without the hearing aids he has trouble hearing people talk, understanding movies or hearing music. He testified that the ringing in his ears is 24 hours a day, seven days a week. Employee testified that it causes him problems with doing his work in that he can't hear squeaks or rattles in cars, has problems hearing vacuum leaks and can't detect wind noise.

Employee also testified that he has sleep problems as a result of the ringing in his ears and that he only sleeps 2-3 hours at a time at night before waking. He stated he took over-the-counter medication to help with sleep. He also indicated that he uses a fan and other "white noise" to try to help him with sleeping as prescribed by the doctors.

Employee indicated that driving a vehicle causes him problems because of the road noise and he would stop frequently because of the irritation on long trips. He also indicated that the constant ringing and buzzing in his ears causes him to have irritability so he tends to stay away from people. Employee testified that the ringing and buzzing is constant but sometimes gets worse. At those times it can last for 30 minutes to several days and if it continues he will have to leave work. He indicated that when it gets severe it will cause headaches. He testified he took over-the-counter medication for headaches.

When asked if the hearing aids help he indicated that they do reduce the ringing and buzzing in the ears and help with hearing. When Employee was asked if he still used a stethoscope at work he indicated he did not.

Employee was asked if he had had any injuries to his hearing since July 11, 2007 when the accident occurred at Autry Morlan and he answered, "No." Employee also testified that he had had no injuries to his hearing outside of work since 2007.

Employee testified that the hearing aids lasted for 3-5 years and that he required quarterly checkups and batteries for the use of the hearing aids. Employee stated that he was asking the Judge to order continued complications with hearing aids and treatment as has been provided for his hearing injury to-date.

On cross-examination, Employee indicated that he did have hearing tests in Colorado but that he had no written prescription with him for the hearing aids for the rest of his life. Employee testified that he has been working at Car's Collision in Colorado since July 14, 2008.

Numerous medical records were admitted into evidence.

Employee was seen July 11, 2007 at Ferguson Medical Group Urgent Care by Dr. Gordon Jones with a history of being exposed to loud noise at work while listening with stethoscope. His history is that he now has buzzing and ringing in his ears. A tympanogram was administered showing hearing loss at greater than 300 Hz. Assessment was hearing loss with recommendation for recheck in one week and prescription to avoid loud noises in the meantime.

Employee was seen again on July 23, 2007 by Dr. Jones with continued complaints of ringing in the ears and some improved hearing. Assessment was hearing loss with repeat hearing test in another week.

Employee was seen again by Dr. Jones on July 30, 2007 with some improvement in hearing. An assessment of hearing loss and recheck and repeat of audiogram in two weeks.

Employee was sent by the workers' compensation claims specialist to see Dr. Troy Major for an evaluation of his ears/hearing on August 9, 2007. Dr. Major is with Southeast Missouri ENT Consultants Ltd. in Cape Girardeau. Employee was seen by Dr. Major on August 9, 2007. He presented with complaints of some hearing loss, ringing in the ears and tinnitus bilaterally with sensitivity to higher pitches. He did have improved hearing. Dr. Major did an examination of

Employee with a diagnosis of 1) hearing loss, neural, 2) unspecified tinnitus. Dr. Major recommended air/bone/speech studies and tympanogram. Dr. Major recommended treatment of hearing protection with hearing aids and lipoflavinoid as medication. Dr. Major stated that the lipoflavinoids was for his tinnitus and he should also sleep with a fan at night.

The audiological record completed by Dr. Major on August 9, 2007 reflected moderate to severe high frequency sensor neural hearing loss as well as mild sloping to severe sensor neural hearing loss with notes to 1) recheck annually, 2) hearing aids. Authorization from Missouri Automobile Dealers workers' compensation fund was given to Dr. Major by Tonya Geldner on August 20, 2007 according to the records of Dr. Major.

Employee was next seen at Southeast Missouri ENT Consultants Ltd. on July 29, 2008 for a hearing evaluation. The patient reported headaches, front and top of head along with complaints of hearing loss-bilateral recent, and ringing-constant. Audiogram of that date revealed mild sloping to severe sensorineural hearing loss, both ears. There has been no significant change since a year ago with diagnosis of hearing loss, sensorineural, bilateral and recommendation for air/bone/speech studies with an audiological report of "no significant change since last year".

The second entry on July 30, 2008 consisted of the same review of systems, same physical examination, same diagnosis with recommendation for air conduction study. The audiological record of July 30, 2008 noted "no significant change since last year."

A third report on July 31, 2008 at Southeast Missouri ENT Consultants Ltd. indicates same review of systems, same results from physical examination with a diagnosis of hearing loss, sensorineural, bilateral with recommendation for air conduction study and general recommendations of 1) bilateral hearing aids with follow up every quarter. The hearing aid lab warranty maximum is 3 years. Clinical reasoning: Hearing loss, sensorineural, bilateral, and 2) Repair of hearing aid with a 1 year warranty is \$215.00. Clinical reasoning: Hearing loss, sensorineural, bilateral. With an audiological report of "no significant change since last year" dated July 31, 2008.

Employee was sent to Dr. Anthony A. Mikulec at Otolaryngology Head and Neck Surgery in St. Louis on November 13, 2008. Physical examination of the ears, nose and throat were reported as normal. An audiogram was performed and after applying calculations in accordance with the Missouri Workers' Compensation Rules the percentage of hearing loss was calculated at 0% for the right ear and 0% for the left ear.

Dr. Mikulec stated that that "tinnitus occurs commonly in adult populations in individuals exposed to and not exposed to industrial noise or head trauma. The exact condition is not known, but has been reported in cases of industrial noise exposure and trauma, even though, certain individuals exposed to high levels of industrial noise or significant trauma do not report tinnitus. The presence of tinnitus is generally based on a patient's history and taken at base value. If asked for a medical opinion on tinnitus, I reply 0.5% permanent partial disability of the whole person for the presence of each ear, which may be of an industrial cause. As Mr. Kersey

has no compensable hearing loss according to Missouri criteria, it is my medical opinion that he has 0% disability related to his tinnitus.”

Dr. Mikulec’s audio report states “Right ear mild SNHL (sensorineural hearing loss) @ 500 Hz, moderately severe to severe SNHL @ 3000–8000 Hz. Left ear moderately severe to severe SNHL at 3000-8000 Hz. Good speech understanding at both ears. Recommend continue w/ IME follow up and use of amplification.” Dr. Mikulec indicated that the audiograms performed on November 13, 2008 were very similar to the prior audiograms performed. Dr. Mikulec reported that Employee had worn hearing protection while working at various collision shops.

Dr. Annamaria Guidos performed an independent medical exam on the employee on November 29, 2010. Dr. Guidos stated that the employee has a history of hearing loss with associated constant high pitched ringing and low pitched humming in both ears as a result of a work-related injury that occurred on July 11, 2007.

Dr. Guidos opined that Employee had reached maximum improvement from his work injury of July 11, 2007 and that he continues to have bilateral sensorineural hearing loss and tinnitus which is disabling. She opined that he is entitled to a 15% loss of whole person for the persistent and constant tinnitus. However, Dr. Guidos did not give an opinion regarding whether the employee’s injury was the prevailing factor in causing the constant tinnitus.

APPLICABLE LAW:

Burden of Proof:

The burden is on the employee to prove all material elements of the employee’s claim. *Melvies v. Morris*, 422 S.W.2d 335 (Mo. App. 1968). The employee has the burden of proving that not only did the employee sustain an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between the accident and the injuries and the medical treatment for which the employee is seeking compensation. *Griggs v. A.B. Chance Company*, 503 S.W.2d 697 (Mo. App. 1973).

Medical Causation:

- 287.020.3 RSMo.:
 - (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident 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.

- (2) An injury shall be deemed to arise out of and in the course of the employment only if:
 - (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
 - (b) It does not come from a hazard or risk unrelated to the employee to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.
- (3) An injury resulting directly or indirectly from idiopathic causes is not compensable.
- (4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.
- (5) The terms “injury” and “personal injuries” shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results there from. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

RULINGS OF LAW:

Issue 2. Medical Causation

Dr. Mikulec stated that the presence of tinnitus is generally based on a patient’s history and taken at base value. He stated “if asked for a medical opinion on tinnitus, I reply 0.5% permanent partial disability of the whole person for the presence of each ear, which may be of an industrial cause. As Mr. Kersey has no compensable hearing loss according to Missouri criteria, it is my medical opinion that he has 0% disability related to his tinnitus.” It is important to note that Dr. Mikulec stated that the tinnitus “may” be of industrial cause. He does not state whether the employee’s work accident was the primary cause for the tinnitus.

Dr. Guidos stated that the employee has a history of hearing loss with associated constant high pitched ringing and low pitched humming in both ears as a result of a work-related injury that occurred on July 11, 2007. Dr. Guidos opined that Employee had reached maximum improvement from his work injury of July 11, 2007 and that he continues to have bilateral sensorineural hearing loss and tinnitus which is disabling. She opined that he is entitled to a 15% loss of whole person for the persistent and constant tinnitus. However, Dr. Guidos did not give an opinion regarding whether the employee’s injury was the prevailing factor in causing the constant tinnitus. Furthermore, Dr. Guidos’ opinion does not contain any language that would suggest that she believes the employee’s accident was the prevailing factor in causing his tinnitus.

Neither doctors, Dr. Mikulec or Dr. Guidos stated whether the employee's July 11, 2007 work accident was the prevailing factor or the primary reason that the employee had tinnitus. Dr. Mikulec stated that the tinnitus "may" be of industrial cause. Although Dr. Guidos gave a rating of 15% permanent partial disability for constant and persistent tinnitus, she did not give a causation opinion. Based on all of the evidence presented, I find that Dr. Mikulec's opinion was more credible than Dr. Guidos on the issue of causation.

Based on all of the evidence presented, I find that the employee failed to meet his burden of proof that the July 11, 2007 work accident was the prevailing factor in causing the employee's tinnitus. Based on all of the evidence presented, I find that the employee did not prove the tinnitus was medically causally related to the employee's July 11, 2007 work accident.

Based on this finding, I find that the employee's claim for compensation is denied. Furthermore, the remaining issues in this case are moot and shall not be ruled upon.

Employee: Bert Kersey

Injury No. 07-061758

Date: _____ Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation