

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

Injury No. 12-103979

Employee: Earl Resinger
Employer: Mississippi Lime Company
Insurer: Ace American Insurance Co.

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, heard the parties' arguments, 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

Employee sought permanent partial disability benefits based on the claim that his noisy work for employer was the prevailing factor causing him to suffer the resulting medical condition of tinnitus and disability in the form of a constant ringing/buzzing in his ears that disturbs his sleep and hinders his ability to understand people's voices in a noisy environment. The administrative law judge awarded permanent partial disability benefits, finding the testimony from the PhD audiologist, David Mason, more persuasive than the contrary testimony from employer's evaluating physician, Dr. Anthony Mikulec. Employer appeals, arguing that the testimony from Dr. Mason is insufficient, as a matter of law, to satisfy employee's burden of proof with respect to the question of medical causation. We are not persuaded, for the following reasons.

In the case of *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo. App. 1997), the court determined that a non-physician psychologist's testimony was sufficient to satisfy an employee's burden of proving medical causation of a brain injury. *Id.* at 282. The court reasoned that "conceivably a psychologist or other non-physician might attain a degree of knowledge, skill, experience, training, or education in medicine that would provide the foundation to become a medical expert." *Id.* The *Landers* decision stands for the proposition that where an expert witness possesses scientific, technical, or other specialized knowledge that will assist the trier of fact in resolving an issue of medical causation, the fact the witness does not possess a license to practice medicine is not particularly relevant.

In its brief, employer acknowledges the *Landers* decision, but suggests that its holding does not survive the 2005 amendments to the Missouri Workers' Compensation Law. We note, however, that the legislature in 2005 specifically rejected and abrogated a number of judicial decisions and interpretations of key phrases within Chapter 287; see § 287.020.10 RSMo. In doing so, the legislature did not name the *Landers* decision as among those abrogated.

As the parties are undoubtedly aware, we are required to strictly construe the provisions of Chapter 287 by virtue of § 287.800.1 RSMo, and "a strict construction of a statute presumes nothing that is not expressed." *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. 2009). Consistent with this mandate, we cannot presume that the legislature abrogated the *Landers* decision where it did not expressly do so. We conclude that Dr. Mason's testimony amounts to competent and substantial evidence and is sufficient to satisfy employee's burden of proof with respect to the issue of medical causation of his work-related tinnitus.

Employee: Earl Resinger

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Employer also argues that Dr. Mason's testimony is insufficient to support an award of permanent partial disability benefits, because § 287.190.6(2) RSMo states that "[p]ermanent partial disability or permanent total disability shall be demonstrated and certified by a physician." We are not persuaded. Employee's permanent partial disability derives solely from the subjective symptoms of his work-related tinnitus. Both Dr. Mason and Dr. Mikulec agreed that there is no objective measure for tinnitus; as a result, we find as a factual matter that it is not possible for a physician to "demonstrate" or "certify" employee's disability referable to tinnitus. Where the uncontested evidence reveals that there is no objective method for quantifying the degree of an employee's disability referable to a work injury, we conclude that the language of § 287.190.6(2) is simply not applicable.

We additionally note that § 287.190.6(2) does not prescribe any penalty or sanction for a party's failure to provide a physician's demonstration and/or certification of permanent disability; it would thus appear that the provision is directory, rather than mandatory. See *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 76 (Mo. 2009), noting that "the use of 'shall' in a statute does not inevitably render compliance mandatory, when the legislature has not prescribed a sanction for noncompliance."

This is a close case, and we very much appreciate the thorough and impeccable briefing and argument presented by both parties. Ultimately though, and after careful consideration, we are not persuaded to disturb the administrative law judge's weighing of the conflicting expert opinion evidence, or the choice to credit employee's testimony regarding his tinnitus symptoms. Accordingly, and for the additional reasons stated above, we affirm and adopt as our own the administrative law judge's award allowing compensation.

Conclusion

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

The award and decision of Administrative Law Judge Carl Strange, issued July 21, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm 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 23rd day of December 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Earl Resinger

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I disagree with the majority's decision to affirm the administrative law judge's award allowing compensation.

As noted by the Commission majority, the permanent partial disability that employee claims to suffer is related solely to his purely subjective complaint that he experiences constant ringing or buzzing in his ears. Employee claims he has been suffering from this condition for at least twenty years. I am not persuaded.

On cross-examination, employee admitted that the records from his treating physician, Dr. Cadiz, do not contain any mention of ringing in employee's ears—and in fact memorialize employee's repeated and specific *denial* of any tinnitus—from 2000 through 2013. Regardless of the legal question whether employee's paid expert David Mason can satisfy his burden of proof with respect to the issue of medical causation, because employee's testimony regarding his own subjective complaints is not persuasive, there is no basis for an award of permanent partial disability benefits in this case.

I would reverse the award of the administrative law judge and deny this claim. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION
FINAL AWARD

Employee: Earl Resinger

Injury No. 12-103979

Dependents: N/A.

Employer: Mississippi Lime Company

Additional Party: N/A.

Insurer: ESIS, Inc.

Hearing Date: May 4, 2015

Checked by: CS/kg

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? June 29, 2012.
5. State location where accident occurred or occupational disease contracted: Ste. Genevieve 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 the employer insured by above insurer? Yes.
11. Describe work Employee was doing and how accident happened or occupational disease contracted: Employee alleged tinnitus due to occupational noise exposure while at Employer.
12. Did accident or occupational disease cause death? N/A.

13. Parts of body injured by accident or occupational disease: Body as a whole.
14. Nature and extent of any permanent disability: (See findings).
15. Compensation paid to date for temporary total disability: \$0.00
16. Value necessary medical aid paid to date by the employer-insurer: \$0.00
17. Value necessary medical aid not furnished by the employer-insurer: N/A.
18. Employee's average weekly wage: \$981.37
19. Weekly compensation rate:

\$654.25 for temporary total disability and permanent total disability; and
\$425.19 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: Employee awarded permanent partial disability from Employer in the amount of \$10,204.56 (See findings).
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: N/A.

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 costs plus 15% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Robert Meyers

FINDINGS OF FACT AND RULINGS OF LAW

On May 4, 2015, the employee, Earl Resinger, appeared in person and by his attorney, Robert Meyers, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Matthew Mocherman. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about June 29, 2012, Mississippi Lime Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by ESIS, Inc.
2. On or about June 29, 2012, the employee was an employee of Mississippi Lime Company and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of the employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage was \$981.37, his rate for temporary total disability and permanent total disability is \$654.25, and his rate for permanent partial disability is \$425.19.
6. The employer has furnished no medical aid to the employee.
7. The employer has paid no temporary total disability benefits to the employee.

ISSUES:

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

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

1. Employer hearing loss records; and
2. Deposition of David Mason, Ph.D.

Employer-Insurer's Exhibits:

- A. Deposition of Dr. Anthony Mikulec; and
- B. Treatment Records of Dr. Cadiz.

Issue 1. Occupational Disease; and Issue 2. Medical Causation.

Earl Resinger (“Employee”) has been working for the Mississippi Lime Company (“Employer”) since 1969. As a result of his employment, Employee has alleged that he suffered tinnitus due to occupational exposure of loud noise. In support of his position, Employee offered the opinions of an audiologist, David Mason, Ph.D. that the prevailing factor of his tinnitus and noncompensable hearing loss was his employment at the noisy workplace with Employer (Employee’s Exhibit 2). Employer has offered the opinion of Dr. Anthony Mikulec that Employee’s hearing loss and tinnitus were not related to his work for Employer. Both experts agree that Employee does not have compensable hearing loss based on Missouri Workers’ Compensation standards. At the time of the hearing, Employee testified that during his employment with Employer he worked in very loud areas including the shop area. Further, Employee testified that during the late 1980s and early 1990s that Employer began requiring hearing protection around the loud rock screens and crushers, but not in the shop area which was frequently noisy also due to diesels running and banging metal. Although Employee first noticed the tinnitus 25 or 30 years ago, he testified that it became constant after 2000. As a result, Employee noted that the tinnitus causes interference with activities like holding conversations and watching television. Based on the evidence submitted at trial, I find the testimony of Employee to be credible and further find that Employer-Insurer failed to offer sufficient credible evidence to discredit the testimony of Employee. Consequently, I find the opinions of David Mason, Ph.D. to be more credible than the opinions of Dr. Anthony Mikulec in this matter since he fully considers all the limitations and information provided by Employee.

Based on the evidence, I find that Employee has satisfied his burden of proof on the issues of occupational disease and medical causation for tinnitus. I therefore find that Employee has sustained an occupational disease on or about June 29, 2012, arising out of and in the course of his employment and that his employment was the prevailing factor in causing the resulting medical condition and disability.

Issue 3. Nature and Extent of Disability.

Based on the evidence and my above findings, I find that Employee, as a direct result of his June 29, 2012 work-related occupational disease, has suffered a 6% permanent partial disability of his body as a whole at the 400 week level (24 weeks). As a result of Employee’s June 29, 2012 work-related occupational disease, I order Employer to pay to Employee the sum of \$425.19 per week for 24 weeks for a grand total of \$10,204.56.

ATTORNEY’S FEE:

Robert Meyers, attorney at law, is allowed a fee of costs plus 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:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation