Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 8, 2016

CLAIM NO. 201500403 & 201500402

AUSTIN POWDER COMPANY PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

LAWRENCE MULLINS
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Austin Powder Company ("Austin Powder") appeals from the November 25, 2015, Opinion, Award, and Order and the December 28, 2015, Order ruling on its Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ awarded permanent partial disability ("PPD") benefits for hearing loss and carpal tunnel syndrome and medical benefits for both. On

appeal, Austin Powder asserts the ALJ's decision regarding the alleged hearing loss is not based on substantial evidence in the record.

The Form 103 (Claim: 2015-00402) filed March 23, 2015, alleges on May 2, 2014, Mullins became disabled due to occupational hearing loss arising out of and in the course of his employment. Mullins was working as a drill operator at the time of the exposure. Mullins alleged the hearing loss occurred due to: "Repetitive exposure to loud noise in the workplace." The Form 104 attached to Mullins' Form 103 indicates his employment with Austin Powder as a drill operator in the coal mines began in December 2007 and concluded on May 2, 2014. Under "exposure to substances causing occupational disease" is "coal dust & loud noise." The Form 104 reveals Mullins' employment prior to working for Austin Powder is as follows:

- Zag Resources, Coal Mines, Drill Operator, 2006-2007, Coal Dust & Loud Noise;
- Miller Brothers Coal, Coal Mines, Rock Truck Driver, 2006, Coal Dust & Loud Noise;
- Virginia Drilling, Drilling, Drilling Operator, 2006, Loud Noise;
- Sturgeon Mining, Coal Mines, Heavy Equipment Operator, 2004-2006, Coal Dust & Loud Noise;
- Don's Excavating, Construction, Laborer, 2000-2004, Loud Noise;

- Lloyd Smith Construction, Construction, Laborer, 1987-2000, Loud Noise.

The March 23, 2015, Form 101 (Claim: 2015-00403) alleges on May 2, 2014, Mullins injured his back, bilateral shoulders, bilateral knees, and bilateral upper extremities in the following manner: "Cumulative trauma due to repetitive use of his Back, Bilateral Shoulders, Bilateral Knees and Bilateral Upper Extremities."

On March 23, 2015, Mullins filed a "Motion to Join and Bifurcate." By order dated May 20, 2015, the ALJ consolidated the two claims.

The August 12, 2015, Benefit Review Conference order, identified the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; unpaid or contested medical expenses; injury as defined by the ACT; credit for unemployment benefits; exclusion for pre-existing disability/impairment; TTD. Under "other" is the following:

> The Defendant agrees that the Plaintiff is alleging that his HL and injury manifested on 05/02/14 but they are disputed [sic] that in fact any HL or any injury is work-related AND that those are the correct dates of manifestation if in fact any condition has arisen; Plaintiff is seeking a PTD; Plaintiff is not waiving his CWP claim.

The October 13, 2003, report of I-Yuan Joseph Chang, PA-C was introduced by Austin Powder.[1] Under "History of Present Illness," Chang wrote:

> Lawrence Mullins is a 43 year old male.
>
> He reported a loss of hearing which is getting progressively worse. Patient has a 20+ year history of gradual hearing loss in the left ear, which had become essentially deaf for 10 years, the ears feel full, and ringing in the ears. He reported no easy bleeding. He reported no vertigo.

Mullins' June 29, 2015, deposition was introduced. Mullins testified he ran a drill for Austin Powder, and prior to working for Austin Powder, worked as a drill operator for Zag Resources. He testified as follows:

> Q: Now, were you exposed to loud noises at Zag Resources?
>
> A: Same as Austin.

The July 13, 2015, Form 108-HL University Evaluation Medical Report of Dr. Barbara Eisenmenger was introduced. After performing a physical examination, Dr. Eisenmenger provided the following "diagnosis":

> Mr. Mullins has greater hearing loss than would be expected for an individual of 55 years of age. Objective and behavioral measures are consistent bilaterally and show a flat

[1] We note that Austin Powder filed this medical record as the medical record of Dr. Frank Daniel Mongiardo.

> moderately severe sensorineural hearing loss through 3000Hz with a sloping severe sensorineural high frequency loss above that point in the right ear. The left ear revealed a profound low frequency hearing loss with no response to pure tones in the higher frequencies. A sloping high frequency hearing loss was evident in the right ear and possibly in the left ear which could be associated with hearing loss from noise exposure. The low and mid-frequency hearing loss is likely from another cause. Based on the reported history of noise exposure, the apparent absence of other factors associated with hearing loss, and the results of the hearing evaluation, a portion of this high frequency hearing loss is likely long term noise exposure which cannot be separated from hearing loss in the low frequencies from an unknown cause.

Under causation, Dr. Eisenmenger checked "yes" in response to the following statement: "Audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace." Dr. Eisenmenger also checked "yes" in answer to the following question: "Within reasonable medical probability, is plaintiff's hearing loss related to repetitive exposure to hazardous noise over an extended period of employment." Dr. Eisenmenger checked "no" in response to the following question: "Within reasonable medical probability, is plaintiff's hearing loss due to a single incident of trauma?"

Dr. Eisenmenger assigned a 24% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. In answer to the question, "Was any portion of the plaintiff's hearing loss an active impairment prior to acquiring the work-related condition?", Dr. Eisenmenger wrote as follows: "Unknown without previous hearing tests."

Austin Powder introduced the September 15, 2015, deposition of Dr. Eisenmenger. During the deposition, Dr. Eisenmenger testified as follows:

> Q: Okay. Well, this gentleman by the name of Dr. Chang or Mr. Chang in 2006, May 23, 2006, said audio- and I quote here, 'Audiogram showed right mild to severe and left- severe to profound sensorineural hearing loss.' So, right - mild to severe, and left - severe to profound sensorineural hearing loss.
>
> ...
>
> Q: In 2006 he was found to have in his left ear a severe to profound sensorineural hearing loss.
>
> A: Uh-hmm.
>
> Q: And you have seen- I think in your language you said in your examination [sic] 2015 a profound predominantly sensorineural hearing loss is present through 2,000 hertz in the left ear.
>
> A: Uh-hmm.

Q: Now, you went through more detail in your evaluation, and we have your audiometric evaluation, but does this language here suggest- and I believe this gentleman who did this exam was an audiologist. Does this- and he was looking at an audiogram. Does this language suggest that this gentleman had approximately the same hearing loss in 2006 that he has at the present time for the left ear?

A: No, no.

Q: Okay. Is it- how would you describe these two things?

A: Based on that description, if we're using these modifiers, these normal whatevers, it appears that in both ears his hearing has gotten poor in the lower frequencies on my exam on the description of what they found in 2006.

...

A: Okay. You don't typically see this much hearing loss in the low and mid frequencies with it just being noise exposure alone. I mean, even if it's really being loud- and, you know, I see people from not just the ones coming in through Office of Workers' Claims but other sources where the noise is extremely loud in the workplace, typically you will see normal to almost normal, mild, hearing loss in the lows, and then you have this big notch, this big dive.

Q: At the higher frequencies?

A: In the higher frequencies. He has- he still has the dive here, especially in the right ear, that's kind of obvious, like starting about 4, but I

don't know why we're sitting at 60 and 65.

Q: What can cause that? What are some conditions?

A: There could be medical- there could be medical things, medical issues that he had that may have caused it. Sometimes it could be, although this also tends to be more high frequency, reaction to certain kinds of medication. Typically those medications are IV-administered, so you would have to have a pretty good illness for that. And some people just develop that hearing loss, and I don't know- he didn't- like I said, he didn't report family history, but I don't know if that could be a potential. I don't know. Just name something pretty much.

Q: But this is not a hearing loss that you normally would associate with exposure to noise; is that correct?

A: That's correct.

Q: Okay.

A: Well, let's rephrase that. I wouldn't- what I can't relate to noise is the hearing loss that we see, oh, that flat part of the hearing loss on the right ear. So, from 250 to about 3,000 it's relatively flat, and then it dives. Okay. So, we still have maybe some evidence of that noise-exposed loss in the higher frequencies, but I don't know what's going on in the lower frequencies.

On the other ear he had quite a bit of hearing loss the last time he was seen anyway. So, I have no idea, but this is not the kind of hearing loss that in

the left ear- this amount of hearing loss, and it's kind of-

Q: Let me just- please finish that thought. In the left ear, is this a hearing loss consistent with these mysterious or nonwork-related factors, not noise relation that you've talked about?

A: It's- it's a little bit difficult to tell because we- you know, we have his hearing actually getting a little- a little bit better at 2, and I don't know if it's dropping or not because we were- we're out of limits of the audiometer. So, if it's there, it's- I can't see it, but it might be there. I don't- that one is a big- that one is, you know, 50/50. I don't know on that side because I don't have a good look at that hearing.

Q: Would it be safe to say that from the documents from 2003 and 2006 that this gentleman had a significant hearing loss before 2007?

A: He had a significant hearing loss, especially in the high frequencies, in both ears in- based on the description that was in the history of present illness in the 2000 and- this is the 2006 document.

Q: Okay. So, how much impairment- and I- and I realize this is a difficult question, but if you found him to have a 24 percent impairment now and you look at this impairment that he probably had in 2006 and he started work at Austin Powder in 2007- that's the reason for my particular years that I've used there.

A: Okay.

Q: It looks like that at the time he started work for Austin Powder, would you agree that he had a significant hearing loss?

A: He had- well, he definitely had a significant hearing loss in his left ear. He had a significant high frequency hearing loss in his right ear, it looks like.

Q: Okay. Now, has that hearing loss that he has in his left ear, does that appear as of 2006 that he may very well have had the same presentation that he has now in your audiometry findings?

A: The only reason I would say no is because he- it's being described as a [sic] severe to profound. Severe gets you all the way up to 70. He's down at- he's at 100 or above now. So, we have had a drop somewhere to cause- and more than likely in the lows. So, maybe his low frequency hearing was more at 70, and then it dropped to where it is today.

Q: But, like you said earlier, that low frequency hearing loss is due to something other than noise exposure in all medical likelihood.

A: Yes.

...

Q: Okay. And, so, you're saying that the reason for that hearing loss in the lower decibels, though, again, is because of this nonwork-related factor?

A: More than likely, yes.

Q: Okay. So, when we're talking about- or let me rephrase that. In your report under subparagraph G, under diagnosis,

about six lines down, you say, 'The low and mid frequency hearing loss is likely from another cause.' And that's still your opinion today?

A: Yes.

Q: Now, I'd like for you to assume, and he's given testimony to this effect, that while he worked at Austin Powder he worked in an enclosed pressurized cab, and they had hearing protection, and I believe we're going to be getting testimony in the record to show that his decibel level to which he was exposed was around 50 decibels. Given that, would he have had any real harmful exposure while working for Austin Powder in that hypothetical situation?

A: Well, in that hypothetical situation, that does not meet the level that would even require- if we're talking about it was 50 dB in the cab without anybody in it, it doesn't even require ear protection.

...

Q: So, would it be correct to say that it appears that his low and mid frequency hearing loss has increased from 2006 to the time of your examination?

A: Yes.

Q: Are you able to say how much of that low and mid frequency hearing loss is part of your AMA rating?

A: Well, probably a significant amount of it, since you're averaging 5, 1, 2, and 3 to get that AMA rating, and 5, 1, and 2 are the areas that we're talking

about that have dropped significantly since.

Q: Could you please take a few minutes and do that calculation?

A: Which calculation?

Q: To show how much of his AMA impairment is attributable to the low and mid frequency hearing loss, please.

A: Okay.

Q: I've got a-

A: Okay. Yeah. I know. I've got a calculator. The issue here is, is all of that hearing loss that's sitting there totally nonrelated, or is there some that might be related and an overlay? I mean, I can tell you based on- I can- you know, the 60 percent in the right ear takes those- here, 1, 2, 3, those four frequencies right there, so 60 percent. Over here-

Q: And you're now talking about the left ear?

A: The left ear, over on the left side, all of- all of his numbers are going to be 100. If he has- if he has a threshold of 100 or worse, it automatically changes to 100.

Q: Now, when you say 'to 100,' what do you mean by that?

A: 100 dB.

Q: Okay. So, that means he cannot hear anything below that level?

A: Correct.

Q: Okay.

A: So, we're looking at 500, 1,000, 2,000 are 100 or worse, and they were responses, and then above that I don't even get a response at 3,000. I mean, I'm at the limits of my audiometer and I don't get a response.

So, I'd say these are probably- these percentages that you're seeing are probably coming from the low frequency, the mid- the low and mid frequency components of his hearing loss as opposed to his high frequency hearing loss.

Q: All right.

A: So, that's not going to change the percentage.

Q: Right, but it does show us, though, that the vast majority of his present loss is not related to his noise exposure in his employment in all likelihood medically.

A: Definitely in the right ear. In the left ear- in the right ear I have air conduction scores and bone conduction scores that tell me a lot. In the left ear I couldn't even get bone conduction scores. So, that leaves me a little bit of question in there, because if I could have gotten 5 dB higher, would I have gotten a response or not? I don't know. And that could make a difference in how I answered the question, but based on not being able to get bone conduction scores, the hearing loss in the left ear, again, at 5, 1, and 2 is completely- all of those are 100 or worse. So, they're going to get a rating- or a number assigned to them of 100, and I don't get one at 3,000. I don't know if it would have been I don't know why- but, again, I have this huge gap, and sometimes that's a

problem with hearing tests is that when you do air conduction testing, sound goes from outside your ear all the way in, the audiometer can get a little bit louder for us. when we try and go straight in, avoid your outer ear, avoid your middle ear, your eardrum, the bones behind your eardrum, go straight into the cochlea, which is really your organ of hearing buried in your head, go straight in, bone conduction thresholds can tell us what's going on in there, but you can't get as loud when you're doing bone conduction testing because it takes more power to drive that particular instrument that we're using to do that measurement. So, I mean, I have big gaps here. I have no idea-

Q: Again, you're referring to the left ear.

A: The left ear, on the left side. I have a big gap. The biggest one is at 3,000. My no response is at 75, but then I have no response at 120. I don't know if this is just because of the difference in how well I can test or if there is something- I don't know. So, this side is harder. The left side is a lot harder to answer.

Q: Would you say that- I mean, would it surprise you if he had the same finding in 2006, or does it appear that he had substantially the same loss in 2006 as he does at the present in his left ear?

A: That's 2003. Sorry. I'm just looking back to see who this guy was. He was a PA, so he's a physician's assistant. I don't know what C means. I don't see- so, this is 2006. This was 2003. Somewhere it has to have a description. Left- severe to profound, and what did he call it over here? That was his

history. So, what did you find? Tell me what you found. I don't know.

Q: I'm seeing it. I'm just looking here under history of his present illness in 2006 where the doctor says left- severe to profound sensori- [sic]

A: Yeah. That's- what I'm wondering is usually like when I do something like that, that's telling me I'm writing down what we know about him before we do the test, and then the test is done, and then something happens, you know? It would be nice if he had a hearing test you could see it for sure. It's hard to say in the left side. It's not real clear.

Q: It would appear, though, that Mr. Chang was identifying the fact, though, that at least according to Mr. Mullins, Mr. Mullins had a very severe hearing loss, which he interpreted as basically causing him to be deaf in his left ear.

...

A: That was his perception.

Q: Yes.

A: The only thing that's tricky about that is that when the patient is reporting, you know, I can't hear anything out of my whichever ear in this case, I can't hear anything out of my left ear, if you have a big difference in hearing between your right and your left ear, and your right ear is a lot better, whichever ear hears sound louder is the one where you perceive it to be, and, so, a lot of people think they have a big hearing loss in one ear, where it's just not that much different from the other, but it's poorer, and, so, perceptually-wise

they hear it in their good ear so they think their bad ear isn't working. So, I don't know.

...

Q: Now, you've had a lot of experience doing these types of examinations and rendering these basic findings. Would it be your estimate- I mean, what would be your estimate as to how much AMA impairment he likely had in 2006?

...

Q: I mean, you said that most of his hearing impairment at the present time is from this low and mid frequency hearing loss that is from an unknown cause, correct?

A: Right, correct.

Q: Okay. Can you just hazard a guess as to how much of that 24 percent? I mean, are we talking about-

...

A: I think, again, one of the issues is, you know, if you look at your little sheet over there that has your mild, moderate, whatever, you notice that it's a range. So, how do I know if we're talking mild, was it 25 or was it 40? That can make a big difference in your percentage, and I don't know. Just because of the- from the description I know about where it was going to sit, somewhere in a given, but that's a good size range, and it doesn't take that much difference from 35 to 40 to really have a significant influence over the percentage. So, I have- I can tell you that based on the description his hearing has likely gotten worse because

he's not in that range anymore. He's in a new range.

Q: And that's because of these- of the loss of low and mid frequency hearing, correct?

A: Yes, but I don't know how much- I don't know where he was when it was called mild. Was it at 25, or was it at 30, or was it at 45? You know, within that range. Those are pretty good ranges for those descriptive terms.

Q: Can you determine how much impairment he has just from noise-related loss?

A: Don't know.

...

Q: Would it be safe to say that when you look at your 24 percent impairment, in all medical certainty you can't say how much of this is work-related and how much is not work-related?

A: I cannot separate them.

...

Q: All right. He worked for Austin Powder starting in 2007. Is it your testimony today that the 24 percent you found is not attributable in its entirety to his work at Austin Powder, that some part pre-existed and some part is related to this condition from some other cause that caused the low and mid frequency hearing loss?

A: Because we have- at least with the descriptors, we know that hearing was better before, hearing has gotten worse, but it doesn't sound like his hearing was normal before either. So,

likely - I mean, likely he has lost some hearing from the time that- we're making an educated guess here again because that was in 2000- we're looking at 2006 to 2015, and this was like about a year before, and, so, if they didn't do an audiogram or any kind of test before he was hired to know what his hearing really was, then probably not because he was hired to know what his hearing really was, then probably not because we would have had it. That makes it a little bit more difficult to answer; however, just from the descriptors we know that he has moved from one descriptive category to another, which means his hearing did get worse. Was it caused by his work environment or some -

Q: And that's before he started.

A: This is before he started. So, he did have some amount of hearing loss before he started. That's going to be- without audiograms and specific thresholds, it's going to be very difficult to play the percentage game and do the calculations and know what we should be using.

...

Q: But it appears to you that the worst thing he's had in his hearing while over, say- or since 2006 is principally due to the hearing loss in the low and mid frequency level?

A: From the descriptors that were used in the 2003 and the 2006 reports, those are the ones that have changed significantly to the hearing loss that we did in 2015.

Q: Okay. So, the majority of- or from what you can tell, the hearing loss

> that he has experienced while he was employed at Austin Powder is in the low and mid frequency range principally?
>
> A: More so in the low and mid frequency range than in the high frequency range because we already had from the descriptors a pretty significant loss, but we still drop from I think severe to profound for one of them.
>
> ...
>
> A: So- and that's the problem, you know, with the percentage of hearing loss game is that we don't have a way of saying this percentage of his hearing loss is attributable to this versus this percentage is attributable to noise. We can't pull those two things apart.
>
> The only way we can really do that is to have previous testing so that we can have a look and see what it was like, how was it progressing, what was happening with it over a period of time, and still that doesn't make it perfect, it doesn't make it easy, but it makes it a little bit easier to be able to make a statement about, you know, what's going on with his- with his hearing.

Dr. Eisenmenger speculated that in 2003, Mullins had a 16% impairment rating. Her testimony on this subject is as follows:

> Q: Okay. So, just to summarize, then, based upon your analysis, it would appear that in 2003 this gentleman had probably about a 16 percent AMA hearing loss to the body as a whole, and then-
>
> A: That's a big guess, but that-

Counsel for Mullins: Objection. She didn't say probably. She said she was speculating-

A: Yeah.

...

Q: -and you're not alone in that dilemma among physicians. Roger and I and Melissa have all heard that before. But I guess just to finish up here, your best estimate based upon your past experience is that he had at least a 16 percent impairment-

A: That was not my-

Q: -under the AMA Guides before-

Counsel for Mullins: Objection. That's not what she said.

Q: -before he went to work-

A: That is not my-

Q: -for Austin Powder?

A: That is not my best- I mean, that was based on the- it's a mild loss, it's a moderate loss, and I took the higher level of those. So, that was really speculative. I just took the worst case scenario for each of those categories and gave you some numbers, but I have no idea if they're right or wrong. So, I don't know what that - I don't know how- what good that does you, but just so you can see based on mild- it went from mild to severe. Okay. So, then we moved it from this much to that much, and that's where those numbers came from, but I don't know if that's really what happened with him. I don't know. So, I just gave you some- you asked to make- speculate

on what you think it could be, and I did, but I don't know that it's true.

Dr. Eisenmenger testified further as follows:

Q: But based upon your experience and looking at the nomenclature utilized by the earlier audiologist, you're saying that you think he had a 16 percent impairment under the AMA Guides' 5th Edition as of 2003, he had an additional amount, which is difficult for you to ascertain, as of 2006, you came up with an additional amount of 9 percent, but it could be 3 percent or 6 percent or 9 percent?

A: Well, it could be anything.

...

A: And this guy- I shouldn't say 'this guy.' This person who saw this gentleman both times on the 2003 document is listed as a physician's assistant, okay, not an audiologist. So, I don't know what to make of the information that he collected anyway, so-

...

Q: But it shows that there was some amount beyond that 2003 amount of impairment of 16 percent. There was an additional amount of worsening to his hearing that he experienced in all medical likelihood before he went to work for Austin Powder, whether it was an additional 2 percent, 3 percent, or more, correct?

A: Based on the verbal or the categorical descriptions of impairment, mild moderate, severe, profound, or moderately severe, whichever one he was

using. So, that's just the best guess. I mean, I don't know.

Q: Okay.

A: And I still don't even know how much of it might have come from noise prior to his employment and how much of it was from some other unknown cause anyway. I don't know. You know, without- without actual audiometric data, I don't know.

Q: And, in fact, I guess you can't really say whether or not 95 percent of all his present hearing impairment is due to nonwork-related causes or not.

...

A: There is always a probability that the hearing tests that we get aren't related to noise, and I don't know what his prior work history is. I don't think I have that in my hand right now. You know, that's that stuff, but-

...

A: Yeah, I've got papers everywhere now. But, you know, what we're trying to do is we're trying to split stuff apart in two different categories and trying to figure out how much did he have before that was work-related and how much did he have before that wasn't and how much did he come out with work-related and how much did he come out with not, and it's just impossible to do that. It's very hard to do it even if you have audiograms, and I have no audiograms.

In the November 25, 2015, Opinion, Award, and Order, the ALJ entered the following findings of fact and conclusions of law regarding Mullins' hearing loss claim:

> As for the hearing loss I have been presented with the reports from Beltone, the report by Dr. Mongiardo [sic] and the report from the University Evaluator. To reject the UME I must provide a cogent and acceptable rationale. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000).
>
> I understand the lengthy cross-examination conducted by Defense counsel. It is clear from the examination, the large number of leading questions and the lengthy and involved hypothetical questions that counsel is arguing and testifying that the Plaintiff's hearing loss is primarily either not work-related or a pre-existing and active condition. He bases this on his own conclusion, his interpretation of a 2006 hearing test conducted by a Mr. Chang and an internet article he downloaded.
>
> However, Dr. Eisenmenger gave sufficient and detailed answers as to why that theory is not applicable. In a nutshell she explained that given the various standards used for evaluating hearing, the fact the 2006 test results were conclusory without specific data and the unreliable subjective self-reporting of hearing loss that any answer of apportionment prior to the examination she conducted would be speculative.
>
> As such and in reliance on Dr. Eisenmenger the Plaintiff retains a work-related 24% impairment rating for hearing loss and will be awarded income

> and medical benefits accordingly. KRS 342.7305. Really, Dr. Eisenmenger is uncontradicted on this point as this is her testimony she has not recanted and the Defendant has only offered counsel's theories and testimony on the subject.
>
> The testimony from Mr. Roark is not persuasive. He did not measure decibels on the machine(s) Mullins was using nor can he guarantee the operations were the same. The question of whether or not ear muffs were provided or could reasonably be used has been raised. I believe Mullins that they weren't. Further, even Mr. Roark found the noise to be between 60-70 dbs and counsel, in his whole cloth hypothetical on the subject, asked Dr. Eisenmenger about the effects of 50 dbs on hearing loss.

Austin Powder filed a petition for reconsideration on December 8, 2015, asking for additional findings of fact regarding why the entire 24% impairment rating is compensable. In the alternative, Austin Powder requested the ALJ vacate the hearing loss award.

In the December 28, 2015, Order on Reconsideration, the ALJ stated as follows:

> This matter comes before the undersigned on the Defendant's Petition for Reconsideration and the Plaintiff's Response thereto. Having reviewed the pleadings and the file as a whole I conclude that the Defendant has misinterpreted the report and testimony of Dr. Eisenmenger. Dr. Eisenmenger did testify that part of the Plaintiff's hearing loss was non-work-related but

> she did not assign an impairment rating for it. She testified the entire 24% impairment rating is work-related. The Petition is OVERRULED.

On appeal, Austin Powder's argument is broken down into three sub-arguments. First, Austin Powder argues there is no work-related hearing loss exposure. This argument is directly contradicted by the July 13, 2015, Medical Report of Dr. Eisenmenger in which she checked "yes" in response to the following statement and question:

- Audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace.

- Within reasonable medical probability, is plaintiff's hearing loss related to repetitive exposure to hazardous noise over an extended period of employment.[sic]

Even though during her deposition, Dr. Eisenmenger testified a portion of Mullins' hearing impairment is due to non-work-related causes, *she was unable to quantify the alleged non-work-related impairment*. This is consistent with Dr. Eisenmenger's report in which she stated as follows:

> Based on the reported history of noise exposure, the apparent absence of other factors associated with hearing loss, and the results of the hearing evaluation, ***a portion of this high frequency hearing loss is likely long term noise exposure which cannot be***

> ***separated from hearing loss in the low frequencies from an unknown cause***. (emphasis added).

The ALJ is able to exclusively rely upon the statements made in Dr. Eisenmenger's report regarding causation and disregard her equivocal deposition testimony. KRS 342.285 designates the ALJ as the finder of fact, and he is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ may choose whom and what to believe and, in doing so, 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

KRS 342.7305(4) states as follows:

> ***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 with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits. (emphasis added).

The Supreme Court of Kentucky's language in Greg's Construction v. Keeton, et. al., 385 S.W.3d 420, 425 (Ky. 2012), is directly on point:

> Substantial evidence supported the factual findings entitling the claimant to a rebuttable presumption that his hearing impairment was an injury covered by Chapter 342, *i.e.,* a work-related injury. Dr. Jones reported that the claimant exhibited a pattern of hearing loss "compatible with that caused by hazardous noise exposure in the workplace" and opined that the hearing loss resulted from "repetitive exposure to hazardous noise over an extended period of employment." Moreover, the claimant testified that he was exposed to loud noise repetitively throughout his nearly 35 years of work as a heavy equipment operator.

While we acknowledge Dr. Eisenmenger's deposition testimony is confusing on the issue of non-work-related hearing loss versus work-related, her July 13, 2015, Medical Report is unmistakably clear in stating the audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. The Form 104 attached to both Mullins' Form 103 and Form 101 indicates Mullins was exposed to loud noise in *every job he held from 1987 through 2014*. Mullins' deposition testimony addresses his noise exposure. Thus, the rebuttable presumption stated in

KRS 342.7305(4) is applicable, and the ALJ is able to infer that the 24% impairment rating assigned by Dr. Eisenmenger is indeed entirely work-related. This determination will not be disturbed.

Austin Powder's second sub-argument is Dr. Eisenmenger allegedly opined in her deposition that Mullins' pre-existing hearing impairment rating in 2003 is 16%. This can be readily dismissed, as a review of Dr. Eisenmenger's deposition on this subject, set out verbatim within this opinion, indicates the 16% impairment rating was purely speculative.

Assuming *arguendo*, Mullins sustained work-related hearing loss with previous employers, that fact would be irrelevant.

KRS 342.7305(4) states as follows:

> 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 with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits.*** (emphasis added).

This statutory mandate was reaffirmed by the Supreme Court of Kentucky in Greg's Construction v. Keeton, et. al., supra:

> Finally, the ALJ did not err by refusing to apportion liability among Greg's and the other defendants. Regardless of whether ALJs may apportion liability in other types of gradual injury claims, KRS 342.7305(4) is unambiguous with respect to liability for noise-induced hearing loss. The statute imposes liability "exclusively" on the employer with whom the employee was last injuriously exposed to hazardous noise. We presume that the legislature intended to say what it said.

Id. at 426.

Therefore, the liability for any pre-existing hearing loss falls on Austin Powder.

Austin Powder's final sub-argument is that since 2006, Mullins' hearing loss impairment is allegedly due to non-work-related conditions. This argument has already been addressed and dismissed. Dr. Eisenmenger, in her deposition, testified that a portion of Mullins' hearing loss is non-work-related. However, she also testified that she is unable to separate the work-related from the non-work-related and quantify the non-work-related hearing loss. The ALJ has the discretion, then, to exclusively rely upon Dr. Eisenmenger's report which is unambiguous

concerning this issue. In her report, Dr. Eisenmenger checked "yes" in response to the following statement and question:

- Audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace.

- Within reasonable medical probability, is plaintiff's hearing loss related to repetitive exposure to hazardous noise over an extended period of employment.[sic]

The ALJ's award of PPD benefits and medical benefits for work-related hearing loss will not be disturbed.

Accordingly, the November 25, 2015, Opinion, Award, and Order and the December 28, 2015, Petition for Reconsideration are **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I agree with the result reached by the majority in this case. Clearly, Austin Powder did not establish a pre-existing active disability within reasonable medical probability, and therefore, the ALJ did not err in awarding benefits. However, I note in Greg's Construction v. Jerry Keeton, et al, 385 S.W.3d 420 (Ky.

2012), relied upon for guidance by the majority, the Kentucky Supreme Court reached an inconsistent result. In the initial portion of the decision, the Court noted there was a rebuttable presumption. However, in its conclusion and decision, the Court determined the presumption was not rebuttable. This is inconsistent and that result fails to provide sufficient guidance. That said, I agree with the result reached by the majority in this case as noted above.

COUNSEL FOR PETITIONER:

HON WALTER HARDING
400 W MARKET ST STE 2300
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
320 WHITTINGTON PKWY
DWC SUITE 2ND FL
LOUISVILLE KY 40222