

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No.: 10-113135

Employee: Gary Lawson

Employer: Mississippi Lime Company

Insurer: Ace American Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Medical causation of tinnitus*

The administrative law judge determined that employee suffered an injury by occupational disease in the form of tinnitus, relying in part on the testimony from employee's expert, the audiologist Dr. Mason. Employer argues that under § 287.190.6(2) RSMo, we must reverse the administrative law judge's award of permanent partial disability benefits because Dr. Mason is not a medical doctor. We disagree for the following reasons.

Although § 287.190.6(2) RSMo provides that "[p]ermanent partial disability or permanent total disability shall be demonstrated and certified by a physician," it makes no reference to opinions regarding causation. We note that, in this case, the expert opinions proffered by both parties are in agreement on most points; we find that both of these experts are generally credible witnesses. We might have been inclined to give greater weight to employer's expert Dr. Mikulec *if* he had opined that employee's tinnitus was not (or probably was not) related to his industrial exposure to loud noises during his 41 years working for employer, but this is simply not the case. Nowhere in his report does Dr. Mikulec express an opinion that employee's tinnitus is not work-related, nor does he identify another, more likely cause for employee's tinnitus. Instead, Dr. Mikulec opined that employee's tinnitus "may be of an industrial cause." *Transcript*, page 147.

In our view, Dr. Mason's credentials are more than sufficient to give weight to his opinions regarding causation. In *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 282 (Mo. App. 1997), the court stated that "[i]t is within the province of the Commission to determine what weight it will accord expert testimony on medical causation." Contrary to employer's arguments, we find nothing in subsequent amendments to Chapter 287 (the language of which we must, of course, strictly construe pursuant to § 287.800 RSMo) that would suggest a legislative intent to diminish the "province of the Commission" as to issues of causation.

With regard to permanent partial disability, Dr. Mikulec testified employee has no permanent partial disability because he has no compensable hearing loss and because

Employee: Gary Lawson

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his tinnitus “does not appear to be troublesome to him.” *Transcript*, page 118. Applying the rule of strict construction, we find no support for Dr. Mikulec’s (essentially legal) conclusion that one cannot suffer compensable tinnitus without compensable hearing loss. As for Dr. Mikulec’s testimony that employee has no disability due to tinnitus because it is insufficiently troublesome, we must point out that this conflicts with Dr. Mikulec’s report wherein he rates a 0.5% permanent partial disability of the body as a whole due to bilateral tinnitus.

Finally, we note that the requirement under § 287.190.6(2) RSMo that “objective medical findings shall prevail over subjective medical findings” has no application in a case such as this one where all experts agree that there are no objective criteria for identifying or measuring the disabling impact of tinnitus. Again, applying strict construction pursuant to § 287.800, we cannot conclude that benefits are not owed in this case just because the existence of permanent disability cannot be established or measured objectively.

We defer to the administrative law judge’s findings regarding employee’s credibility and the nature and extent of permanent partial disability employee suffers referable to the compensable occupational disease of tinnitus. Because we otherwise agree with the administrative law judge’s findings, analysis, and conclusions, we adopt them as our own without further comment.

**Conclusion**

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued November 12, 2013, is attached and incorporated by this reference.

The Commission approves and affirms the administrative law judge’s allowance of an attorney’s fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Gary Lawson Injury No. 10-113135  
Dependents: N/A  
Employer: Mississippi Lime Company  
Additional Party: N/A  
Insurer: Ace American Insurance Company c/o ESIS Inc.  
Appearances: Robert Meyers, attorney for the employee.  
Matt Mocherman, attorney for the employer-insurer.  
Hearing Date: August 8, 2013 Checked by: LCK/rm

**SUMMARY OF FINDINGS**

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? On or about October 11, 2010.
5. State location where accident occurred or occupational disease contracted: Ste. Genevieve County.
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 happened or occupational disease contracted: The employee was exposed to prolonged harmful noises during his employment at Mississippi Lime Company.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left ear, right ear and body as a whole.
14. Nature and extent of any permanent disability: 5% permanent partial disability of the body as a whole for tinnitus.
15. Compensation paid to date for temporary total disability: None.
16. Value necessary medical aid paid to date by employer-insurer: None.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: \$1,501.16.
19. Weekly compensation rate: \$799.18 for temporary total disability and \$418.58 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$8,371.60 for permanent partial disability.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee shall be subject to a lien in the amount of 15% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Robert Meyers.

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW**

On August 8, 2013, the employee, Gary Lawson, appeared in person and with his attorney, Robert Meyers, for a hearing for a final award. The employer-insurer was represented by its' attorney, Matt Mocherman. The parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS:**

1. The parties agreed to have the hearing in Iron County, but the case is a Ste. Genevieve County venue case.
2. Mississippi Lime Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its' liability was fully insured by Ace American Insurance Company c/o ESIS Inc.
3. On or about October 11, 2010, Gary Lawson was an employee of Mississippi Lime Company and was working under the Workers' Compensation Act.
4. The employer had notice of the employee's alleged occupational disease.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$1,501.16. The rate of compensation for temporary total disability is \$799.18 and for permanent partial disability is \$418.58.
7. The employer-insurer did not pay any medical aid.
8. The employer-insurer did not pay any temporary disability benefits.

### **ISSUES:**

1. Occupational Disease.
2. Medical Causation.
3. Nature and Extent of Permanent Partial Disability.

### **EXHIBITS:**

#### Employee Exhibits:

- A. Hearing loss records furnished by the employer-insurer.
- B. Deposition, curriculum vitae and report of Dr. Mason, PhD.

#### Employer-Insurer Exhibits:

1. Deposition of Dr. Mikulec.
2. Curriculum Vitae of Dr. Mikulec.
3. Report of Dr. Mikulec.

Judicial Notice of the Contents of the Division's File for the employee was taken.

**WITNESS:** Gary Lawson.

**PROPOSED AWARDS:** The employer-insurer's proposed award was received on August 26, 2013. The employee's proposed award was received on September 9, 2013.

**STATEMENT OF THE FINDINGS OF FACT:**

The employee testified that he is 62 years old. He worked for 41 years at Mississippi Lime Company from June 11, 1969 until October 11, 2010. He worked in all parts of the plant. From the time he started until the 1990s no hearing protection was required. After that hearing protection was required. He used hearing protection before it was required and used cotton balls when he was jack hammering and tearing out bricks. He worked in several different locations in the plant which were all noisy. In 2000-2002 he worked in the bagging facility which was less noisy than the other, but he did wear hearing protection when he worked around blower trucks which was about 40% of the time. Except for those two years, he always worked in areas of the plant that required hearing protection. Around 2005, he bid on and became a crane operator/machinist which was the last position he held with the company until he retired. At times he did not wear the required hearing protection when he was communicating on the radio.

The employee testified that he went deer hunting every fall when he was working, but probably has not gone in the last 7 years. He used a .243 rifle to hunt deer. In a typical deer hunt he would fire once or twice. He did not wear hearing protection when he hunted. Since he retired he goes target shooting with a .17 HMr, .22 and .22 magnum. Now he wears noise reduction head phones when he target shoots. He shoots 1.5 to 2 hours maybe twice a month. Around 1995-1996 he went to Dr. Burk and Dr. Herzog for hearing problems.

On September 20, 1996, Dr. Burk stated in a letter that the employee was having difficulty with his hearing, and that many times a hearing loss at the 4000 range is due to exposure to persistent noise such as diesel engines or machinery. Dr. Burk advised the employee to avoid noise exposure in the future.

On October 14, 1996, Dr. Herzog stated in a letter that the employee has a history of bilateral high-frequency sensorineural hearing loss at 4000 Hz and above with the left ear worse than the right. He recommended that the employee avoid significant noise exposure and if noise levels exceed OSHA standards in his workplace, he should use appropriate ear protection.

The employee testified that he was having trouble with hearing, and had noises in his ears. The noises are like bugs, crickets, or locusts. He first noticed the ringing in his ears 20 years ago or longer. He has the ringing all of the time. Prior to retiring, he had ringing in his ears at work and at home. It drives him crazy to be in a quiet area. To minimize the noise in his head he has the radio or TV going all the time. In a quiet room it is very noticeable, but background noise drowns it out. He sleeps with a CPAP machine that had background noise which is for sleep apnea, but it drowns out the noise in his ears. Prior to going on the CPAP machine in the early 1990s, he had trouble sleeping. It is hard to understand when his wife is talking if the TV is playing. His grandkids do not understand why he cannot hear all of the time.

He has difficulty if there is more than one noise at a time. He believes that the cause of the noise in his head is from the noise at work.

The records show that the employee had audiograms performed on a yearly basis while employed at Mississippi Lime beginning in November of 2001 through November of 2009.

Opinions:

In his report dated July 13, 2012, Dr. Mikulec stated that the employee reported that he has tinnitus. Tinnitus occurs commonly in adult populations in persons exposed to and not exposed to industrial noise or head trauma. The exact cause of the condition is not known but it has been reported in cases of industrial noise exposure and trauma even though some people with exposure to high levels of industrial noise or significant trauma do not report tinnitus. The presence or absence of tinnitus is generally based on the patient's history. It was Dr. Mikulec's opinion that the employee had a 0.5% permanent partial disability of the whole person for the presence of tinnitus in each ear which may be of an industrial cause. Dr. Mikulec stated that as the employee has no compensable hearing loss according to Missouri criteria, it is his opinion that the employee has 0% disability related to his tinnitus.

The deposition of Dr. Mikulec was taken on December 6, 2012. Dr. Mikulec is an associate professor at St. Louis University, specializing in otology and neurotology which is the treatment of the ear and its disorders. Dr. Mikulec obtained his medical degree, his internship in general surgery and a residency in otolaryngology. Dr. Mikulec completed a fellowship in otolaryngology and is board certified.

Using the Missouri Workers' Compensation Law standards for hearing loss calculations, Dr. Mikulec assessed 0% impairment of the right ear; 0% impairment of the left ear; and 0% binaural hearing loss. Dr. Mikulec testified that the employee has hearing loss, but based upon the calculations of the State of Missouri, and in particular the allowance for age, he does not have any more hearing loss than would be expected for his age by the State of Missouri.

Dr. Mikulec testified that tinnitus is a subjective ringing or noise in the head. About half of Americans will experience tinnitus at some time in their life. Tinnitus is often related to hearing loss, but not always, and some people who are profoundly deaf have no tinnitus and some people who have a small amount of hearing loss or no hearing loss will have extreme tinnitus. There is no objective measurement of tinnitus and the cause of tinnitus is unknown.

It was Dr. Mikulec's opinion that the employee had 0% disability related to his tinnitus. He based his opinion on several reasons. First, the employee had no hearing loss based upon Missouri criteria; secondly, his tinnitus does not appear to be troublesome to him. He noted that the employee stated that at night his tinnitus is drowned out by his sleep apnea mask. When patients are bothered by tinnitus it is almost invariably at night, and often the most effective treatment for it is running fans or a radio in-between stations. Based upon the amount of bother caused by the tinnitus based on the history that the employee provided him, it is very low compared to other patients who he has treated who have very bothersome tinnitus.

Dr. Mikulec stated that the employee does have some degree of hearing loss, and it would not be surprising to have this type of hearing loss with tinnitus. Dr. Mikulec agreed that industrial noise is one of a number of things that can cause both hearing loss and tinnitus, together or separately. It was Dr. Mikulec's opinion that the employee's tinnitus was very, very low compared to the patients he has had; and that the employee's tinnitus is not compensable.

The employee was seen by Dr. Mason, PhD. His deposition was taken on March 12, 2013. Dr. Mason has a B.A. in Speech Pathology, a M.A. in audiology; and a Ph.D. in Hearing Science. Dr. Mason is an audiologist. He is a former Interim Head of Audiology for The Central Institute for the Deaf, and is currently in private practice. His practice is performing hearing tests and providing hearing aids to his patients.

Dr. Mason examined the employee on May 29, June 5, and June 7, 2012. He conducted hearing loss exams and a tinnitus test. Dr. Mason stated that the employee has severe sensorineural hearing loss in the high frequencies which is consistent with exposure to high industrial noises. Dr. Mason stated that the employee does not have any hearing loss within the Missouri Workers' Compensation Code Standards. Dr. Mason stated that the employee does not have normal hearing but the Missouri laws only look at a restricted range of frequency and within that range his hearing is normal, but overall it is abnormal. It was his opinion that under Missouri Workers' Compensation Law the employee has 0% hearing impairment of the right ear and 0% hearing impairment of the left ear. Therefore the employee is not entitled to any disability under Missouri Workers Compensation Law for hearing loss. Dr. Mason testified that even though the employee does not have compensable hearing loss under Missouri standards, he does have substantial hearing loss and tinnitus.

Dr. Mason testified that most people (approximately 70%) who have hearing loss also have tinnitus. Dr. Mason stated that industrial hearing loss can be a cause of tinnitus. Most people that are exposed to high noise levels will have some hearing loss and some tinnitus. Tinnitus is subjective. Dr. Mason has the patient match sounds to the subjective tinnitus. The employee answered questions as if he actually has tinnitus. It was Dr. Mason's opinion that the prevailing factor in causing the employee's non-compensable hearing loss and his tinnitus was industrial noise exposure. It was Dr. Mason's opinion that the employee had a 10% permanent partial disability to the body as a whole related to the employee's constant bilateral tinnitus. Dr. Mason disagreed with Dr. Mikulec's assessment that the employee had very mild tinnitus.

## **RULINGS OF LAW:**

### ***Issue 1. Occupational Disease and Issue 2. Medical Causation.***

Under Section 287.067.2 RSMo, an injury by occupational disease is compensable only if the occupational exposure 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.

Under Section 287.067.4 RSMo, loss of hearing due to industrial noise is recognized as an occupational disease and is hereby defined to be a loss of hearing in one or both ears due to prolonged exposure to harmful noise in employment. Harmful noise means sound capable of producing occupational deafness.

The compensability of job-related hearing loss is governed by Section 287.197 RSMo and 8 CSR 50–5.060. Loss of hearing due to industrial noise for compensation purposes shall be confined to the frequencies of 500, 1000, and 2000 cycles per second. Loss of hearing ability for frequency tones above 2000 cycles per second are not considered as constituting disability for hearing.

Tinnitus is a compensable work related injury separate and apart from accompanying hearing loss. See *Thatcher vs. Trans World Airlines*, 69 S.W. 3d 533 (Mo.App.2002); *Poehlin vs. Trans World Airlines, Inc.* 891 S.W. 2d 505, (Mo.App.1994); *Lawrence vs. Anheuser-Busch Companies, Inc.* 310 S.W. 3d 248 (Mo. App. 2010).

The employee's testimony regarding his noise exposure at work, the problems with his loss of hearing and the problems with tinnitus is credible and persuasive.

It was Dr. Mikulec's opinion that the employee did not have any compensable hearing loss based upon Missouri criteria and the employee's tinnitus was not compensable. It was Dr. Mikulec's opinion that tinnitus occurs commonly in adults exposed to and not exposed to industrial noise. The exact cause of the condition is not known. The presence of tinnitus may be of an industrial cause. Tinnitus is often related to hearing loss, but not always. Dr. Mikulec stated that industrial noise is one of a number of things that can cause both hearing loss and tinnitus, together or separately.

It was Dr. Mason's opinion that the employee has a substantial hearing loss and tinnitus. The severe sensorineural hearing loss is in the high frequencies and is consistent with exposure to high industrial noises. Dr. Mason stated that the employee does not have any hearing loss within the Missouri Workers' Compensation standards. It was his opinion that under Missouri Workers' Compensation Law the employee has 0% hearing impairment on the right and 0% hearing impairment on the left. The employee is not entitled to any disability under Missouri Workers Compensation Law for hearing loss. It was Dr. Mason's opinion that the prevailing factor in causing the employee's non-compensable hearing loss and his tinnitus was industrial noise exposure.

I find that the opinion Dr. Mason is very persuasive and is more persuasive than the opinion of Dr. Mikulec.

Based on all the evidence, I find that the employee's prolonged occupational exposure to harmful noises during his employment at Mississippi Lime Company was the prevailing factor in causing the resulting medical condition and disability of bilateral hearing loss and bilateral tinnitus. I find that the employee sustained a compensable work-related occupational disease and injury that arose out of and in the course of his

employment. I find that the employee's bilateral hearing loss and bilateral tinnitus are medically causally related to the employee's occupational disease.

Based on Section 287.197 RSMo and 8 CSR 50-5.060, I find that the employee's loss of hearing is not a compensable disability since his severe hearing loss is in the cycles higher than 2000. I find that the employee's tinnitus condition is a compensable disability.

***Issue 3. Permanent Partial Disability***

It was Dr. Mikulec's opinion that the employee had 0% disability related to his tinnitus. It was Dr. Mason's opinion that the employee had a 10% permanent partial disability to the body as a whole related to his constant bilateral tinnitus.

Based on a review of the evidence, I find that as a direct result of the work related tinnitus the employee sustained a 5% permanent partial disability of the body as a whole at the 400 week level. The employer-insurer is therefore ordered to pay to the employee a total of 20 weeks of compensation at the rate of \$418.58 per week for a total award of permanent partial disability of \$8,371.60.

**ATTORNEY'S FEE:**

Robert Meyers, attorney at law, is allowed a fee of 15% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

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Lawrence C. Kasten  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*