

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

Injury No.: 94-199952

Employee: Tom Lingo
Employer: Midwest Block and Brick
Insurer: Travelers Insurance Company

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. 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 3, 2008. The award and decision of Chief Administrative Law Judge Hannelore D. Fischer, issued April 3, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of 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 20th day of August 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Tom Lingo

Injury No. 94-199952

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Midwest Block and Brick

Additional Party:

Insurer: Travelers Insurance Company

Hearing Date: February 7, 2008

Checked by: HDF/tmh

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: July 21, 1994.
5. State location where accident occurred or occupational disease was contracted: Jefferson City, 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? 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: Employee was moving bags of cement when a bag broke.
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: Head.

Nature and extent of any permanent disability: See award.

15. Compensation paid to-date for temporary disability: \$14,386.39.
16. Value necessary medical aid paid to date by employer/insurer? \$30,785.66.
17. Value necessary medical aid not furnished by employer/insurer? \$0.
18. Employee's average weekly wages: 260.00.
19. Weekly compensation rate: \$173.33.

- Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: $15\% \times 400 = 60$;
 $60 \times \$173.33 = \$10,399.80$

TOTAL: \$10,399.80

22. Second Injury Fund liability: N/A.

23. Future Requirements Awarded: N/A

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: George Miller

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tom Lingo

Injury No: 94-199952

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Midwest Block and Brick

Additional Party: Travelers Insurance Company

Insurer: February 7, 2008

Checked by: HDF/tmh

FINAL AWARD

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on February 7, 2008. Memoranda were submitted by March 3, 2008.

The parties stipulated that the claimant, Tom Lingo, was employed by Midwest Block and Brick (Midwest) on or about July 21, 1994, and that he sustained an injury by accident on that day. The accident arose out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law and workers' compensation liability was insured by Travelers Insurance, Inc. The employer had timely notice of the injury. A claim for compensation was timely filed. The claimant's average weekly wage was \$260.00; the applicable rate of compensation is \$173.33 per week. Temporary disability benefits have been paid to the claimant to date in the amount of \$14,386.39, representing payments made from July 23, 2004, through February 26, 1996. Medical aid has been provided in the amount of \$30,785.66.

The issues to be resolved by hearing include: 1) the causation of the claimant's current condition, including his alleged permanent total disability, 2) the nature and extent of permanent disability, including the alleged liability of the employer/insurer for permanent total disability benefits from February 27, 1996, forward, and 3) the liability for a medical bill for services provided by St. Mary's Hospital on April 5, 2002, in the amount of \$2132.74.

FINDINGS OF FACT

The claimant, Tommy Ray Lingo, was born in 1952, obtained his GED while in the military and, with the help of his GI bill, went to Linn Technical College and attended Auto Diesel School. Thereafter, Mr. Lingo worked as a mechanic for a Chevrolet dealer and as a laborer, prior to being hired at Midwest on February 23, 1994.

Mr. Lingo's duties at Midwest included bagging cement. The cement came out of a bagging machine into a bag which, when properly filled, would weigh 94 pounds. The bags were described by Mr. Lingo as having a plastic lining and paper exterior. When overfilled, the bags would burst, creating a shotgun-like sound and distributing cement into the area.

On July 21, 1994, Mr. Lingo described carrying a bag, which was overfilled to 200 pounds, to a pallet. When the bag burst, Mr. Lingo described having his head turned to the side as he was carrying the bag, with his right ear about a foot from the bag. Mr. Lingo does not recall the events immediately after the bag burst, but remembers being outside, completely covered with cement.

Mr. Lingo also recalls feeling nauseous and dizzy and having bleeding from his right ear. Mr. Lingo saw Dr. Eric Caywood the day of the accident. Dr. Caywood noted Mr. Lingo's right ear complaints; however, Dr. Caywood's notes are difficult to decipher and, therefore, not of great value. Mr. Lingo was to return for a follow-up visit with Dr. Caywood five days later, on July 26, 1994, but apparently did not return for this appointment.

The following day, July 22, 1994, Mr. Lingo saw Dr. Edward Becka, a D.O. and ear, nose and throat specialist. Dr. Becka's notes from his July 22, 1994, examination of Mr. Lingo reflect a history of the accident as follows: "He was working at his place of employment where they make concrete mix materials and was working on a machine that fills bags of concrete and one of the bags exploded near his head on the right side and got this premix material in his ear and also in his eye. He said it happened with great force." Dr. Becka noted that Mr. Lingo "was examined according to my initial new patient office protocol." Dr. Becka found that the "left tympanic membrane and external canal appears normal." However, the "right external canal is exquisitely swollen. There was debris and particle matter, looked like concrete, kind of powder grayish stuff." Dr. Becka cleaned out additional material from the right ear. Dr. Becka diagnosed "traumatic myringitis, infected external auditory canal, diffuse hyperemia and some hearing loss bilateral, the cause of which is now not specifically determined."

When Dr. Becka saw Mr. Lingo again on July 25, 1994, his notes reflect that an exam of the "left tympanic membrane is normal" while the right membrane had improved. Mr. Lingo continued to complain of dizziness and nausea and Dr. Becka recommended that he see Dr. Larry Nichols, D.O.

Dr. Nichols' records reflect that he saw Mr. Lingo from August 2, 1994, through March of 1995, and that his main focus during that time period was Mr. Lingo's elevated blood pressure. However, when Dr. Nichols initially saw Mr. Lingo, he noted that Mr. Lingo complained of nausea and disequilibrium, which Dr. Nichols felt was secondary to the ear injury. Dr. Nichols described the examination of the right ear as revealing "the right TM to still be rather injected" with fluid "at the very bottom behind the TM" and "a small perforation at about 6 o'clock midway down the lower quadrant" and "a greenish type of exudate which may be either this compound or an infection remaining on the eardrum as well." Dr. Nichols reported that "the other ear was unremarkable."

In a January 25, 1995, letter to a claim representative, Dr. Nichols stated that the July 21, 1994, injury exacerbated Mr. Lingo's hypertension and caused his perforated right eardrum, as well as the inflammation of the mastoid air cells shown on the MRI on the right side.

Mr. Lingo saw Dr. David Marty, M.D., an ear, nose and throat specialist as early as August 8, 1994, at which time Mr. Lingo complained of difficulty hearing, dizziness, and nausea. Dr. Marty found "a very small perforation in the central part of his drum" and "high frequency sensorineural hearing loss" consistent with old noise induced hearing loss. On November 29, 1994, Dr. Marty wrote a letter stating that Mr. Lingo was unable to work due to persistent vertigo and disequilibrium associated with nausea and vomiting; Dr. Marty suggested surgical exploration and intervention of "an inner ear fistula as a result of the high pressure injury which occurred to his ear."

Mr. Lingo initially saw Dr. Jacques Herzog, M.D., otologist and neurologist, on May 9, 1995, following the explosion of a "cement bag". At the time of the initial evaluation Dr. Herzog found the left tympanic membrane intact. The right tympanic membrane, however, was perforated, the right middle ear and mastoid had become infected, and "it was felt that labyrinthine involvement was present due to the reported symptoms of vertigo as well as the positive finding of vertigo on tympanometry, suggesting the possibility of a perilymphatic fistula."

Mr. Lingo underwent a right tympanomastoidectomy performed by Dr. Herzog on May 30, 1995; the tympanic membrane healed and the graft used to reconstruct the perforation was successful. In addition, a "round window fistula" was repaired on the same day.

By the end of July of 1995, Mr. Lingo's symptoms improved, according to Dr. Herzog, with only isolated episodes of vertigo. Pneumatic otoscopy in the right ear caused no dizziness. Complaints of disequilibrium

continued. Dr. Herzog recommended Platform Posturography on August 22, 1995, which “suggested the possibility of a vestibular etiology” (see Herzog letter of January 22, 1996). A November 26, 1995, audiogram revealed normal hearing in the right ear while the left ear “revealed decreased thresholds with mild vertigo noted on tympanometry, although pneumatic otoscopy revealed no evidence of dizziness” (see Herzog letter of January 22, 1996).

Dr. Herzog suggested in his January 22, 1996, letter that Mr. Lingo was experiencing new symptoms in the left ear, which Dr. Herzog described as Meniere’s Disease. Dr. Herzog stated that most cases of Meniere’s Disease are idiopathic. Dr. Herzog went on to say that although Meniere’s Disease can be due to a head injury, the delayed symptoms in the left ear following trauma to the right side of the head “would be very difficult to explain.”

Mr. Lingo sought an evaluation at the Harry S. Truman Memorial Veteran’s Hospital in Columbia, Missouri. Lisa Guillory-Parsons, M.A., Audiology and Speech Pathology Service, wrote a June 4, 1997, letter to Dr. Schuman in which she described Mr. Lingo’s left ear audiogram [as] consistent with cochlear hydrops, a component of Meniere’s Disease. With regard to the cause of the disease, Ms. Guillory-Parsons says only that she consulted with Dr. Scott Estrem, an otologist at the University of Missouri Medical School, regarding the possibility of Meniere’s symptoms contralateral to the side of the injury. Dr. Estrem apparently told Ms. Guillory-Parsons that there are several cases documented in the literature and that it is possible.

Mr. Lingo’s current complaints include continued balance problems, ringing in the ears, difficulty hearing, and episodes of dizziness, as well as memory and concentration difficulties. Mr. Lingo does not believe that he is capable of employment.

Dr. Brick Johnstone testified by deposition that he evaluated Mr. Lingo in August of 1996 as a referral from a vocational rehabilitation counselor. With regard to Mr. Lingo’s intellectual functioning, Dr. Johnstone stated that Mr. Lingo would need to focus on finding positions “that were routine and had repetitive ...tasks with little variation.” Dr. Johnstone noted Mr. Lingo’s physical limitations and that Mr. Lingo should not look for work involving driving until a physician approved driving. In addition, Dr. Johnstone did not feel that Mr. Lingo could work around heavy or dangerous equipment or around machinery necessitating quick reaction times. Moreover, Mr. Lingo’s diminished motor dexterity would make auto repair work more difficult, according to Dr. Johnstone. Dr. Johnstone based his evaluation on an understanding that Mr. Lingo had sustained a traumatic brain injury rather than a hearing loss.

Dr. John Hogg, a clinical neuropsychologist, evaluated Mr. Lingo on June 19, 1999, as a referral from an attorney representing him prior to current counsel’s representation. Dr. Hogg found Mr. Lingo to have a mild cognitive impairment and recommended that Mr. Lingo work in routine work environments not involving significant time pressures. Dr. Hogg assumed that Mr. Lingo had sustained a traumatic brain injury based on the data provided to him.

Dr. Brent Koprivica, board certified in emergency medicine and occupational medicine, testified by deposition that he evaluated Mr. Lingo on January 31, 1998. Dr. Koprivica found Mr. Lingo to be permanently and totally disabled as the result of his July 21, 1994, accident. Dr. Koprivica stated that Mr. Lingo sustained a traumatic brain injury resulting in neuropsychological dysfunction, an injury to the tympanic membrane of the right ear successfully surgically repaired and vestibular dysfunction as the result of the July 21, 1994, accident. In conjunction with the vestibular dysfunction, Dr. Koprivica described vertigo, or a spinning sensation, to be the manifestation of the vestibular dysfunction.

Dr. Koprivica described Meniere’s Disease as encompassing a triad of symptoms, loss of hearing, a ringing sensation in the ears, or tinnitus, and vertigo. Dr. Koprivica stated that trauma can cause Meniere’s Disease and that, in his opinion, Mr. Lingo had contralateral Meniere’s Disease, affecting Mr. Lingo’s left ear, as the

result of the July 21, 1994, accident. Dr. Koprivica noted that Mr. Lingo told him that he was able to drive because he could tell if he was going to have an episode of vertigo in enough time to pull the car off of the road.

During cross-examination, Dr. Koprivica stated that Mr. Lingo has no hearing loss in his right ear measurable under Missouri's Workers' Compensation Law.

Dr. John McKinney, board certified in otolaryngology, head and neck surgery, testified that he examined Mr. Lingo on February 22, 1996, at the request of defense counsel. Dr. McKinney diagnosed Mr. Lingo with Meniere's Disease in his left ear unrelated to the July 21, 1994, accident. According to Dr. McKinney the hearing loss sustained by Mr. Lingo results from his Meniere's Disease rather than an accident on July 21, 1994.

Dr. McKinney acknowledged that tinnitus can result from industrial noise exposure and that he would assign a .5% of the body permanent disability for tinnitus in each ear.

Dr. Aaron Koonce, board certified neurologist, testified by deposition that he evaluated Mr. Lingo on June 15, 2005, as a referral from his primary care doctor, Dr. Richard Daugherty, because of "persistent problems of balance difficulty, falling, and vertigo." At the time that Dr. Koonce saw Mr. Lingo, Mr. Lingo was complaining of "bilateral hearing loss, ringing in the ears, and fullness of the ears both sides." Dr. Koonce found scarring on the right tympanic membrane (ear drum), "presumably from the ruptured tympanic membrane", and slight bulging of the left tympanic membrane. According to Dr. Koonce, the bulging of the left tympanic membrane indicates some sort of increased pressure in the middle ear cavity.

Dr. Koonce saw Mr. Lingo again in April of 2007, in Wisconsin, where Dr. Koonce had relocated. According to Dr. Koonce, Mr. Lingo complained of continuing and unchanged attacks of vertigo, described as occurring daily. Dr. Koonce noted that Mr. Lingo continued to walk with a cane, walking with a wide base and very slowly.

Dr. Koonce diagnosed Mr. Lingo with "peripheral vestibulopathy from the explosion," which he described as damage to the organ in the inner ear that controls orientation of position and movement. This condition, according to Dr. Koonce, would cause vertigo, balance problems, tinnitus and hearing loss, bilaterally. When asked about the explosion occurring close to the right side of the head yet affecting the left ear, Dr. Koonce replied that the force of the explosion could have been strong enough to affect both sides of the head. Dr. Koonce did not feel that Mr. Lingo had Meniere's Disease, but described Mr. Lingo's symptoms as those of Meniere's Disease; Dr. Koonce opined that Mr. Lingo did not have Meniere's Disease because Meniere's Disease is usually spontaneous rather than post-traumatic.

Dr. Koonce acknowledged that he wrote two reports, one in June of 2005, confirming a diagnosis of Meniere's Disease, and the second in April of 2007, indicating that Mr. Lingo does not have Meniere's Disease. Dr. Koonce stated that he believed Meniere's Disease to be of unknown etiology or an unidentifiable cause.

Dr. Koonce admitted that the development of symptoms related to Mr. Lingo's left ear until between 12 and 17 months post accident makes it "impossible to state with any medical certainty as to what has caused those new developing problems." Dr. Koonce agreed that "there does appear to be something going on in the left ear that's in all likelihood independent of the initial event."

Mr. Lingo's wife, son, friends, and neighbors all testified that Mr. Lingo was "normal" before the accident and since the accident walks with a cane or stick and has fallen.

Several employees of Photofax Surveillance testified regarding their observations and recordings of Mr.

Lingo at various times from June of 2003 through the day before the hearing in 2008. The recorded material shows Mr. Lingo walking without the use of a cane the majority of the time, walking on uneven surfaces, getting in and out of various vehicles unassisted and without difficulty, weed-eating with a gas-powered weed-eater, bending over to grab dropped mail, filling and changing birdfeeders, repeatedly loading a muzzle and target shooting, and jogging through hilly, wooded terrain to examine the target, and walking up and down outside steps, both with and without his hand on the handrail; Mr. Lingo's cane was rarely in sight, with the exception of Mr. Lingo carrying the cane outside of a doctor's office.

APPLICABLE LAW

The employee must establish a causal connection between the accident and the claimed injuries. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704 (Mo. App.1994); Blankenship v. Columbia Sportswear, 875 S.W.2d 937 (MO.App.1994). Expert testimony is required where the cause and effect relationship between the claimed injury or condition and the alleged cause is not within the realm of common knowledge. See, McGrath v. Satellite Sprinkler Systems.

AWARD

Mr. Lingo has sustained his burden of proof that he has traces of tinnitus in his right ear, as well as scarring on the right tympanic membrane, related to the breaking of a bag of cement on July 21, 1994.

Mr. Lingo failed to prove that any disability related to or resulting from the left ear was caused by the July 21, 1994, accident. Whether Mr. Lingo has Meniere's Disease in his left ear or just Meniere's like symptoms in that ear is irrelevant. For the first seventeen months following July 21, 1994, there is no evidence of anything other than a normal exam of the left ear. Dr. Becka, Dr. Nichols and Dr. Herzog all treated Mr. Lingo's right ear complaints following the July 21, 1994, accident; all three physicians examined Mr. Lingo's left ear and found the left ear examination unremarkable. The first physician-substantiated sign of injury in the left ear is in November of 1995 by Dr. Herzog who admitted that a causal connection to the July 21, 1994, accident was, at best, tenuous. Dr. Koonce, likewise, recognized the lack of a causal connection between the events of July 21, 1994, and the condition of Mr. Lingo's left ear.

Likewise, Mr. Lingo failed to sustain his burden of proof that he sustained a traumatic brain injury as the result of the events of July 21, 1994. There is no evidence of anything resembling a brain injury in any of the medical records contemporaneous with the accident or in any of the medical records from a treating physician. The only testimony regarding traumatic brain injury is from experts who were told that Mr. Lingo had sustained a traumatic brain injury and were then asked to opine based on the information supplied to them.

As the result of the damage to the right ear sustained on July 21, 1994, Mr. Lingo has sustained a permanent disability of 15% of the body as a whole. No permanent disability is awarded for complications to or injury in the left ear or for a traumatic brain injury.

There was no evidence to support liability for a medical bill in the amount of \$2132.74 for services provided by St. Mary's Hospital on April 5, 2002.

All objections preserved for ruling are overruled.

Date: _____

Made by: _____

HANNELORE D. FISCHER
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation