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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001166-WC

D&L MINING — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NOS. WC-15-00649 AND WC-15-00650

JIMMY HENSLEY,
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE, AND
KENTUCKY WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: D&L Mining Company, LLC, ("D&L") appeals from a Workers' Compensation Board ("Board") decision affirming the opinion, order and award of the Administrative Law Judge ("ALJ") finding Jimmy Hensley

("Hensley") suffered a 17% whole person impairment rating resulting in an award of permanent partial disability (PPD) benefits for hearing loss and was entitled to the three times multiplier.[1] D&L asserts the award was improper because Hensley's hearing loss was a pre-existing active condition which did not worsen during the less than five weeks he operated a front-end loader and bulldozer for D&L. Additionally, D&L claims the hearing loss did not prevent Hensley from working, and he was therefore not entitled to the three multiplier. Finding no error, we affirm.

Hensley was born May 24, 1960, and is now fifty-seven years old. He is a high school graduate who spent his entire thirty-two-year work career as a heavy equipment operator in various industries—primarily construction and coal mining. Throughout his work history, Hensley was exposed to repetitive hazardous noise and experienced hearing loss.

In 2013, prior to his employment with D&L, Hensley underwent an audiogram in anticipation of filing a hearing loss workers' compensation claim against a former employer. The medical report, dated December 5, 2013, noted Hensley has been a coal miner for thirty years, indicated a diagnosis of moderate to severe binaural[2] sensorineural hearing loss, and recommended hearing aids. A copy of the 2013 hearing test was filed by D&L. However, Hensley never saw the

[1] In a consolidated claim, Hensley alleged cumulative trauma to his back and shoulders. Those claims were denied, and their denial was not raised on appeal. Hensley has another claim pending against D&L for coal worker pneumoconiosis, Claim Number 2015-00648.
[2] Involving both ears.

results of the audiogram test according to his unrebutted hearing and deposition testimony. Hensley worked for D&L from November to December of 2014,[3] but did not pursue a hearing loss claim until D&L went out of business. Hensley's last day of work at D&L was December 18, 2014.

Hensley filed an Application for Resolution of Injury Claim (Form 101), alleging on December 18, 2014, he was injured within the scope and course of employment with D&L due to cumulative trauma from repetitive use of his back; an Application for Resolution of Hearing Loss Claim (Form 103), alleging on December 18, 2014, he had sustained disabling occupational hearing loss due to repetitive exposure to hazardous workplace noise; and an Employment History (Form 104). In support of his hearing loss claim, he attached a report from Beltone Hearing Care Center of Somerset, Kentucky, dated March 12, 2015, indicating a diagnosis of slight to moderately severe binaural sensorineural loss, noting complaints of tinnitus, and recommending hearing aids.

Hensley was deposed on July 21, 2015. He testified he had been exposed to loud noise from equipment at work and had suffered hearing loss. He admitted his first audiogram was performed in 2013, but he denied receiving a copy of the report or having had any knowledge of the audiogram results.

[3] Hensley testified in his deposition he worked for Job Land Mining from February through June 2014. He further testified one of the Job Land Mining bosses started a new business—D&L—at the same location with the same equipment in June 2014. Hensley claimed he worked "off the books" for D&L from June through November 2014.

Dr. Barbara Eisenmenger, an audiologist, performed a university medical evaluation at the request of the Division of Workers' Compensation. In a medical report dated September 21, 2015, she diagnosed a pattern of hearing loss compatible with a long-term exposure to hazardous occupational noise, with no pre-existing active impairment. She assigned a 17% whole person impairment rating due to permanent hearing loss based on the AMA *Guides*,[4] recommended treatment to include use of hearing aids, and imposed restrictions of wearing hearing protection devices when exposed to loud noise. Dr. Eisenmenger was unaware of the 2013 audiogram but had been provided Hensley's work history and March 12, 2015, audiogram results.

A Benefit Review Conference was conducted on January 14, 2016. The following contested issues were identified: benefits per KRS[5] 342.7305 and 342.730; work-related causation; notice; average weekly wage; unpaid or contested medical expenses; injury as defined by the workers' compensation act; exclusion for pre-existing disability/impairment; and temporary total disability.

Dr. Lisa Koch, another audiologist, conducted an independent medical examination at D&L's request. Her medical report, dated January 26, 2016, included comparison of Hensley's audiograms from 2013 and 2015. Based on the 2013 audiogram, Dr. Koch opined Hensley had exhibited a pre-existing active hearing loss qualifying for an 18% whole person impairment rating due to binaural

[4] *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, Linda Cocchiarella & Gunnar B. J. Anderson, American Medical Association (AMA Press, 2000).

[5] Kentucky Revised Statutes.

hearing loss. Based on his 2015 audiogram, she opined Hensley had sustained no additional hearing loss due to his 2014 employment at D&L.

At the hearing on January 29, 2016, Hensley testified he had been exposed to constant loud noise at D&L due to the operation of heavy equipment. He also testified he did not wear hearing protection, nor was he required to do so, because he needed to be able to hear other employees and equipment to safely perform his work duties.

Based on the lay and medical evidence, the ALJ found Hensley had suffered hearing loss compatible with long-term exposure to hazardous occupational noise, such as that to which he had been exposed while employed at D&L. The ALJ awarded PPD benefits pursuant to KRS 342.7305 and KRS 342.730 based on a finding of a 17% whole person impairment rating. Benefits were enhanced because the ALJ found Hensley was unable to return to work because wearing medically-recommended hearing protection would create safety issues for himself and others. Citing *Greg's Construction v. Keeton*, 385 S.W.3d 420 (Ky. 2012), the ALJ held D&L, the last employer of record, exclusively liable for benefits.

D&L did not petition for reconsideration but appealed the ALJ's decision to the Board. The Board affirmed the ALJ. D&L now appeals to this Court, raising the following issues: (1) whether the ALJ erred in awarding Hensley PPD benefits when he had the same level of hearing loss prior to his employment with D&L; and (2) whether the ALJ erred in finding Hensley could

not return to the same type of work and enhancing the PPD benefits by the three multiplier. We affirm.

KRS 342.285 designates the ALJ as finder of fact in workers' compensation cases. Our standard of review is:

> [t]he claimant had the burden of proof and risk of non-persuasion before the ALJ with regard to every element of his claim. KRS 342.285 designates the ALJ as the finder of fact in workers' compensation cases. It permits an appeal to the Board but provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and, together with KRS 342.290, prohibits the Board or a reviewing court from substituting its judgment for the ALJ's "as to the weight of evidence on questions of fact."
>
> KRS 342.285 gives the ALJ the sole discretion to determine the quality, character, and substance of evidence. As fact-finder, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;" whether the decision "was procured by fraud;" or whether the decision was erroneous as a matter of law. Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion. A party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, i.e., that the finding was unreasonable under the evidence.

Greg's Const., 385 S.W.3d at 423-24 (internal footnotes omitted).

KRS 342.7305(4) establishes a rebuttable presumption of work-related causation of hearing loss and liability, stating:

> [w]hen audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure and the employee demonstrates repetitive exposure to hazardous noise in the workplace, there shall be a rebuttable presumption that the hearing impairment is an injury covered by this chapter, and the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits.

Concerning rebuttable presumptions, it has long been held

> presumptions may only be indulged in so long as there is no substantial evidence to the contrary. Once substantial evidence to the contrary is offered, the presumptions disappear, and any factual issues in dispute must be determined based on the evidence adduced.

Wells v. Hamilton, 645 S.W.2d 353, 355 (Ky. App. 1983) (citing *Carroll v. Carroll*, 251 S.W.2d 989 (Ky. 1952)). Further,

> rebuttable presumptions are governed by KRE 301. A rebuttable presumption shifts to the party against whom it is directed the burden of going forward with evidence to rebut or meet it but does not shift the burden of proof (i.e., the risk of nonpersuasion) from the party upon whom the burden was originally cast. If the presumption is not rebutted, the party with the burden of proof prevails on that issue by virtue of the presumption. If the presumption is rebutted, it is reduced to a permissible inference. The ALJ must then weigh the conflicting evidence and decide which is most persuasive.

AK Steel Corp. v. Adkins, 253 S.W.3d 59, 63-64 (Ky. 2008) (citing *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 95 (Ky. 2000)).

The rebuttable presumption provided in KRS 342.7305(4) applies upon proof of: (1) a pattern of hearing loss compatible with that caused by hazardous noise exposure, and (2) an employee's demonstration of repetitive exposure to hazardous noise in the workplace. If established and unrebutted, liability is exclusively assigned to the employer with whom the employee was last injuriously exposed to hazardous noise. Here, the ALJ found the rebuttable presumption applicable because Hensley made the two required showings, neither was rebutted by D&L, and D&L was the last employer.

First, Hensley's audiograms revealed a pattern of hearing loss compatible with that caused by hazardous noise exposure. After examining Hensley and reviewing his March 2015 audiogram, Dr. Eisenmenger opined, within a reasonable degree of medical probability, Hensley's hearing loss was consistent with the pattern typical of long-term exposure to occupational hazardous noise. Evidence of the 2013 audiogram report, submitted by D&L and referenced by Dr. Koch, further evidenced a pattern of hearing loss consistent with long-term, repetitive exposure to hazardous workplace noise.

KRS 342.0011(4) defines injurious exposure as "exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made." The ALJ correctly held *Greg's Construction* does not require Hensley to prove his last employment caused a measurable hearing loss, nor does it require proof of a minimum period of exposure. The underlying facts of *Greg's Construction* are similar to the facts of

the instant case. Both Hensley and the claimant in *Greg's Construction* had hearing loss prior to their final employment. Unlike the claimant in *Greg's Construction*, Hensley underwent an audiogram prior to his last employment. Nevertheless, Hensley had no knowledge of the earlier audiogram results until after working for another employer and thereafter filing a workers' compensation claim. Based on the Supreme Court of Kentucky's holding in *Greg's Construction*, we determine Hensley's prior hearing test represents a difference without a distinction.

Second, Hensley's own testimony demonstrated repetitive exposure to hazardous workplace noise throughout his employment at D&L. D&L submitted no proof to rebut Hensley's testimony. Similar to the deficiencies noted in *Greg's Construction*, D&L did not counter Hensley's testimony by demonstrating the heavy equipment he operated and worked around did not expose him to hazardous noise, Hensley's work for D&L differed from his previous hazardous work, Hensley wore or could have worn ear protection while employed at D&L, or D&L required employees to participate in a hearing conservation program to prevent exposure to hazardous noise. Therefore, we hold D&L failed to overcome the statutory rebuttable presumption established in KRS 342.7305(4).

Further, KRS 342.7305(4) imposes liability "exclusively" on the employer with whom the claimant was last injuriously exposed to hazardous noise, preventing apportionment to prior employers. The plain language of this statute is unambiguous with respect to liability for noise-induced hearing loss attributable to

the workplace. Hensley's employment with D&L represented his last injurious exposure. Thus, we hold the ALJ was correct in exclusively assigning liability to D&L for Hensley's compensable work-related hearing loss.

Next, D&L argues Hensley was not entitled to the three multiplier under KRS 342.730(1)(c)1 because he can perform the essential functions of his customary work. Under KRS 342.730(1)(c)1, benefits for an injured employee who lacks physical capacity to return to the work performed on the date of injury shall be multiplied by three. The Supreme Court of Kentucky has held "application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage." *Adams v. NHC Healthcare*, 199 S.W.3d 163, 168-69 (Ky. 2006).

There is no evidence Hensley ever returned to work after leaving D&L. Additionally, Dr. Eisenmenger's medical report stated Hensley's work restrictions should include wearing hearing protection devices when working around hazardous workplace noise. However, Hensley testified he was unable to wear protective hearing devices while operating equipment at D&L Mining or in similar work because doing so created an unreasonable risk of harm. No rebuttal evidence was offered by D&L. Thus, the ALJ did not err in finding Hensley lacks the physical capacity to return to the work performed on the date of the injury, and was correct in applying the three multiplier to Hensley's award of PPD benefits.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, JIMMY HENSLEY:

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