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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000761-WC

GREG'S CONSTRUCTION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00242

JERRY KEETON; JOHNSON-FLOYD COAL COMPANY; MILLER BROTHERS COAL COMPANY; APOSTLE FUELS; HON. OTTO DANIEL WOLFF IV, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Greg's Construction appeals from an opinion, order and award of an Administrative Law Judge (ALJ), as affirmed by the Board of Workers'

Claims ("Board"), holding Greg's Construction exclusively liable, per KRS[1] 342.7305(4), for paying benefits and medical expenses relating to Appellee Jerry Keeton's claim of permanent partial hearing loss. Upon review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Jerry Keeton, born April 5, 1955, has a history of over thirty years of exposure to occupational noise due to his work as a heavy equipment operator. The following is a chronology of the relevant evidence and procedural steps in this matter:

- For two months in either 2006 or 2007: Keeton worked as a bulldozer operator for Greg's Construction.
- September 2007: Keeton started working for Johnson Floyd Coal Company ("Johnson Floyd").
- December 15, 2008: An audiogram requested by Keeton's counsel performed by Dr. Robert Manning revealed a 15% whole person impairment for hearing loss. Dr. Manning noted Keeton has reported a 35 year history of loud noise exposure, but offered no opinion regarding causation.
- March 5, 2009: Keeton filed his Form 103 against Johnson Floyd, supporting it with Dr. Manning's test results. Keeton alleged he sustained or became disabled due to occupational hearing loss arising out of and in the course of his employment on December 15, 2008.
- March 6, 2009: Keeton ceased working for Johnson Floyd.

[1] Kentucky Revised Statute.

- On or about March 6, 2009: Keeton began working for Miller Brothers Coal Company ("Miller Brothers").

- April 3, 2009: Keeton ceased working for Miller Brothers.

- April 16, 2009: Notice was issued for a university evaluation scheduled for July 1, 2009.

- May 13, 2009: Keeton began working for Apostle Fuels ("Apostle").

- May 14, 2009: At the request of Johnson Floyd, Dr. Joseph Touma evaluated Keeton and assessed a 9% whole person impairment. Dr. Touma indicated the high frequency loss is compatible with noise-induced hearing loss. Keeton filed the report on June 10, 2009 "for its statistical content."

- July 1, 2009: Dr. Raleigh Jones conducted a university evaluation.

- July 8, 2009: Keeton ceased working for Apostle.

- July 10, 2009: Keeton began working for Greg's Construction a second time.

- July 13, 2009: The university evaluation form 108-HL completed by Dr. Jones was filed. The report indicated a 19% whole person impairment rating. The report showed Johnson Floyd as Keeton's employer, but a workers' compensation information sheet attached to the report noted Keeton was working for Apostle at the time. Dr. Jones indicated the audiograms and other testing established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. Dr. Jones stated, within reasonable medical probability, Keeton's hearing loss was related to repetitive exposure to hazardous noise over an extended period of employment.

- August 12, 2009: The ALJ granted Keeton's motion to add Miller Brothers and Apostle as additional defendants.

- January 8, 2010: Keeton ceased working for Greg's Construction.

- March 16, 2010: Keeton is again examined by Dr. Manning who assesses an 18% whole person impairment. The evaluation was requested by Keeton's counsel. Dr. Manning noted Keeton reported feeling he had a greater hearing loss since the first evaluation.

- April 14, 2010: Greg's Construction was added as a defendant.

- August 5, 2010: The benefit review conference and final hearing are held. Contested issues included: 1) whether Keeton had sustained an "injury" as defined by Kentucky's Workers' Compensation statute; 2) the extent and duration of Keeton's injury; 3) whether Keeton's injury constituted a preexisting active impairment; 4) whether Keeton had been injuriously exposed to hazardous levels of noise while working for each respective employer; and 5) which of Keeton's employers was liable for paying Keeton's benefits.

With regard to the issue of injurious exposure, the ALJ found that Greg's Construction was the last of Keeton's employers to injuriously expose Keeton to hazardous levels of noise. The ALJ began his analysis by quoting the relevant statute, KRS 342.7305(4), which provides in pertinent part, that "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."

Thereafter, the ALJ reasoned:

> In compensation proceedings, a claimant's testimony concerning his condition is competent and has probative value. James v. Elkhorn Piney Coal Mine Co., [277 Ky. 765, 127 S.W.2d 823 (1939)]. A worker's testimony is competent evidence of his physical condition. Ira A.

> Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).
>
> Herein, [Keeton] answered, "Yes," when asked, "Do you think your hearing loss—did you notice it worsening while you were at Greg's Construction?" (FH p. 14-15). [Keeton] also answered "Yes," when asked if he was exposed to a lot of noise at Greg's. At Greg's he operated an open cab D5. He testified, that when being considered for employment by Greg's Construction, he told them about his hearing loss. He testified that Greg's did not provide him with hearing protection (FH p. 16), but he did wear ear muffs. (FH p. 34). Plaintiff's belief that he had a greater hearing loss is reiterated in Dr. Manning's March 16, 2010 opinion letter, which noted, "He presents himself today reporting that he feels he has lost more of his hearing.["] [Keeton's] input on this point is not refuted.

Regarding extent and duration, the ALJ adopted Dr. Jones's opinion, as stated in Dr. Jones's university evaluation of Keeton. The ALJ also accepted Dr. Jones's 19% functional impairment rating of Keeton's injury. Finally, the ALJ reasoned that because Greg's Construction was the last employer to injuriously expose Keeton to hazardous levels of noise in its workplace, per KRS 342.7305(4), Greg's Construction was exclusively liable for Keeton's benefits.

Greg's Construction filed a petition for reconsideration, arguing that the expert medical evidence in this matter failed to demonstrate that Keeton's hearing loss had worsened as a result of his employment with Greg's Construction. For the same reason, Greg's Construction also argued that the ALJ erred in failing to find that Greg's Construction had rebutted the presumption described in KRS 342.7305(4). Finally, Greg's Construction argued that the ALJ erred in assigning

it exclusive liability for Keeton's benefits, rather than apportioning liability among itself, Johnson Floyd, Miller Brothers, and Apostle Fuels.

However, the ALJ denied Greg's Construction's petition. In its own review, the Board affirmed. This appeal followed.

II. STANDARD OF LAW

It is well settled that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). The decision of the ALJ may be appealed to the Board, but "[n]o new evidence may be introduced before the Board, and the Board may not substitute its judgment for that of the ALJ concerning the weight of evidence on questions of fact." *Smith v. Dixie Fuel Co.*, 900 S.W.2d 609, 612 (Ky. 1995). The role of this Court in reviewing decisions of the Board "is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 798 (Ky. App. 1995) (citing *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)).

If a decision is made in favor of the claimant, as it was here, the question on appeal "is whether the decision . . . is supported by substantial evidence." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). The term "substantial evidence" has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of

reasonable men." *Smyzer v. B.F. Goodrich Chemical Company*, 474 S.W.2d 367, 369 (Ky. 1971).

III. ANALYSIS

Regarding a claim of occupational hearing loss, KRS 342.7305(4) provides that

> [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.

Here, Keeton testified that he had over thirty years of exposure to loud noise over the course of his work as a heavy equipment operator, which included his employment with the various entities in this matter. Dr. Manning's December 15, 2008 report and audiogram assigned Keeton a 15% whole person impairment for hearing loss attributable to loud noise exposure. The ALJ also gave presumptive weight to Dr. Jones's July 13, 2009, university evaluation, which contained Dr. Jones's opinion and supportive findings that "audiograms and other testing establish[ed] a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace[.]" In short, substantial evidence supports that Keeton's hearing impairment is an injury covered by Kentucky's Workers' Compensation statute.

Indeed, on appeal, Greg's Construction does not take issue with the ALJ's finding that Keeton's hearing impairment is causally related to exposure to hazardous levels of workplace-related noise.[2] Nor, for that matter, does Greg's Construction contest that it was Keeton's last employer. Rather, Greg's Construction argues, first, that it was error for the ALJ to hold Greg's Construction liable for paying Keeton's benefits because, as it contends, the evidence in this matter fails to prove that its workplace caused or worsened Keeton's hearing impairment. Second, and alternatively, Greg's Construction argues that the ALJ erred in holding it exclusively liable for paying Keeton's benefits and that liability for paying Keeton's benefits should instead be apportioned between Greg's Construction, Johnson Floyd, Miller Brothers, and Apostle.

1. Substantial evidence demonstrates that Greg's Construction's workplace injuriously exposed Keeton to hazardous levels of noise.

In support of its first argument, Greg's Construction notes that Dr. Manning's December 15, 2008 evaluation, and Dr. Jones's July 1, 2009 evaluation, both predated Keeton's six-month tenure as a Greg's Construction employee, and that the one medical evaluation of record that was conducted when Keeton was its employee, *i.e.*, Dr. Manning's re-evaluation of Keeton on March 16, 2010, gives no indication that Keeton's impairment was caused or worsened during that time.

[2] Greg's Construction prefaced its brief before the Board by stating:

> The medical opinions in the record were unanimous in concluding that [Keeton's] hearing tests revealed a pattern of hearing loss compatible with that caused by repetitive hazardous noise exposure. [Keeton] arguably demonstrated that he experienced repetitive hazardous noise exposure in the workplace while working for all four of the co-defendants.

Greg's Construction asserts that the only evidence of whether Keeton was even exposed to hazardous levels of noise at its workplace came from Keeton's own testimony, and that Keeton was not qualified to make that assessment. Finally, Greg's Construction asserts that the record actually demonstrates Keeton's hearing improved while he was working as a Greg's Construction employee. In support, Greg's Construction notes that Dr. Jones assessed Keeton a whole body impairment rating of 19% on July 1, 2009, and that Dr. Manning later assessed Keeton with a whole body impairment rating of 18% on March 16, 2010.

As to the last of these observations, the 1% difference between Dr. Manning's and Dr. Jones's respective evaluations does not indicate that Keeton's condition improved while he was working for Greg's Construction. It only indicates that two different experts used *The American Medical Association's Guides to the Evaluation of Permanent Impairment*, 5th Edition, to arrive at two different conclusions regarding Keeton's impairment. Indeed, Dr. Manning's evaluation contains no reference to Dr. Jones's evaluation. And, Dr. Manning's 18% impairment contained in his March 16, 2010 evaluation is 3% higher than his December 15, 2008 impairment rating of 15%, which actually reflects his belief that Keeton's condition had *worsened* between those two dates.

As to Greg's Construction's argument that Keeton was unqualified to assess whether he was exposed to hazardous levels of noise at Greg's Construction's workplace, we disagree. KRS 342.7305(4) requires only that "the employee demonstrates repetitive exposure to hazardous noise in the workplace[.]"

Keeton's own testimony constituted substantial evidence that he continued to be exposed to harmful occupational noise at Greg's Construction. *See, e.g., Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000) ("A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured.") (citing *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)).

Finally, Greg's Construction misapplies the applicable rule of law in arguing that the evidence in this matter fails to prove that its workplace caused, or worsened, Keeton's hearing impairment. Within the context of this case, the inquiry under KRS 342.7305(4) is: 1) whether Keeton's hearing impairment qualifies as "*an* injury covered by this chapter" (emphasis added); and, if so, 2) whether Greg's Construction was the last employer to injuriously expose Keeton to hazardous levels of noise. The Kentucky Supreme Court has explained that issues of causation and worsening are irrelevant: "The exposure incurred during a particular employment need not have been the actual cause of the disease[,]" and a claimant demonstrates "injurious exposure" by "present[ing] evidence which proves that the type of exposure received during the subject employment would have eventually resulted in contraction of the disease, in other words, that it was injurious." *Begley v. Mountain Top, Inc.*, 968 S.W.2d 91, 95 (Ky. 1998).[3]

[3] In *Begley*, the Supreme Court examined the phrase "injurious exposure" and the significance of the General Assembly's omission of any minimum required period of time for that injurious exposure within the context of KRS 342.316(1)(b) and (10), rather than KRS 342.7305(4). *Begley*, 968 S.W.2d at 95, interpreted "injurious exposure" consistently with our earlier explanation of that term in *Howell v. Shelcha Coal Co.*, 834 S.W.2d 693 (Ky. App. 1992), wherein a panel of this court held that

KRS 342.7305(4) is functionally identical to KRS 342.316(10). Thus, its function is further illustrated by *Howell v. Shelcha Coal Co.*, 834 S.W.2d 693 (Ky. App. 1992). In that case, Howell, a coal miner, collapsed on the job after only two hours of employment at Shelcha. Howell had worked as a miner for thirteen years at a different coal company. After his collapse, a physician diagnosed Howell with pneumoconiosis. This Court held the two-hour period Howell had worked for Shelcha was sufficient to establish "injurious exposure" and that Shelcha was liable for compensating Howell. The Court stated "there can be no serious dispute to the finding that the type of work which was being

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> [a]ll that is required under KRS 342.316(1)(b) is that the exposure be such as could cause the disease independently of any other cause. It will be noted that under neither of the cited subsections is there any minimum *time* requirement for the period of exposure. Accordingly, it is not required that the employee prove he *did* contract silicosis in his last employment, but only that the conditions were such that they could cause the disease over some indefinite period of time.

Id. at 696 (quoting *Childers v. Hackney's Creek Coal Co.*, 337 S.W.2d 680, 683 (Ky. 1960)).

Like KRS 342.316(1)(b) and (10), the General Assembly enacted KRS 342.7305(4) to place exclusive liability upon the last employer to injuriously expose a claimant to the hazard of the disease, *i.e.*, "hazardous noise." And, like KRS 342.316(1)(b) and (10), KRS 342.7305(4) requires no minimum period of time for that exposure. Because the General Assembly enacted KRS 342.7305(4) with the same phraseology as KRS 342.316(10), and subsequent to *Shelcha* and *Childers*, we presume that the General Assembly intended for the Courts to treat the language of KRS 342.7305(4) and its omission of any minimum period of exposure in the same manner as we have treated the language of KRS 342.316(1)(b) and (10) and its omission of any minimum period of exposure. This is because "[a] universally accepted rule of statutory construction is that the General Assembly is presumed to know the status of the law and the constructions placed on it by the courts." *Butler v. Groce*, 880 S.W.2d 547, 550 (Ky. 1994), J. Lambert dissenting (citing *Baker v. White*, 251 Ky. 691, 65 S.W.2d 1022 (1933); *Commonwealth, Dept. of Banking & Secur. v. Brown*, 605 S.W.2d 497 (Ky. 1980)).

performed by Howell at Shelcha could, over time, give rise to coal workers' pneumoconiosis." *Id*. at 696.

Here, as in *Shelcha*, there can be no serious dispute to the finding that the type of work which was being performed by Keeton at Greg's Construction could, over time, give rise to occupational hearing loss, *i.e.*, that it constituted "injurious exposure." It was the same type of work that had, over the course of thirty years, given rise to the occupational hearing loss Keeton had prior to his employment with Greg's Construction. Keeton testified that he was exposed to "a lot of noise" during his employment with Greg's Construction, that the open cab D5 he drove was "very noisy," and that he believed his hearing loss worsened during his employment with Greg's Construction even though he was wearing a moderate amount of hearing protection, *i.e.*, his "earmuffs."

Moreover, Dr. Manning's March 16, 2010 report is consistent with Keeton's testimony that he was exposed to hazardous levels of noise while working for Greg's Construction. As noted, Dr. Manning opined that Keeton's hearing loss constituted a 15% whole body impairment on December 15, 2008, and by March 16, 2010, following Keeton's employment with Greg's Construction, Dr. Manning had increased that figure to 18%.

In sum, Keeton was only required to present substantial evidence demonstrating that he was exposed to hazardous levels of noise during his employment with Greg's Construction. Keeton has done so. And, Greg's Construction cites to nothing in the record that would rebut that Keeton was

injuriously exposed to hazardous levels of noise in its workplace. As such, we find no error with respect to this portion of the ALJ's decision.

2. Greg's Construction is exclusively liable for paying Keeton's benefits.

Alternatively, Greg's Construction argues that liability for paying Keeton's benefits should be apportioned between itself, Johnson Floyd, Miller Brothers, and Apostle. We are compelled by statute to disagree.

In relevant part, KRS 342.7305(4) provides that "the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits." As noted above, substantial evidence supports the ALJ's determination that Greg's Construction was the employer with whom Keeton was last injuriously exposed to hazardous noise. Therefore, pursuant to the unambiguous language of the statute, Greg's Construction is exclusively liable for Keeton's benefits. *See, e.g., Shelcha Coal Co.*, 834 S.W.2d at 696 (holding that identical language in KRS 342.316 is "clear and unequivocal" and precludes apportionment); *see also McDowell v. Jackson Energy RECC*, 84 S.W.3d 71, 77 (Ky. 2002) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says . . . [and][w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992)).

IV. CONCLUSION

For these reasons, the respective decisions of the ALJ and Board are AFFIRMED.

ALL CONCUR.

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