

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

Injury No.: 96-002827

Employee: John Soligo

Employer: GST Steel Company

Insurer: GS Technologies Operating Co.
c/o Missouri Private Sector Individual Self-Insurers Guaranty Corporation

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard oral argument, reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated July 15, 2009. This Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

Preliminaries

The administrative law judge heard this matter to consider: 1) whether the Division of Workers' Compensation (Division) has jurisdiction to hear and rule on the underlying workers' compensation claims; 2) the nature and extent of permanent partial disability resulting from employee's right upper extremity injury and series of injuries from exposure to noise in the workplace; and 3) the employer/insurer's liability for costs and attorney fees pursuant to statute and case law.

The administrative law judge found that employee is not barred on a jurisdictional basis from receiving workers' compensation benefits, because the instant case is indistinguishable from the case of *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo. App. 2009). The administrative law judge also held that employee met his burden of proof to establish entitlement to benefits under the Missouri Workers' Compensation Law, and that employee is entitled to 35% right upper extremity benefits at the 232 week level, for a total of \$20,891.95. Lastly, the administrative law judge found that employer/insurer denied employee's claim without reasonable grounds and, as a result, ordered employer/insurer to pay employee's costs and attorney fees associated with prosecuting this claim.

The employer/insurer's liability in this matter is covered by the Missouri Private Sector Individual Self-Insurers' Guaranty Corporation (Guaranty Corporation), because employer is insolvent.

Guaranty Corporation appealed to the Commission alleging that the administrative law judge erred in finding that employee's claim is not jurisdictionally barred. Guaranty Corporation further alleged the administrative law judge erred in finding the instant case indistinguishable from *Jones*, supra. Finally, Guaranty Corporation alleged that the administrative law judge erred in awarding employee his costs and attorney fees associated with prosecuting this claim because Guaranty Corporation had reasonable grounds for defending the claim.

Employee: John Soligo

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For the reasons set forth below, the Commission reverses the conclusion of the administrative law judge that employee is entitled to an award of costs and attorney fees in this matter. All other aspects of the award of the administrative law judge are affirmed.

Discussion

The issue is whether the administrative law judge properly assessed costs and attorney fees against the employer/insurer in this case. Section 287.560 RSMo, provides, in pertinent part:

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

Under the foregoing section, the general rule is that costs of a proceeding before the Division or the Commission shall be paid out of the state treasury from the fund for the support of the Division. *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 555 (Mo. App. 2004) (citations omitted). However, as an exception to the general rule, the Division or the Commission may assess the whole cost of the proceedings upon a party who, without reasonable ground, brought, prosecuted, or defended a proceeding before the Division or Commission. *Id.* (citations omitted). The "whole cost of the proceedings" includes all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees. *Id.* (citations omitted).

Thus, the question is whether Guaranty Corporation defended this case without reasonable grounds for purposes of § 287.560 RSMo. We conclude that Guaranty Corporation did not defend this case without reasonable grounds.

First, this case involved a factual dispute as to whether employee received notice of the requirement that he file a timely proof of claim with the bankruptcy court. While we agree with the findings of the administrative law judge, we are not convinced that Guaranty Corporation had no reasonable grounds for disputing these factual issues. Second, this case involved valid questions of law including a dispute as to whether the Division of Workers' Compensation has jurisdiction over this matter, and the applicability of the recent case of *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo. App. 2009). Again, while we are convinced that the administrative law judge correctly analyzed and decided the jurisdictional issue, we do not agree with the administrative law judge that the Guaranty Corporation's defense is rendered unreasonable or egregious by operation of the holding in *Jones*, supra.

Here, employee seeks compensation for injuries to his right wrist, elbow, and shoulder sustained at work on January 6, 1996. Guaranty Corporation seeks to defend the case

Employee: John Soligo

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on a jurisdictional basis. While the *Jones* court made clear its view of the type of defense raised here by Guaranty Corporation, the holding in the *Jones* case was that the employee in that case could not be held to have defaulted in his claim for hearing loss, where he was precluded from filing a claim for compensation before the expiration of the deadline for filing a proof of claim with the bankruptcy court, due to the then-current language of § 287.197.7 RSMo. *Jones*, 272 S.W.3d at 520. That rationale is clearly inapplicable to the injuries at issue in this case. As a result, while there is certainly no mistaking the public policy preference of the *Jones* court with regard to the type of defense raised here by Guaranty Corporation, we do not believe the holding in the *Jones* case has the effect of rendering Guaranty Corporation's defense in this matter unreasonable or egregious.

We exercise our discretion under § 287.650 RSMo, with great caution and only where the case for costs is clear and the offense egregious. In sum, we are not convinced that the liability of Guaranty Corporation was "clear and beyond serious dispute" in this matter. *Wilson v. C.C. Southern, Inc.*, 140 S.W.3d 115, 120 (Mo. App. 2004). Where such is the case, we believe the award of costs and attorney fees is improper.

For the foregoing reasons, we find that the administrative law judge incorrectly concluded that employee is entitled to his costs and attorney fees associated with prosecuting his claim.

The Commission reverses that portion of the award holding that employer/insurer is liable for costs and attorney fees. Accordingly, each party shall bear their own costs and shall be responsible for their own attorney fees associated with this matter.

The award and decision of Administrative Law Judge Mark S. Siedlik, as modified, is attached hereto, and its findings and conclusions are incorporated to the extent they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 24th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: John Soligo

SEPARATE OPINION

(Concurring in Part and Dissenting in Part)

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 without modification. I dissent from the majority's decision to deny the award of costs and fees in this matter.

I agree with the finding of the administrative law judge that the jurisdictional issue in this case is identical to that before the court in *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo. App. 2009). Further, I find that the court's unequivocal holding in *Jones* makes clear that there exist no reasonable grounds for the jurisdictional defense raised by Guaranty Corporation in this case. As a result, I believe it is unjust to require employee to bear the burden of costs and attorney fees incurred as a direct result of Guaranty Corporation's pursuing a patently unreasonable defense.

I would affirm the award of the administrative law judge allowing the award of fees and costs against the employer/insurer.

For the foregoing reasons, I respectfully dissent from the portion of the award denying the award of fees and costs.

John J. Hickey, Member

AWARD

Employee: John Soligo

Injury No. 96-002827

Dependents: N/A

Employer: GST Steel Company

Insurer: GS Technologies Operating Co.

Additional Party: N/A

Hearing Date: April 21, 2009

Checked by: MSS/lh

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: January 6, 1996.
5. State location where accident occurred or occupational disease was contracted: Employer's premises, Kansas City, Jackson 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? 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: Right upper extremity – Employee fell from a ladder 8 to 10 feet and landed on his right side.
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: Right upper extremity.
14. Nature and extent of any permanent disability: 35 percent permanent partial disability to the right upper extremity at the level of the shoulder – 232 week level.
15. Compensation paid to-date for temporary disability: \$8,139.00.

16. Value necessary medical aid paid to date by employer/insurer? \$3,737.00.
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$491.19.
19. Weekly compensation rate: \$257.29.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

81.2 weeks for permanent partial disability from employer: \$20,891.95.

22. Amounts payable for costs and attorney fee awarded pursuant to statute and caselaw – attorney's fees and costs as set forth above.
23. Second Injury Fund liability: N/A
24. Future requirements awarded: N/A

Said payments to begin upon receipt of Award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Mr. Christopher R. Smith.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Soligo

Injury No. 96-002827

Dependents: N/A

Employer: GST Steel Company

Insurer: GS Technologies Operating Co.

Additional Party: N/A

Hearing Date: April 21, 2009

Checked by: MSS/lh

These claims come on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri on April 21, 2009. The Claimant appears in person and by Counsel Mr. Christopher R. Smith. The Employer/Insurer's liability under the Missouri Workers' Compensation Law is now covered by the Missouri Private Sector Individual Self Insurers' Guarantee Corporation as Employer is insolvent. The Employer/Insurer appears by Counsel Mr. Joseph R. Ebbert.

The issues to be resolved by this hearing are:

- 1) Whether the Division of Workers' Compensation of the Department of Labor and Industrial Relations has jurisdiction to hear and rule on the underlying Workers' Compensation claims;
- 2) The nature and extent of permanent partial disability resulting from Claimant's right upper extremity injury and series of injuries from exposure to noise in the workplace; and
- 3) The Employer/Insurer's liability for costs and attorney fee pursuant to statute and caselaw.

The evidence at trial consisted of the testimony of Claimant in person as well as documentary evidence comprising Claimant's Exhibits A through S as well as Employer/Insurer's Exhibits 1 through 3.

FINDINGS

The jurisdictional issue

Employer offered Exhibit 1, a document entitled, "Notice of Bankruptcy and Automatic Stay" and Exhibit 2, an affidavit of mailing to which is attached a document entitled, "Notice Requiring Filing of Proofs of Claim by July 27, 2001". Exhibit 2 includes a list of the creditors in the bankruptcy proceeding.

GST and the Guarantee Corporation assert that the Missouri Division of Workers' Compensation has no jurisdiction over these claims because Mr. Soligo, Claimant, failed to file a proof of claim with the bankruptcy court pursuant to Section 287.865.5, which provides, in part, that "the employee must make timely claim for such payments according to procedures set forth

by a court of competent jurisdiction over the delinquency or bankruptcy proceedings of the insolvent member.” Claimant admitted that he did not file a proof of claim with the bankruptcy court but denied having received notice of the requirement to file a proof of claim.

With regard to the jurisdictional issue, I find in accordance with Employers Exhibits 1 and 2 that the bankruptcy court sent notice to Claimant. I find Claimant to be a credible witness and his testimony persuasive. He testified that in 2001, he had two mailing addresses: 2723 Harrison and 2727 Harrison, Kansas City, Missouri. He further testified that in 2001, there were problems with mail delivery, *i.e.*, mail was frequently misdelivered to his address. It is reasonable to infer that Claimant’s mail was likewise misdelivered to other addresses on occasion. I find that he did not file a proof of claim with the bankruptcy court and that he has no memory of receiving Exhibits 1 and 2 or even seeing them until some time after the deadline of July 27, 2001 had expired. And, since I believe Claimant’s testimony that he did not receive notice in time to meet the July 27, 2001 deadline, I further find that the requirement under Section 287.865.5 that a claimant must file a timely proof of claim with the bankruptcy court is waived.

The jurisdictional issue at hand is identical to that before the court in the case of *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo.App. WD 2009). There, the court allowed an award of benefits in the underlying workers’ compensation claim despite the fact that the claimant did not file a timely proof of claim with the bankruptcy court.

First, the court reasoned that to bar a workers’ compensation claim would frustrate the basic purpose of the Guaranty Corporation “which is to aid the workers of insolvent self-insured companies.” *Id.* at 519. Second, the court stated that the Division of Workers’ Compensation and the Guaranty Corporation share “a sense of responsibility to help workers be informed of their rights and responsibilities” citing the following portion of Section 287.872:

[T]he Workers’ Compensation Division may: Require that the [Guaranty Corporation] notify the member employers and *any other interested parties of the determination of insolvency and of their rights* under sections 287.860 to 287.885. Such notification shall be by mail to the last known address thereof when available; but, if sufficient information for notification by mail is not available, notice by publication in a newspaper of general circulation in accordance with the applicable law pertaining to same shall be sufficient[.]

Section 287.872.2(1) (emphasis added). *Id.* at 520. Third, the court stated, “[e]ven if the Division does not choose to *require* the Guaranty Corporation to notify workers, we fail to see that the Guaranty Corporation cannot do so on its own initiative.” *Id.* And fourth, since the Guaranty Corporation had notice of GST Steel’s bankruptcy, it would have been in keeping with its basic purpose to have filed a proof of claim on Claimant’s behalf. *Id.* at 519, citing *In re Wire Rope Corp. of America, Inc.*, 300 B.R. 1, 9 (Bankr. W.D. Mo. 2003). As in *Jones*, I find that Claimant is not barred on a jurisdictional basis from receiving Workers’ Compensation benefits for his work-related injuries.

Claimant testified that he injured his right wrist, elbow and shoulder at work on January 6, 1996 when he fell backwards from a ladder and landed on his right side on a concrete floor. He first went to the plant dispensary for medical treatment. From there, the course of medical

treatment included treatment in the emergency department at North Kansas City Hospital, evaluation and treatment by Dr. McNamara, physical therapy at North Kansas City Hospital and finally, evaluation by Dr. Curnow who diagnosed a rotator cuff tear and recommended surgery to repair the tear. Claimant declined surgery because he wanted to heal on his own.

Claimant testified that after the above course of treatment he continues to have problems with the right upper extremity as follows. He has shooting, stabbing pain in the right shoulder. His right hand swells. He has weakness and limited range of motion in the right shoulder and the entire right upper extremity.

Claimant testified that while he continued to work after the shoulder injury, he was limited at work as follows. He required the assistance of co-workers with overhead lifting, with lifting heavy steel panels and with other tasks. When working on overhead lights, he had to work with his left arm and thus was unable to work as fast as he could prior to the injury. Outside of work, he was and is limited in his ability to maintain the three properties that he owns. He can no longer paint houses or work on cars. He has difficulty mowing the grass. His adult sons live in the local area, and he requires their help with any kind of heavy lifting and overhead lifting.

Claimant was examined by Dr. Koprivica who found Claimant to have a permanent partial disability of 35% to the right upper extremity at the 232 week level as a result of his injuries of January 6, 1996. Employer did not present evidence regarding permanent partial disability.

Accordingly, with regard to the nature and extent of permanent disability, I find that the Claimant has met his burden of proof to establish entitlement to benefits under the Missouri Workers' Compensation Law and is entitled to 35% upper extremity benefits at the 232 week level for a total of \$20,891.95 (81.2 weeks at \$257.29 per week).

Claimant's entitlement to costs and attorney fee

Section 287.560 provides that the Division may assess the whole cost of the proceedings against a party who defends the proceedings without reasonable ground. The Supreme Court of Missouri construes the phrase, "whole cost of the proceedings" to include an attorney fee. *Landman v. Ice Cream Specialties, Inc., and Old Republic Insurance Co.*, 107 S.W.3d 240, 252 (Mo. Banc.).

I further find that Employer/Insurer defended these proceedings without reasonable ground in light of the *Jones* decision which is instructive in determining the claimant's rights. Claimant testified that Exhibit S truly and accurately reflects the expenses advanced by the Eppright Law Office in prosecuting these claims. Exhibit S was admitted in evidence without objection.

Accordingly, Claimant has met his burden of proof to establish entitlement to costs and an attorney fee pursuant to statute and caselaw. Claimant is entitled to costs as described and set forth in Exhibit S in the amount of \$3,341.44 and an attorney fee in the amount of \$9,986.97 (\$20,891.95 + \$15,714.50 + \$3,341.44 = \$39,947.89 X 25%).

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 01-167266

Employee: John Soligo

Employer: GST Steel Company

Insurer: GS Technologies Operating Co.
c/o Missouri Private Sector Individual Self-Insurers Guaranty Corporation

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard oral argument, reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated July 13, 2009. This Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

Preliminaries

The administrative law judge heard this matter to consider: 1) whether the Division of Workers' Compensation (Division) has jurisdiction to hear and rule on the underlying workers' compensation claims; 2) the nature and extent of permanent partial disability resulting from employee's right upper extremity injury and series of injuries from exposure to noise in the workplace; and 3) the employer/insurer's liability for costs and attorney fees pursuant to statute and case law.

The administrative law judge found that employee is not barred on a jurisdictional basis from receiving workers' compensation benefits, because the instant case is indistinguishable from the case of *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo. App. 2009). The administrative law judge also held that employee met his burden of proof to establish entitlement to benefits under the Missouri Workers' Compensation Law, and that employee is entitled to 12.5% of the body as a whole benefits for a total of \$15,714.50. Lastly, the administrative law judge found that employer/insurer denied employee's claim without reasonable grounds and, as a result, ordered employer/insurer to pay employee's costs and attorney fees associated with prosecuting this claim.

The employer/insurer's liability in this matter is covered by the Missouri Private Sector Individual Self-Insurers' Guaranty Corporation (Guaranty Corporation), because employer is insolvent.

Guaranty Corporation appealed to the Commission alleging that the administrative law judge erred in finding that employee's claim is not jurisdictionally barred. Guaranty Corporation further alleged the administrative law judge erred in finding the instant case indistinguishable from *Jones*, supra. Finally, Guaranty Corporation alleged that the administrative law judge erred in awarding employee his costs and attorney fees associated with prosecuting this claim because Guaranty Corporation had reasonable grounds for defending the claim.

Employee: John Soligo

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For the reasons set forth below, the Commission reverses the conclusion of the administrative law judge that employee is entitled to an award of costs and attorney fees in this matter. All other aspects of the award of the administrative law judge are affirmed.

Discussion

The issue is whether the administrative law judge properly assessed costs and attorney fees against the employer/insurer in this case. Section 287.560 RSMo, provides, in pertinent part:

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

Under the foregoing section, the general rule is that costs of a proceeding before the Division or the Commission shall be paid out of the state treasury from the fund for the support of the Division. *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 555 (Mo. App. 2004) (citations omitted). However, as an exception to the general rule, the Division or the Commission may assess the whole cost of the proceedings upon a party who, without reasonable ground, brought, prosecuted, or defended a proceeding before the Division or Commission. *Id.* (citations omitted). The "whole cost of the proceedings" includes all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees. *Id.* (citations omitted).

Thus, the question is whether Guaranty Corporation defended this case without reasonable grounds for purposes of § 287.560 RSMo. We conclude that Guaranty Corporation did not defend this case without reasonable grounds.

First, this case involved a factual dispute as to whether employee received notice of the requirement that he file a timely proof of claim with the bankruptcy court. While we agree with the findings of the administrative law judge, we are not convinced that Guaranty Corporation had no reasonable grounds for disputing these factual issues. Second, this case involved valid questions of law including a dispute as to whether the Division of Workers' Compensation has jurisdiction over this matter, and the applicability of the recent case of *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo. App. 2009). Again, while we are convinced that the administrative law judge correctly analyzed and decided the jurisdictional issue, we do not agree with the administrative law judge that the Guaranty Corporation's defense is rendered unreasonable or egregious by operation of the holding in *Jones*, supra.

Here, the employee seeks compensation for hearing loss and tinnitus, and Guaranty Corporation seeks to defend the case on a jurisdictional basis. While the *Jones* court

Employee: John Soligo

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made clear its view of the type of defense raised here by Guaranty Corporation, the holding in the *Jones* case was that the employee in that case could not be held to have defaulted in his claim for hearing loss, where he was precluded from filing a claim for compensation before the expiration of the deadline for filing a proof of claim with the bankruptcy court, due to the then-current language of § 287.197.7 RSMo. *Jones*, 272 S.W.3d at 520. Although the employee in the *Jones* case was also pursuing a tinnitus claim that arguably *would* have been ripe before the expiration of the deadline for filing a proof of claim with the bankruptcy court, the holding in *Jones* did not address this fact. *Id.* As a result, while there is certainly no mistaking the public policy preference of the *Jones* court with regard to the type of defense raised here by Guaranty Corporation, we do not believe the holding in the *Jones* case has the effect of rendering Guaranty Corporation's defense in this matter unreasonable or egregious.

We exercise our discretion under § 287.650 RSMo, with great caution and only where the case for costs is clear and the offense egregious. In sum, we are not convinced that the liability of Guaranty Corporation was "clear and beyond serious dispute" in this matter. *Wilson v. C.C. Southern, Inc.*, 140 S.W.3d 115, 120 (Mo. App. 2004). Where such is the case, we believe the award of costs and attorney fees is improper.

For the foregoing reasons, we find that the administrative law judge incorrectly concluded that employee is entitled to his costs and attorney fees associated with prosecuting his claim.

The Commission reverses that portion of the award holding that employer/insurer is liable for costs and attorney fees. Accordingly, each party shall bear their own costs and shall be responsible for their own attorney fees associated with this matter.

The award and decision of Administrative Law Judge Mark S. Siedlik, as modified, is attached hereto, and its findings and conclusions are incorporated to the extent they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 24th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: John Soligo

SEPARATE OPINION

(Concurring in Part and Dissenting in Part)

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 without modification. I dissent from the majority's decision to deny the award of costs and fees in this matter.

I agree with the finding of the administrative law judge that the jurisdictional issue in this case is identical to that before the court in *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo. App. 2009). Further, I find that the court's unequivocal holding in *Jones* makes clear that there exist no reasonable grounds for the jurisdictional defense raised by Guaranty Corporation in this case. As a result, I believe it is unjust to require employee to bear the burden of costs and attorney fees incurred as a direct result of Guaranty Corporation's pursuing a patently unreasonable defense.

I would affirm the award of the administrative law judge allowing the award of fees and costs against the employer/insurer.

For the foregoing reasons, I respectfully dissent from the portion of the award denying the award of fees and costs.

John J. Hickey, Member

AWARD

Employee: John Soligo

Injury No. 01-167266

Dependents: N/A

Employer: GST Steel Company

Insurer: GS Technologies Operating Co.

Additional Party: N/A

Hearing Date: April 21, 2009

Checked by: MSS/lh

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: Series of injuries through April 27, 2001.
5. State location where accident occurred or occupational disease was contracted: Employer's premises, Kansas City, Jackson 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? 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: Hearing loss/tinnitus – significant noise exposure over the years.
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: Hearing loss/tinnitus.
14. Nature and extent of any permanent disability: 12.5 percent whole body from tinnitus/hearing loss.
15. Compensation paid to-date for temporary 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 wages: \$599.96.
19. Weekly compensation rate: \$314.29.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

50 weeks for permanent partial disability from employer: \$15,714.50.

22. Amounts payable for costs and attorney fee awarded pursuant to statute and caselaw – attorney's fees and costs as set forth above.
23. Second Injury Fund liability: N/A
24. Future requirements awarded: N/A

Said payments to begin upon receipt of Award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:
Mr. Christopher R. Smith.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Soligo

Injury No. 96-002827

Dependents: N/A

Employer: GST Steel Company

Insurer: GS Technologies Operating Co.

Additional Party: N/A

Hearing Date: April 21, 2009

Checked by: MSS/lh

These claims come on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri on April 21, 2009. The Claimant appears in person and by Counsel Mr. Christopher R. Smith. The Employer/Insurer's liability under the Missouri Workers' Compensation Law is now covered by the Missouri Private Sector Individual Self Insurers' Guarantee Corporation as Employer is insolvent. The Employer/Insurer appears by Counsel Mr. Joseph R. Ebbert.

The issues to be resolved by this hearing are:

- 1) Whether the Division of Workers' Compensation of the Department of Labor and Industrial Relations has jurisdiction to hear and rule on the underlying Workers' Compensation claims;
- 2) The nature and extent of permanent partial disability resulting from Claimant's right upper extremity injury and series of injuries from exposure to noise in the workplace; and
- 3) The Employer/Insurer's liability for costs and attorney fee pursuant to statute and caselaw.

The evidence at trial consisted of the testimony of Claimant in person as well as documentary evidence comprising Claimant's Exhibits A through S as well as Employer/Insurer's Exhibits 1 through 3.

FINDINGS

The jurisdictional issue

Employer offered Exhibit 1, a document entitled, "Notice of Bankruptcy and Automatic Stay" and Exhibit 2, an affidavit of mailing to which is attached a document entitled, "Notice Requiring Filing of Proofs of Claim by July 27, 2001". Exhibit 2 includes a list of the creditors in the bankruptcy proceeding.

GST and the Guarantee Corporation assert that the Missouri Division of Workers' Compensation has no jurisdiction over these claims because Mr. Soligo, Claimant, failed to file a proof of claim with the bankruptcy court pursuant to Section 287.865.5, which provides, in part, that "the employee must make timely claim for such payments according to procedures set forth

by a court of competent jurisdiction over the delinquency or bankruptcy proceedings of the insolvent member.” Claimant admitted that he did not file a proof of claim with the bankruptcy court but denied having received notice of the requirement to file a proof of claim.

With regard to the jurisdictional issue, I find in accordance with Employers Exhibits 1 and 2 that the bankruptcy court sent notice to Claimant. I find Claimant to be a credible witness and his testimony persuasive. He testified that in 2001, he had two mailing addresses: 2723 Harrison and 2727 Harrison, Kansas City, Missouri. He further testified that in 2001, there were problems with mail delivery, *i.e.*, mail was frequently misdelivered to his address. It is reasonable to infer that Claimant’s mail was likewise misdelivered to other addresses on occasion. I find that he did not file a proof of claim with the bankruptcy court and that he has no memory of receiving Exhibits 1 and 2 or even seeing them until some time after the deadline of July 27, 2001 had expired. And, since I believe Claimant’s testimony that he did not receive notice in time to meet the July 27, 2001 deadline, I further find that the requirement under Section 287.865.5 that a claimant must file a timely proof of claim with the bankruptcy court is waived.

The jurisdictional issue at hand is identical to that before the court in the case of *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo.App. WD 2009). There, the court allowed an award of benefits in the underlying workers’ compensation claim despite the fact that the claimant did not file a timely proof of claim with the bankruptcy court.

First, the court reasoned that to bar a workers’ compensation claim would frustrate the basic purpose of the Guaranty Corporation “which is to aid the workers of insolvent self-insured companies.” *Id.* at 519. Second, the court stated that the Division of Workers’ Compensation and the Guaranty Corporation share “a sense of responsibility to help workers be informed of their rights and responsibilities” citing the following portion of Section 287.872:

[T]he Workers’ Compensation Division may: Require that the [Guaranty Corporation] notify the member employers and *any other interested parties of the determination of insolvency and of their rights* under sections 287.860 to 287.885. Such notification shall be by mail to the last known address thereof when available; but, if sufficient information for notification by mail is not available, notice by publication in a newspaper of general circulation in accordance with the applicable law pertaining to same shall be sufficient[.]

Section 287.872.2(1) (emphasis added). *Id.* at 520. Third, the court stated, “[e]ven if the Division does not choose to *require* the Guaranty Corporation to notify workers, we fail to see that the Guaranty Corporation cannot do so on its own initiative.” *Id.* And fourth, since the Guaranty Corporation had notice of GST Steel’s bankruptcy, it would have been in keeping with its basic purpose to have filed a proof of claim on Claimant’s behalf. *Id.* at 519, citing *In re Wire Rope Corp. of America, Inc.*, 300 B.R. 1, 9 (Bankr. W.D. Mo. 2003). As in *Jones*, I find that Claimant is not barred on a jurisdictional basis from receiving Workers’ Compensation benefits for his work-related injuries.

Claimant was born on July 14, 1947 and is presently 61 years old. He was employed at GST Steel for 32 years and last worked there on April 27, 2001. For the majority of this time, he worked 16 hours per day, 6 days per week. He worked around loud machinery including air

compressors which often had high-pitched air leaks. Although he wore hearing protection, he felt the noisy workplace caused his hearing loss and tinnitus over the years.

Claimant testified that as a result of the hearing loss and tinnitus, he has constant ringing in both ears. The ringing makes it difficult for him to understand others when they speak unless he is looking directly at them. He also has difficulty understanding others during telephone conversations.

Claimant was examined by Dr. Koprivica who opined that due to noise exposure through the last date of his employment at GST Steel, Claimant has developed high frequency sensorineural hearing loss with significant bilateral tinnitus resulting in 12.5% permanent partial disability to the body as a whole. Employer did not present evidence regarding permanent partial disability.

Accordingly, with regard to the nature and extent of permanent disability I find that the Claimant has met his burden of proof to establish entitlement to benefits under the Missouri Workers' Compensation Law and is entitled to 12.5% to the body as a whole benefits for a total of \$15,714.50 (50 weeks at \$314.29 per week).

Claimant's entitlement to costs and attorney fee

Section 287.560 provides that the Division may assess the whole cost of the proceedings against a party who defends the proceedings without reasonable ground. The Supreme Court of Missouri construes the phrase, "whole cost of the proceedings" to include an attorney fee. *Landman v. Ice Cream Specialties, Inc., and Old Republic Insurance Co.*, 107 S.W.3d 240, 252 (Mo. Banc.).

I further find that Employer/Insurer defended these proceedings without reasonable ground in light of the *Jones* decision which is instructive in determining the claimant's rights. Claimant testified that Exhibit S truly and accurately reflects the expenses advanced by the Eppright Law Office in prosecuting these claims. Exhibit S was admitted in evidence without objection.

Accordingly, Claimant has met his burden of proof to establish entitlement to costs and an attorney fee pursuant to statute and caselaw. Claimant is entitled to costs as described and set forth in Exhibit S in the amount of \$3,341.44 and an attorney fee in the amount of \$9,986.97 ($\$20,891.95 + \$15,714.50 + \$3,341.44 = \$39,947.89 \times 25\%$).

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation