

FINAL AWARD DENYING COMPENSATION
(After Mandate from the Missouri Court of Appeals
for the Eastern District of Missouri)

Injury No.: 04-146397

Employee: Sharon Lawrence
Employer: Anheuser Busch Companies, Inc.
Insurer: Self c/o Helmsman Management

Preliminaries

On April 27, 2010, the Missouri Court of Appeals for the Eastern District issued an opinion reversing the award and decision of the Labor and Industrial Relations Commission (Commission). *Lawrence v. Anheuser Busch Companies, Inc.*, No. ED93731, 2010 Mo. App. LEXIS 547, at *11 (Mo. App. April 27, 2010). By mandate dated May 20, 2010, the Court remanded this matter to the Commission for further proceedings in accordance with the opinion of the Court.

Pursuant to the Court's mandate, we issue this award. We find that the award and decision 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 7, 2009, as supplemented herein.

Procedural History

The administrative law judge heard this matter to consider 1) whether employee sustained an occupational disease; 2) whether employee's hearing loss and tinnitus are medically and causally related to her work for employer; 3) whether employee is entitled to future medical care; 4) applicable compensation rates; 5) whether and to what extent employee has sustained any permanent partial disability; and 6) whether employee filed her claim within the statute of limitations.

The administrative law judge ultimately found that employee's claim for compensation due to hearing loss and tinnitus was not filed within the statute of limitations and, therefore, is barred. All other issues were deemed moot.

Employee appealed to the Commission alleging the administrative law judge erred in ruling that employee's claim is barred by the statute of limitations. On review, we affirmed the administrative law judge's denial of compensation and adopted the administrative law judge's award and decision as our own.

Employee filed an appeal of our decision with the Missouri Court of Appeals for the Eastern District. Employee's sole point on appeal was that the Commission erred in finding that her claim for compensation relating to her alleged tinnitus is barred by the statute of limitations. Employee did not appeal the Commission's decision with regard to her alleged hearing loss. The Court reversed our award after finding we did not make sufficient findings. The Court reasoned that tinnitus is a claim that is separate and distinct from hearing loss. The Court stated that tinnitus is an occupational disease and thus the running of its statute of limitations is governed by § 287.063.3 RSMo, not § 287.197 RSMo (the hearing loss statute). The Court stated that the Commission, in failing to properly analyze tinnitus as an occupational disease, did not make the

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requisite factual finding as to when employee's tinnitus was reasonably discoverable, pursuant to § 287.063.3. For the foregoing reasons, the Court of Appeals reversed the award and remanded the matter to the Commission for a determination of when employee's tinnitus was reasonably discoverable and, after making that determination, whether employee's claim for tinnitus was timely.

The primary issue before the Commission is when employee's tinnitus was reasonably discoverable.

Findings of Fact

On August 24, 2005, employee filed a claim for workers' compensation benefits alleging she suffered hearing loss and tinnitus arising out of and in the course of her employment with Anheuser Busch, Inc. (Employer). Employee worked for employer from November 1978 until she retired in November of 2004. Her last date of work with employer was February 17 or 18 of 2004. Employee testified during her time working in the "Bevo Building," she was exposed to varying noise levels ranging, on a scale of 1-10 with 10 being the loudest, from 3/10 to 10/10. Employee testified that in the late 1970s and early 1980s in an office with a noise level of 10/10 to 9.5/10, she noticed a change in her hearing. She noticed that she was going home every night with a headache and would have a cricket-like sound in her ears. At first, employee did not know what the cricket-like sound in her ears was from, but testified that she then read several articles linking tinnitus to noise exposure. Employee testified that after reading said articles she figured "oh, that's what I got." In 1984, employee was moved to a quieter office on the 8th floor with a noise level of 3/10.

On April 25, 2006, Dr. Sheldon Davis diagnosed employee with hearing loss and tinnitus resulting from occupational noise exposure while working for employer. Dr. Davis assigned a rating of 10% permanent partial disability (5% per ear) attributable to employee's tinnitus.

Employer sent employee to Dr. John McKinney for an examination. Dr. McKinney testified that he could not say for sure whether employee's tinnitus was caused by her exposure to noise while working for employer. Dr. McKinney stated that, based on employee's history and description of symptoms, he assigned a 1% permanent partial disability (.5% per ear) for her tinnitus. Dr. McKinney further testified that his determination was based on the possibility that employee's tinnitus may have been secondary to noise exposure while working for employer.

In denying employee benefits, the administrative law judge did not distinguish employee's claim of hearing loss and employee's claim of tinnitus. The administrative law judge analyzed both claims under § 287.197 (the hearing loss statute). In so doing, the administrative law judge found that employee's 1984 move to the 8th floor office was a sufficient change in noise level to trigger the six month separation period, under § 287.197. Therefore, the administrative law judge concluded that employee's two year statute of limitations began in late 1984, and her 2004 claim for compensation is barred by the statute of limitations.

As previously mentioned, following employee's Application for Review to the Commission, we affirmed and adopted the findings of the administrative law judge.

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Employee appealed to the Missouri Court of Appeals for the Eastern District, which reversed our decision and remanded the case back to us with instructions to make a finding as to when employee's tinnitus was reasonably discoverable.

Conclusions of Law

First of all, it is important to note that employee last worked for employer in November 2004, she filed her claim for compensation on August 24, 2005, and she alleges an injury date of August 17, 2004. Therefore, this case falls under the purview of the pre-2005 amendments to Missouri Workers' Compensation Law, as the 2005 amendments did not go into effect until August 28, 2005.

The Eastern District set out the statutory sections required to properly analyze this case. Section 287.430 RSMo sets the time for the filing of a claim for workers' compensation benefits. Section 287.430 provides, in pertinent part:

no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.

Section 287.063.3 sets forth when the statute of limitations begins running for a claim for an occupational disease.

[t]he statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.

Section 287.197.7 sets forth when the statute of limitations begins running for a claim for occupational deafness. Section 287.197.7 provides:

[n]o claim for compensation for occupational deafness may be filed until six months' separation from the type of noisy work for the last employer in whose employment the employee was at any time during such employment exposed to harmful noise, and the last day of such period of separation from the type of noisy work shall be the date of disability.

Claimant did not appeal her hearing loss claim, only her tinnitus claim. As stated by the Eastern District, tinnitus is not to be analyzed under § 287.197.7, because tinnitus is viewed by Missouri courts as a compensable occupational disease that is separate and distinct from occupational deafness. *Poehlein v. Trans World Airlines, Inc.*, 891 S.W.2d 505, 506-07 (Mo. App. 1994) (overruled on other grounds by *Hampton v. Big Boy Steel*

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Erection, 121 S.W.3d 220 (Mo. banc 2003)). Therefore, determining when the statute of limitations begins to run for tinnitus is governed by § 287.063.3.

However, upon review of the Eastern District's opinion, the post-2005 amendments version of § 287.063.3 was cited. The Commission is of the opinion that the pre-2005 amendments version, as cited above, is applicable to this case because the 2005 amendments affected when the statute of limitations begins to run for occupational diseases. The post-2005 amendments version of § 287.063.3 provides, in cases of occupational disease, the statute of limitations shall not begin to run "until it becomes reasonably discoverable and apparent that an injury has been sustained...." In contrast, the pre-2005 amendments version states that the statute of limitations shall not begin to run "until it becomes reasonably discoverable and apparent that a compensable injury has been sustained...."

The primary question remains. When was it that it became reasonably discoverable and apparent that a compensable injury had been sustained?

According to *Rupard v. Kiesendahl*, 114 S.W.3d 389 (Mo. App. 2003), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003), the standard for triggering the running of the statute of limitations requires: (1) a disability or injury, (2) that is compensable. *Id.* at 394. In the case of an occupational disease, the time in which a compensable injury has been sustained is the time when the disease has produced a compensable disability. *Id.* Missouri courts have interpreted this as being the time when some degree of disability results which can be the subject of compensation. *Id.* However, "mere awareness of the presence of a work related illness is not alone, knowledge of a 'compensable injury' under the occupational disease provisions of the Workmens' Compensation Law. Generally, such a condition becomes apparent when an employee is *medically advised* that he or she can no longer physically continue in the suspected employment." *Moore v. Carter Carburetor Div. ACF Industries, Inc.*, 628 S.W.2d 936, 941 (Mo. App. 1982).

The court in *Rupard* stated that "[i]n Missouri, the statute of limitations in an occupational disease case begins running when: (1) an employee is no longer able to work due to the occupational disease; (2) an employee must seek medical advice and is advised that she can no longer work in the suspected employment; or (3) an employee experiences some type of disability that is compensable." *Rupard*, 114 S.W.3d at 394.

Generally, an employee is not expected to file a workers' compensation claim until the employee has reliable information that his or her condition is the result of his or her employment. An employee is entitled to rely on a physician's diagnosis of his or her condition rather than his or her own impressions. *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 416 (Mo. App. 1988). However, "[u]nder certain circumstances, it can be foreseen the [statute of limitations] should begin to run without having an expert's opinion in the employee's hands. The facts of each case will have to be determined on a case by case basis in this uncertain area, all under existing doctrine of construing [the workers' compensation] law liberally." *Id.* at 417.

In the present case, employee testified that she began experiencing tinnitus in the early 1980s and did not know what it was from, but at some point she read several articles

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linking tinnitus to noise exposure “and then [she] figured, oh, that’s what I got.” Many years later, employee retired on either February 17 or 18, 2004, but she did not file her claim for compensation until August 24, 2005. Noteworthy, however, is that employee’s claim for compensation included a claim for tinnitus, despite the fact that she did not receive a medical diagnosis linking her tinnitus to her work until April 25, 2006.

Taking into consideration the guidance provided in *Sellers*, specifically, the portion indicating that in certain circumstances, the statute of limitations should begin to run without having an expert’s opinion in the employee’s hands, we find that the statute of limitations began running after employee read several articles linking tinnitus to noise exposure and she made the conclusion that tinnitus is what she had. Although employee did not specifically testify as to when she read the articles or when she made the conclusion that she had tinnitus, we find, based on her testimony, that this discovery took place in the 1980s when she was still being exposed to the loud noise. Employee testified that when she was working in the loud area, she noticed after a while that she was “going home every night with a headache” and that she noticed she was “having a ringing in her head.” At first, she had no idea what it was from “[a]nd then [she] read several articles and then [she] figured, oh, that’s what I got.” Her testimony indicates that this discovery was made somewhat contemporaneously with her noticing that she was coming home after work with headaches and ringing in her head.

In addition, the fact that employee suffered from this condition for roughly 20 years and knew well enough to put “tinnitus” on her claim for compensation before ever having gotten the diagnosis from a doctor is very persuasive.

Because we find that employee’s tinnitus was reasonably discoverable and apparent in the early 1980s, we find that the statute of limitations began running on employee’s claim at that time. Therefore, we find that her August 24, 2005, claim for compensation was filed well after the statute of limitations had run.

For the foregoing reasons, we find that employee’s claim for compensation relating to her tinnitus is barred by the two year statute of limitations.

Given at Jefferson City, State of Missouri, this 22nd day of July 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary