

OPINION ENTERED: JULY 26, 2012

CLAIM NO. 201100551

AK STEEL CORPORATION

PETITIONER

VS.

**APPEAL FROM HON. RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE**

ROGER MARSHALL
and HON. RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

SMITH, Member. AK Steel Corporation ("AK Steel") appeals from the December 29, 2011 Opinion and Award rendered by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ"), awarding Roger D. Marshall ("Marshall") permanent partial disability ("PPD") benefits and medical benefits for a work-related hearing loss. AK Steel also appeals from the

ALJ's January 25, 2012 Order ruling on its petition reconsideration. The sole question presented by AK Steel on appeal is whether the ALJ erred in finding Marshall's claim was not barred by the applicable statute of limitations. We affirm.

Marshall filed a Form 103 Application for Resolution of Hearing Loss Claim on April 11, 2011 alleging he became disabled on January 28, 2011 due to an occupational hearing loss arising out of and in the course of his employment. He indicated he became aware of the condition on February 15, 2011 and gave notice to the employer on March 4, 2011.

Marshall testified by deposition taken June 9, 2011 and at the hearing held November 14, 2011. Marshall began working for AK Steel in 1970 and worked there continuously until his retirement on January 28, 2011. Most of his work was as a rigger and involved layout work, blueprint reading, fabricating and operating mobile equipment. He performed repair work throughout the mill and often worked in motor rooms rebuilding turbines. He claimed his work environment was very noisy. Marshall stated he wore soft earplugs on average two to three hours a day.

Marshall testified he became aware he had hearing loss in the late 1980s and saw Dr. Touma. Dr. Touma performed testing and told Marshall he had hearing loss and would

probably need hearing aids. Marshall sought treatment at a clinic in Memphis where hearing tests were performed and he was told he had nerve damage. Marshall wore hearing aids for a short time but had problems wearing them while working in the mill.

Marshall indicated he did not see any doctor for his hearing from the 1980s until 2011, with the exception of yearly physicals at AK Steel. Marshall indicated his symptoms had increased and his hearing had worsened in the last five years. He stated he has to ask people to repeat things and to talk directly to him. Marshall stated he was disqualified from operating mobile equipment at AK Steel after his yearly test in June 2010.

At the hearing, Marshall stated he was never told his hearing loss was related to his work at the time of any of his hearing tests at AK Steel. Marshall stated he was never actually informed by a doctor that his hearing loss was related to his work. He learned his hearing loss was work-related from his attorney after an evaluation by Dr. Manning in February, 2011.

Marshall submitted the report of Dr. Robert Manning who performed an audiogram on February 15, 2011. Marshall gave a history of a forty year exposure to loud noise while employed in steel mills. He noticed pain and drainage from

both ears previously but not within the past year. He reported hearing loss in both ears for the past twenty years with a diagnosis of hearing loss approximately one year ago. He noted significant problems hearing and understanding in all situations. Testing by Dr. Manning demonstrated bilateral moderate to profound nerve impairment hearing loss, slightly greater in the right ear.

Dr. Manning advised Marshall the hearing loss was in large part due to loud noise exposure over the duration of his work history. Dr. Manning noted Marshall's hearing loss represents permanent nerve impairment which may continue to worsen and recommended hearing aids for the remainder of his life. According to the American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides"), Dr. Manning found a 63.1% binaural impairment which equates to a 22% whole person impairment rating.

Dr. Matthew Bush and Dr. Jennifer Shinn of the University of Kentucky evaluated Marshall on August 17, 2011. The audiogram revealed a moderate sloping to moderately severe symmetric sensory neural hearing loss with 54% discrimination on the right and 44% discrimination on the left. Marshall had flat tympanograms bilaterally. Audiograms and other testing established a pattern of

hearing loss compatible with that caused by hazardous noise exposure in the workplace.

Dr. Bush opined, within a reasonable degree of medical certainty, Marshall suffered from an occupationally related, noise induced neural hearing loss. Pursuant to the AMA Guides, he found a 60.3% binaural impairment which translates to a 21% impairment of the whole person. Dr. Bush noted he discussed further hearing protection precautions with Marshall and advised him to aggressively protect his hearing. Dr. Bush stated Marshall was a candidate for, and may benefit from amplification.

AK Steel submitted records of hearing tests performed from 1985 to 2004 that showed a worsening of Marshall's hearing over time. The records included notification slips from the Armco Inc. Medical Department dated July 9, 1985, March 26, 1986 and October 23, 1990 which stated "This is to inform you that you have a significant loss of hearing as detected by comparison of today's test results with your original hearing test." Records on May 29, 2001, June 10, 2003 and May 18, 2004 indicate Marshall was "advised on noise conservation" for occupational and non-occupational noise and Marshall "voiced understanding." The records contain no impairment ratings, nor do they specify the degree of monaural or binaural hearing loss.

The ALJ made the following findings regarding whether Marshall sustained an injury as defined by the Act:

Here, the plaintiff's work required him to be exposed to noise throughout his employment, with the possible exception of the time from June 2010 until his retirement January 28, 2011. During this time the employer had determined that he had sufficient impairment to warrant transferring him to other work, presumably less noisy work. Because audiograms produced after the employment ended on January 28, 2011 reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure, and because the employee has demonstrated repetitive exposure to hazardous noise in the workplace, the presumption of KRS 342.7305 (4) applies. There has been no showing of the cause of or extent of impairment, if any, demonstrated by the earlier hearing tests. Therefore the presumption has not been rebutted. I conclude that Mr. Marshall has sustained an injury as defined by the Kentucky Workers Compensation Act in the form of hearing loss. The employer is responsible for compensation for all of the impairment.

With regard to the limitations issue, the ALJ first recited the provisions of KRS 342.185 then provided a detailed review of the statutory provisions applicable throughout Marshall's work life.

The ALJ then found as follows:

Mr. Marshall's exposure to noise in the industrial setting continued at least until June 2010 and may have continued until January 28, 2010 [sic]. At no time since January 1, 1973, could he have made a claim for occupational hearing loss under the statutes or under medical guides adopted by the statutes so long as that exposure to noise continued. The claim was filed on April 11 2011, less than one year following the last date of the employment and the last date of exposure to industrial noise.

From 1973 until 1980 there were special statutory rules in effect for hearing loss claims. From 1980 to 1996, there were special rules in place through the incorporation by reference of the AMA Guides. Since 1996 we still have special rules in place for hearing loss claims. A new statute was enacted, KRS 342.7305, specifically dealing with hearing loss claims. Subsection 1 requires impairment to be determined under the AMA guides. This would incorporate the requirement that the impairment is no longer accelerating beyond an age-appropriate rate and maximum rehabilitation has been achieved. This requires that the claimant cease excessive exposure to noise. Subsection 2 places a threshold of 8% impairment before income benefits are paid. Subsection 4 of KRS 342.7305 provides:

(4) When 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.

This is an interesting presumption. When the employee demonstrates a history of exposure and an impairment compatible with that history, then two things are presumed. First it is presumed that the impairment is an injury covered by the Kentucky Workers Compensation Act. Second it is presumed that the employer with whom the employee was last injuriously exposed to hazardous noise is exclusively liable. This presumption can be broadly or narrowly construed. If broadly construed, this would presume that the claim is compensable under the Act with benefits to be paid by the last employer. If narrowly construed, it may simply mean that the claim is presumed to be justiciable under the Act. "Covered by" is often found in an insurance context (which the workers compensation program is) in the sense of "protected by." The 1996 amendments to the Workers Compensation Act were intended as a simplification of the process with a greater certainty of outcome. With a history of exposure and an impairment compatible with that history, the claimant would lack only an opinion as to causation between the two in order to establish basic compensability. The presumption however, is not limited to a presumption of a causal relationship between the impairment and the exposure, it presumes that the

impairment is an injury "covered by" the Act.

Both hearing loss claims and cumulative trauma claims are special claims. Occupational disease claims and traumatic injury by accident claims both have specific notice and limitations requirements. The occupational disease requirements are found in KRS 342.316 and the traumatic injury by accident requirements are found in KRS 342.185. The courts have had a difficult time trying to fit these specially shaped pegs into either a square hole as an injury or a round hole as an occupational disease. The efforts of the courts in cases such as *Randall Company v. Pendland, Ky.*, 770 S.W.2d 687 (1989) and *Alcan Foil Products v. Huff, Ky.*, 2 S.W.3d 96 (1999) are examples of the difficulty in applying ill-fitting notice and limitations rules that are not specifically provided for by statute. These rules, created by the courts, have made it difficult for claimants and their advisers to tiptoe through the minefield of the notice and limitations rules. Both KRS 342.185 and KRS 342.270 contain periods of limitations. Each speaks of a filing within two years after "the accident." The accident means the occurrence, the happening of which causes the injury. It does not mean the resulting injury. *Fiorella v. Clark*, 298 Ky. 817, 184 S.W.2d 208 (1944). In the case of both gradual, noise induced hearing loss and cumulative trauma, that which causes the injury is not an accident within the ordinary sense of an unusual, fortuitous, unexpected, unforeseen, or unlooked for event. In the case of both gradual, noise induced hearing loss and cumulative trauma that which causes the injury is an ongoing process

which does not stop until the exposure or activity stops. The definition of injury under the Act includes, "any work-related traumatic event or series of traumatic events, including cumulative trauma..." If an injury is a series of events, when does it make the most sense to require the parties to institute litigation concerning it? After the first event of the series? Or after the last event of the series? If there is a limit on the time for filing claims as a result of cumulative trauma or a series of traumatic events, surely that time does not begin to run until the last of the events occur.

The records submitted by AK Steel Corporation show that it probably had an equal, if not better, knowledge of Mr. Marshall's hearing condition than Mr. Marshall did himself. No proof has been entered as to whether AK Steel Corporation ever submitted a first report of injury. Is it possible that AK Steel Corporation did not recognize the hearing loss as an injury until exposure had stopped?

This claim for hearing loss requires proof of a permanent impairment greater than 8% under KRS 342.7305. There is no proof that there was any impairment much less a permanent impairment at any time prior to the examination by Dr. Manning. Without a permanent impairment and with continued exposure to noise, the statute of limitations could not begin to run.

After the discussion above, I conclude that the claim is not barred by limitations. I do so on several grounds:

1. Because there is no specific statute of limitations for hearing loss claims under KRS 342.7305, limitations is not a valid defense.
2. Because the last of Mr. Marshall's presumed injury did not occur until January 28, 2011, any time limitation did not begin before then.
3. Because the statutorily adopted *Guides to the Evaluation of Permanent Impairment* of the American Medical Association provides that hearing impairment be evaluated only after maximum rehabilitation has been achieved and when the impairment is no longer accelerating beyond an age-appropriate rate, it is not appropriate to begin the limitations period until the impairment can be measured.
4. Because the claim arises under a specific statute requiring proof of a permanent impairment, the limitations period does not begin until a permanent impairment exists. There is no proof of any permanent impairment prior to the last exposure.
5. The presumption that the hearing impairment is an injury "covered by" this chapter carries with it the presumption that the claim is timely filed.

Therefore, I conclude that this claim is not barred by the limitations period

of KRS 342.185 as argued by the Defendant.

AK Steel filed a petition for reconsideration arguing the statute of limitations should begin to run from when the claimant becomes aware of a work-related hearing loss rather than when he is first found to have a hearing loss impairment. AK Steel also noted the award, if any, should commence on January 28, 2011 instead of January 28, 2010.

By order dated January 25, 2012, the ALJ corrected the date PPD benefits would commence, but denied the remainder of the petition for reconsideration.

On appeal, AK Steel argues the ALJ erred as a matter of law by determining the statute of limitations did not apply to this case. AK Steel argues the records it produced establish Marshall was made aware of the work-related hearing loss well prior to his retirement on January 28, 2011. AK Steel notes the Supreme Court in Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999) established the statute of limitations begins to run when the disabling nature of the injury becomes manifest to the employee. The Court defined "manifestation of disability" as referring to the physical symptoms that lead the employee to discover that a work-related injury has been sustained. AK Steel notes the Board, in Tower Automotive

v. Carter Claim No. 2000-00499 entered June 4, 2002, stated the "limitations provisions of the Act are triggered for cumulative trauma injuries when the worker becomes aware of a gradual injury and knows it was caused by work."

AK Steel contends there is ample evidence Marshall was aware of his hearing loss as early as the 1980s, decades before he filed his claim. AK Steel states it has submitted "ample evidence suggesting the Respondent/Employee was made well aware of the cause of his hearing loss over the last three decades." Based on the audiology records it submitted, AK Steel asserts Marshall was aware of his Standard Threshold Shift ("STS") condition as early as 2000. AK Steel contends his knowledge of an STS is sufficient to demonstrate his knowledge of causation. AK Steel argues subsequent changes in the yearly exams would be presumed to be work-related absent any other explanation for the loss. AK Steel argues its medical personnel must have identified a work-related STS hearing loss since they subsequently followed OSHA regulations by recommending further hearing protection and evaluation. AK Steel further contends that, since Marshall followed the recommendations, he must be presumed to be aware his hearing condition was work-related. AK Steel

argues it cannot be seriously maintained Marshall did not have actual knowledge of the reason for his hearing loss.

AK Steel notes the ALJ cited provisions of the AMA Guides, the fact the claim arises under a specific statute requiring proof of impairment, and the lack of proof of a permanent impairment prior to the last exposure in holding the statute of limitations does not apply. AK Steel argues the statute of limitations is addressed in KRS 342,185. Pursuant to Randall Company/Randall Div. Of Textron v. Pendland, 770 S.W.2d 687 (Ky. 1989) the date the statute of limitations begins to run is when the disabling reality of the injuries become manifest. AK Steel argues that Marshall's injury became manifest when he was told by its medical professionals he had a work-related hearing loss. It notes Marshall was informed of a change in his hearing when compared to the original testing. He was also informed he had a STS and was advised to practice hearing conservation. AK Steel believes it is appropriate to remand the matter for a second university evaluation to determine what change in Marshall's hearing, if any, occurred in the two year period immediately preceding the filing of his claim.

Since AK Steel, the party with the burden of proof on the issue of the statute of limitations, was unsuccessful

before the ALJ, the issue on appeal is whether the evidence is so overwhelming as to compel the result AK Steel seeks as a matter of law. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As it applies to the statute of limitations defense, Alcan Foil Products v. Huff, *supra*, and its progeny provide that the statute of limitations begins to run when an employee becomes aware 1) he has sustained an injury and 2) the injury was caused by work activities. See also Special Fund v. Clark, 998 S.W.2d 487, 490 (Ky. 1999) and Brown Foreman Corporation vs. Upchurch, 127 S.W.3d 618, (Ky. 2004). Pursuant to Hill v. Sextet Mining Corp., 65 S.W.

3d, 603, (KY, 2001) an employee is not required to self-diagnose the cause of his condition. See also Manalapan Mining Co., Inc. vs. Lunsford, 204 S.W.3d 601, (Ky. 2006) in which the Court noted it is undisputed KRS 342.185(1) imposes a two year period of limitations that begins when a worker has knowledge of a gradual injury and its cause.

Substantial evidence supports the ALJ's finding that the application for benefits was timely filed. Clearly, Marshall was aware he sustained hearing loss decades prior to filing his claim. However, Marshall testified he was not told by a physician that his hearing loss was work-related and he learned the cause of his hearing loss from his attorney after the examination by Dr. Manning on February 15, 2011. Marshall had seen Dr. Touma but denied being told anything regarding the cause of his hearing loss at that time. The ALJ found Marshall to be a credible witness. Marshall's knowledge of the hearing loss, without knowledge of work-related causation, is insufficient to trigger the statute of limitations. A claimant is not expected to self-diagnose a cumulative trauma injury. The manifestation of disability does not occur until a clear and unambiguous medical opinion is given to the claimant. Hill v. Sextet Mining Corp., *supra*. Marshall's application was filed within two years of his last exposure with AK Steel

and within two years of the date he was informed by a physician that his hearing loss was related to exposure to noise at work.

It was reasonable for the ALJ to find there was no showing of the cause of the impairment, if any, demonstrated by the employer's hearing tests. The evidence supports a finding Marshall was not specifically informed by a physician that he had occupational hearing loss prior to leaving his employment. Moreover, no medical report was introduced by AK Steel to demonstrate a physician had previously found Marshall's hearing loss was in fact work-related and that the information was relayed to Marshall. The records from AK Steel's hearing tests fall far short of compelling a finding in its favor.

Accordingly, the December 29, 2011 Opinion and Award rendered by Hon. Richard M. Joiner, Administrative Law Judge and the January 25, 2012 Order ruling on the petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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