

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

Injury No.: 03-062615

Employee: John Francis Lamb
Employer: St. Louis Public Schools
Insurer: Board of Education City of St. Louis
c/o Cannon Cochran Management Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: Alleged June 30, 2003
Place and County of Accident: Alleged St. Louis City, 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 entire record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated October 12, 2006.

I. Preliminary Matters

The issues in dispute and summary of the evidence were accurately recounted in the October 12, 2006, award issued by Administrative Law Judge Matthew D. Vacca and will not be repeated by the Commission unless special emphasis necessitates. That award and decision is attached hereto and incorporated to the extent it is not inconsistent with the instant award.

The administrative law judge found that employer had been given proper notice of employee's claim. The administrative law judge also found that the noise employee was exposed to at work was a substantial cause of employee's hearing loss and awarded employee compensation for that hearing loss.

Employer filed an Application for Review with the Commission alleging the administrative law judge erred in that the award was not supported by substantial and competent medical evidence, that the administrative law judge erred in finding Dr. Berkowitz more credible than Dr. McKinney, and that the award failed to take into account the hearing loss findings of Dr. McKinney.

The Commission agrees that employer received proper notice of employee's claim. However, as discussed below, the Commission finds that Dr. McKinney's medical opinion is the most credible, logical and persuasive, and therefore, that employee has not sustained his burden to show more convincingly that his work for employer was a substantial cause of his hearing loss. Consequently, the administrative law judge's award of benefits to employee is reversed.

II. Medical Causation

Principles of Law

The claimant in a workers' compensation case has the burden to prove all essential elements of his claim, *Cook v. St. Mary's Hosp.*, 939 S.W.2d 934, 940 (Mo.App. 1997), *overruled on other grounds by Hampton v. Bigboy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003), including "a causal connection between the injury and the job[.]" *Williams v. DePaul Health Ctr.*, 996 S.W.2d 619, 631 (Mo.App. 1999), *overruled on other grounds by Hampton*, 121 S.W.3d at 226.

“An injury is compensable if it is clearly work related.” Section 287.020.2, RSMo. 2000. “An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.” *Id.* An injury is not compensable merely because work was a triggering or precipitating factor. *Id.*

“An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020.” Section 287.067 RSMo. 2000. The employee must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. 1994). The employee bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. 1999).

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort.

Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 48 (Mo.App. 1999) (citations omitted).

“Determinations with regard to causation and work-relatedness are questions of fact to be ruled upon by the Commission” *Bloss v. Plastic Enter.*, 32 S.W.3d 666, 671 (Mo.App. 2000) *overruled on other grounds by Hampton*, 121 S.W.3d at 226. Furthermore, in making such determinations, the Commission is the judge of the credibility of witnesses and has discretion to determine the weight to be given opinions. *Id.* Medical causation not within common knowledge or experience must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221 (Mo.App. 1992).

The ultimate determination of credibility of witnesses rests with the Commission; however, the Commission should take into consideration the credibility determinations made by the administrative law judge. When reviewing an award entered by an administrative law judge the Commission is not bound to yield to his or her findings including those relating to credibility, and is authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo.App. 2004).

Injury

The parties placed the following issues in dispute: notice; medical causation as to employee’s hearing loss; past medical expenses due to employee’s hearing loss; permanent partial disability benefits relating to employee’s hearing loss; and future medical benefits relating to employee’s hearing loss.

The Commission finds that employer received proper notice of employee’s claim. The Commission further notes that due to the fact that we find that employee’s hearing loss not to be medically causally related to his work, the remaining issues are moot.

The only expert testimony that could conceivably establish medical causation between employee’s work and his resultant medical condition was the testimony of Dr. Berkowitz. The Commission is not persuaded by the explanation of Dr. Berkowitz as to how employee’s work was a substantial factor in causing employee’s resultant hearing loss. We do not believe this finding to be supported by the evidence. It is apparent from his testimony that Dr. Berkowitz did not have sufficient history of employee’s work history to form a convincing opinion of employee’s condition.

The more credible and persuasive testimony of Dr. McKinney is that the noise employee was exposed to in the performance of his job was not a substantial cause of employee’s hearing loss. Dr. McKinney believes that employee had progressive sensori-neural hearing loss which was not caused by his work because: (1) it is an idiopathic disease; (2) employee wore hearing protection while working; and (3) employee had further hearing loss

after he retired in 2002 and was no longer exposed to the noise.

Dr. McKinney examined employee on September 30, 2005, October 3, 2005 and October 5, 2005. He also reviewed Dr. Berkowitz's report and employee's audiograms that were performed in 1992, 1999 and 2002. Dr. McKinney opined that employee had progressive sensori-neural hearing loss or fluctuating progressive sensori-neural hearing loss. This was based on his observation that employee's 1992 and 1999 audiograms showed no hearing loss, the 2002 audiogram showed binaural hearing loss of 8.4%, the May 2005 audiogram performed by Dr. Berkowitz showed binaural hearing loss of 40%, and Dr. McKinney's audiograms from September and October 2005 showed a 12.6% binaural hearing loss. This demonstrated that employee's hearing fluctuated and actually got better between May 2005 and October 2005.

Dr. McKinney also testified that once a person is removed from a noise source, he or she cannot develop further hearing loss from that noise. Since employee retired in 2002, and his hearing continued to deteriorate, it is apparent that the noise he was exposed to at work was not the source of his hearing loss. Logically then, that noise could not have been a substantial cause of employee's hearing loss. Accordingly, the Commission concludes that employee's work was not a substantial factor in causing his hearing loss

V. Conclusion

The Commission determines and concludes that based on the more credible, convincing and persuasive evidence, the noise that employee was exposed to in the course and scope of his employment was not a substantial factor in the cause of his hearing loss. While it is clear that employee was exposed to noise at work which he classifies as loud, Dr. McKinney's expert medical testimony shows that there is no recognizable link between employee's hearing loss and this noise. Therefore, employee has failed to show by competent and substantial evidence that he has a compensable occupation disease.

Based on the foregoing, the Commission concludes and determines that employee does not have a compensable occupational disease and reverses the award of the administrative law judge dated October 12, 2006.

Given at Jefferson City, State of Missouri, this 22nd day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

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 should be affirmed.

Both employer's and employee's medical experts agree that employee has hearing loss and that this loss began to occur sometime between 1999 and 2002 while working for employer. During this time, and in the performance of his job duties, employee was exposed to loud noise.

Employer's medical expert, Dr. McKinney, provided evidence that employee experienced hearing loss during this time. However, he does not believe that the hearing loss was a result of the loud noise at work. Dr. McKinney had no opinion as to why employee began to lose his hearing during his tenure with employer.

Employee's medical expert, Dr. Berkowitz, also determined that employee suffered a loss of hearing. It was of his opinion that this loss was caused by employee's exposure to the loud noise at work while in small concrete rooms. I agree with the administrative law judge that Dr. Berkowitz appears more credible and that his opinion is more logical and scientific than Dr. McKinney's blanket opinion that the hearing loss was simply not caused by employee's work exposure to loud noise. Dr. Berkowitz also believes that employee's hearing loss will continue to deteriorate because of the damage caused by the performance of his job duties.

Based on the above, I believe that employee has carried his burden of establishing a medical causal relationship between his job as a sheet metal worker and his hearing loss. Employee has shown through expert medical testimony that the performance of his job duty exposed him to the hazard of hearing loss, that this exposure was greater than that to the public in general, and that in fact, his performance of his duties caused his hearing loss.

I would affirm the award of the administrative law judge awarding compensation. I would award past and future medical expenses and permanent partial disability against employer.

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

John J. Hickey, Member

AWARD

Employee: John Lamb

Injury No.: 03-062615

Dependents: N/A

Before the

Division of Workers'

Employer: St. Louis Public Schools

Compensation

Department of Labor and Industrial

Additional Party:

Second Injury Fund (Open) Relations of Missouri

Jefferson City, Missouri

Insurer: Board of Education City of St. Louis
c/o Cannon Cochran Management Services

Hearing Date: September 12, 2006

Checked by: MDV:tr

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: June 30, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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? Yes
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:
Suffered hearing loss due to sheet metal 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
14. Nature and extent of any permanent disability: 27% binaural hearing loss
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: John Lamb

Injury No.:

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17. Value necessary medical aid not furnished by employer/insurer? \$4,297.00
18. Employee's average weekly wages: Maximum
19. Weekly compensation rate: \$649.32/\$340.12

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$4,297.00

Future medical \$6,975.00

48.6 weeks of permanent partial disability from Employer (27% of 180) \$16,529.83

22. Second Injury Fund liability: Open

TOTAL: \$27,801.83

23. Future requirements awarded: None

Said payments to begin immediately 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

John Schneider

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Lamb Injury No.: 03-062615

Dependents: N/A

Employer: St. Louis Public Schools

Additional Party: Second Injury Fund (Open)

Insurer: Board of Education City of St. Louis
c/o Cannon Cochran Management Services

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

Checked by: MDV:tr

ISSUES PRESENTED

The issues presented for resolution by way of this hearing are medical causation, notice, past medical expenses in the amount of \$4,297.00, future medical care to encompass future hearing aids and batteries, and the nature and extent of any permanent partial disability attributable to compensable hearing loss.

FINDINGS OF FACT

1. Claimant is a 65 years old. He is a sheet metal worker for the St. Louis City Public Schools. He began working as a sheet metal worker in the spring of 1965 and continued in that capacity until he retired in December of 2002. Claimant worked the entire time of March 11, 1985 to December 31, 2002 solely in the employ of the St. Louis Public Schools. From 1965 to 1985 he worked for various commercial contractors and was exposed to the usual construction type noises caused by earth movers, hammer drills, saw, jackhammers and metal cutting equipment. No hearing loss protection was provided during the early portion of his career.
2. In 1985, when Claimant went to work for the St. Louis Public Schools, he performed a variety of functions including repairing lockers, erecting toilet partitions, repairing down spouts and guttering, all of which involved drilling into walls with a rotohammer, utilizing electric shears, grinders, direct fabrication material, hammering and pounding.
3. For the last five years at the St. Louis Public Schools, Claimant exclusively was responsible for erecting toilet partitions in the various schools. These were large bathrooms with concrete floors, concrete ceilings and cinder block walls that echoed any power tool vibrations or noise.

4. Claimant testified that he spent 65 to 75% of his time enclosed in concrete rooms. It would require the drilling of holes into brick walls for U-channels which held partitions, drilling holes for each partition, 140 for the typical 9 to 10 stall installation. He would also use rotohammers with masonry bits and drill holes into the floors for pilasters using a large rotohammer and a 5/8 inch bit. The fronts of the partitions would get steel headers and would be cut with reciprocating saws and then Claimant would drill through the headers and pilasters and make the connections. He spent at least five hours each day hammering and drilling. The doors to these rooms were closed to keep the students out and to also keep the noise in so that the workers didn't disturb the classes that were going on.
5. Claimant had a hearing test in 1992 when his daughter told him he had the television up too loud but he did not require hearing aids then.
6. By March of 1999 he had a hearing test and had a difficult time hearing.
7. In January of 2000 he priced hearing aids and was only able to afford one hearing aid at the time. Thus, he got a hearing aid for the right ear that cost \$2,292.00.
8. Claimant had a hearing test again in August 2002 and got his second hearing aid in September of 2002 in the left ear. At this time he also had to have a repair to the right hearing aid and that bill was also in evidence.
9. Claimant demonstrated at trial that his hearing aids are currently wearing out. If he moves his hands close to his ears there is an audible whistling sound emitted from both ears. He needs adjustments to the hearing aids and spends about \$100.00 a year on hearing aid batteries.
10. The School Board bought cheap ear plugs for the employees to use but Claimant purchased his own because they were better and more comfortable.
11. Claimant filed his first claim for hearing loss in 1999 but the claim was either voluntarily or involuntarily dismissed for a lack of jurisdiction because Claimant had not been separated from the employment for one month. See §287.197.7.
12. Dr. McKinney, an ear, nose and throat specialist graduating from the University of Missouri, testified on behalf of the Employer. He believes that Claimant had a binaural hearing loss of 12.6% as of 2005, 8.4% by virtue of studies performed in 2002 and no compensable hearing loss in 1999. If he used Dr. Berkowitz' figures, he calculates the loss at 40%.
13. Dr. Berkowitz, an ear, nose and throat specialist graduating from Boston University, testified on behalf of Claimant. He pegs the hearing loss at 27% and believes that Claimant will need approximately \$7,000.00 in future medical care for two hearing aids, batteries, a dry jar to help protect them from moisture exposure and an extended warranty to the hearing aids.
14. Dr. McKinney doesn't believe that continued diminishment of hearing loss has any relationship to work. He does not know the cause of continued progressive sensori-neural hearing loss.
15. Dr. Berkowitz believes that the hearing loss will continue to progress and that the continued loss is a result of the work related exposure and the hearing loss the work caused.
16. Dr. Berkowitz appears more credible and appears to have a more logical scientific backing for his opinions. (Exhibit A, pp. 32-37). His explanations are reasonable and appear well founded. Dr. McKinney seems somewhat argumentative. His opinions strike me as biased.

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RULINGS OF LAW

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Notice

It appears to be the Employer's proposition that Claimant never gave notice of his hearing loss while he was working for the Employer. This is a unique defense to a hearing loss claim since the claim cannot legally arise until six months after Claimant is separated from the noisy environment which would have, in this case, been six months after he retired. See §287.197.7 RSMo (2000) [\[1\]](#). Because of the nature of hearing loss cases, the law requires that the hearing loss be assessed after being removed from the noisy environment in the hope the claimant may regain some of his hearing after leaving the environment. To credit Employer's notice defense would require Claimant to give notice of a claim before that claim arises and before the Division acquires jurisdiction. Nonetheless without addressing the merits of that contention, it's clear that this Employee did file a claim trying to get hearing aids and gave notice to the Board while he was still working in 1999 when he filed his original claim and it was dismissed for a lack of subject matter jurisdiction by virtue of §287.197.7. I find the notice issue in Claimant's favor.

Medical Causation

I find that Claimant's hearing loss is medically and causally related to his work for St. Louis City schools working as a sheet metal worker with constant exposure to heavy industrial noise-making equipment in an enclosed concrete and echoing surrounding.

Past and Future Medical

I find that Claimant has incurred past medical expenses in the amount of \$4,297.00 and will require future medical care to cure and relieve the effects of this hearing loss in the amount testified as reasonable by Dr. Berkowitz in the amount of \$6,975.00.

Permanent Partial Disability

I find that Claimant has sustained a 27% binaural hearing loss as a result of his heavy constant exposure to industrial noise and is entitled to 48.6 weeks of permanent partial disability at the disability compensation rate of \$340.12 for a lump sum disability total of \$16,529.83.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Employee: John Lamb

Injury No.: 03-062615



Section 287.197.7 was amended in 2005 to shorten the separation period to one month. §287.197.7 RSMo (2005 Cum. Supp.).