Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 4, 2014

CLAIM NO. 201300301 & 201300300

COMBS LOGGING, II PETITIONER

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

STEVIE COMBS
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Combs Logging, II, ("Combs Logging") appeals from the September 6, 2013, Opinion, Award, and Order and the October 15, 2013, Order on Reconsideration of Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ"). In the September 6, 2013, Opinion, Award, and Order, the ALJ awarded Stevie Combs ("Combs") permanent partial disability ("PPD") benefits and medical benefits for his

hearing loss claim. The ALJ determined Combs did not sustain an injury as defined by the Act to his neck, back, and shoulders.

In its appeal brief, Combs Logging makes three arguments. First, it asserts the ALJ erred in not giving the report of the university evaluator, Dr. Barbara Eisenmenger, presumptive weight and failing to make findings regarding the work-relatedness of Combs' hearing loss in the right ear. Second, it asserts Dr. Angela Morris' report does not constitute substantial evidence and the ALJ failed to provide sufficient findings supporting his reliance on the report. Finally, it asserts the ALJ erred by awarding the three multiplier and failed to provide sufficient findings of fact.

The Form 101 alleges Combs sustained cumulative trauma injuries to his neck, back, and shoulders on January 7, 2012. On that day, Combs was working as an equipment operator in which he was required to sit, pull, push, twist, and turn.

The Form 103 alleges Combs became disabled due to occupational hearing loss on January 7, 2012, by virtue of being exposed to noise at his job site.

By order dated April 4, 2013, the claims were consolidated.

The July 9, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730 [handwritten: "both"]; work-relatedness/causation [handwritten: "both"], notice [handwritten: "both"], average weekly wage, injury as defined by the Act [handwritten: "both"], and TTD. Under "other" is "future medical treatment."

At the July 24, 2013, hearing, Combs described the work he was performing at the time of the injury as follows:

> A: I had to run the dozer, excavator and then some- when I got them started, I- I got them started and then I got on a piece of equipment myself.
>
> Q: Okay. So, how long did you usually just supervise as compared to the dozer and the excavator work?
>
> A: Just getting everybody started every morning.
>
> Q: Okay. So, I mean, an hour, two hours doing that?
>
> A: Usually, around thirty minutes to an hour getting everybody started and I jumped on a piece of equipment and took off with it.

The record contains the Form 108 university evaluation of Dr. Eisenmenger, who provided the following diagnosis:

> Mr. Combs has greater hearing loss than would be expected for an individual of

> 54 years of age in his left ear. He would not provide voluntary thresholds in his right ear; these had to be estimated using Stenger interference levels. Bone conduction could not be obtained because the patient would not respond to the stimulus. The type of hearing loss (conductive vs. sensorineural vs. mixed) could not be determined. Causation for this hearing loss could not be determined based on the results obtained.

Concerning causation, Dr. Eisenmenger checked "yes left" 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" 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" to the following question: "Was any portion of the plaintiff's hearing loss an active impairment prior to acquiring the work-related condition?"

Dr. Eisenmenger put a question mark next to the impairment rating, stating "[t]he impairment ratings could not be determined without accurate voluntary thresholds." Under "note," Dr. Eisenmenger further opined as follows:

> The percentage of hearing loss noted is based on the total hearing loss identified today, irrespective of cause. Should further testing identify

> another pathology as a cause of hearing loss then the percentage due to noise exposure would be less than noted.

Combs introduced the July 1, 2013, report of Dr. Angela Morris. Dr. Morris opined, in part, as follows:

> Otoscopy showed a clear right canal with a perforated eardrum. A whitish/yellow tint was seen behind the eardrum. The left TM was clear and intact. Pure tone testing showed a moderate to severe sensory loss in the left ear with a profound mixed loss in the right ear. No responses of any kind were given on the right side. SRTs were consistent with hearing on the left side and no responses given in the right ear. Good speech discrimination was seen on the left side and no responses on the right side. A flat type B tymp was seen on the right side with a large volume. (Perforation). A normal type A tymp was seen in the left ear which suggests normal middle ear function. OAEs were absent in both ears.
>
> Due to the conductive component seen in the right ear, percentages of loss are being based on the fact that most noise-induced hearing losses are symmetrical and the bone conduction results were equal to the left ear. This would conclude that the right ear could be no better than the left ear. The conductive component of the right ear would not be noise induced in most situations. He reported no explosions, etc. So assuming that the noise induced portion of loss in both ears is equal, According to the AMA's 'Guide to the Evaluation of Permanent Impairment', Mr. Combs has a 60% monaural loss in each ear. This translates to a 60%

> binaural loss as well. The loss to the whole person is 21%.

In its first argument on appeal, Combs Logging asserts as follows:

> The ALJ has provided no reasonable basis for not relying on the university evaluator's findings as to impairment when he has relied on some of her opinion [sic] as to compatible [sic] with hazardous noise in the work place, which she found was only to the left ear.

In the September 6, 2013, Opinion, Award, and Order, the ALJ determined as follows regarding Combs' hearing loss claim:

> **Work-Relatedness and Causation/ Injury as Defined By the Act (Hearing Loss)**
>
> 20. All of the medical records in evidence conclude that the Plaintiff is suffering from at least some degree of work-related hearing loss. Most notably, the University Evaluation concluded that the Plaintiff’s results are consistent with hazardous noise exposure in the workplace and that the Plaintiff’s hearing loss is related to repetitive exposure to hazardous noise over an extended period of employment.
>
> 21. In accordance with this finding the ALJ finds that the Plaintiff has suffered work related hearing loss.
>
> **Benefits Per KRS 342.7305**
>
> 22. The ALJ finds that the most credible evidence regarding the degree

> of the Plaintiff’s work-related hearing loss is the report of Dr. Angela Morris who reasons that noise related hearing loss is most often symmetrical and that the Plaintiff’s bone conduction results were equal in both ears. She further reasons that the Plaintiff has suffered a 60% monaural loss in each ear translating into a 21% whole person impairment.
>
> 23. The ALJ therefore finds in accordance with the opinion of Dr. Morris that the Plaintiff has suffered a 21% whole person impairment.
>
> 24. The Plaintiff credibly testified that he has trouble driving because of his hearing and that he would be unable to perform the same job as well.
>
> 25. The ALJ therefore finds that the Plaintiff does not retain the ability to return to the same type of work.

In its petition for reconsideration, Combs Logging made the same argument it makes on appeal.

In the October 15, 2013, the ALJ made the following additional findings:

> 1. The ALJ finds that in accordance with the opinion of the University Evaluator that no portion of the Plaintiff's hearing loss was pre-existing and active and that no portion of the Plaintiff's hearing loss is the result of a single incident of trauma.
>
> 2. The ALJ further finds that since the University Evaluator failed to determine the origin of the Plaintiff's right ear hearing loss but definitively stated that no portion of his hearing loss is due to a single incident of

> trauma or to any pre-existing condition and because the University Evaluator failed to provide any impairment rating, that the findings of Dr. Morris are the most reliable evidence regarding the hearing impairment of the Plaintiff.

KRS 342.315(2) governing medical evaluations by university medical schools reads as follows:

> The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the executive director. Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

While KRS 342.315(2) generally requires presumptive weight to be afforded the clinical findings and opinions of the university evaluator, an ALJ has the discretion to reject such evidence where it is determined the presumption has been overcome by other evidence and the ALJ expressly states the reasons for the rejection within the body of his decision. Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 891 (Ky. 2007); Morrison v. Home Depot, 197

S.W.3d 531, 534 (Ky. 2006); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Whether a party overcomes the presumption established under KRS 342.315(2) is not an issue of law, but rather a question of fact at all times subject to the ALJ's discretion as fact-finder to pick and choose from the evidence. Magic Coal Co. v. Fox, supra. As the Supreme Court cautions in Magic Coal Co. v. Fox, supra, the rebuttable presumption does not restrict the ALJ's ability to utilize the discretion afforded under the law to weigh the conflicting medical evidence. Should the ALJ choose to disregard the medical opinions of the university evaluator, the ALJ is merely required to set forth the rationale for disregarding the opinions.

Here, in both the September 6, 2013, Opinion, Award, and Order and the October 15, 2013, Order on Reconsideration, the ALJ has "specifically state[d]...the reasons for rejecting" the university evaluator's opinions in part and accepting it in part. KRS 342.315(2). In the September 6, 2013, Opinion, Award, and Order, the ALJ clearly explained why he partly relied upon the university evaluator's opinions and then relied upon Dr. Morris' opinions regarding an impairment rating. Upon Combs Logging's request in its petition for reconsideration, the ALJ provided further explanation in the October 15, 2013,

Order on Reconsideration. To require the ALJ to provide additional findings would be unreasonable and outside the requirements of the law. Because Dr. Eisenmenger failed to determine Combs' right ear hearing loss and failed to provide any impairment rating, the ALJ relied upon Dr. Morris' impairment rating instead. However, the ALJ relied upon Dr. Eisenmenger's opinions regarding causation. As fact-finder, the ALJ is entitled to rely upon Dr. Eisenmenger's opinions regarding causation and Dr. Morris' impairment rating. The ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329, 330 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, supra. Additionally, if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky.

App. 2006). The ALJ's findings regarding Combs' work-related hearing loss will not be disturbed.

Combs Logging also asserts as follows:

> Dr. Morris cannot rebut the findings of the university evaluator as she failed to performed [sic] the additional Stinger testing that was performed by both Drs. Eisenmenger and Schumaier resulting in a significant difference in the audiogram results and evidence of symptom exaggeration.

However, any allegations regarding Dr. Morris' alleged failure to conduct certain tests goes to the weight to be given to her opinions and not the admissibility of her opinions.

In a companion argument, Combs Logging argues the ALJ did not provide sufficient findings to support his reliance on Dr. Morris. As detailed above, the ALJ provided sufficient findings that address his rejection, in part, of the university evaluator's opinions and his reliance upon Dr. Morris' opinions and impairment rating. While the ALJ’s decision must set forth adequate findings of fact upon which his ultimate conclusions are drawn so the parties are reasonably apprised of the basis of the decision, he is not required to engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526

(Ky. 1973); Shields v. Pittsburg and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Again, Combs Logging asserts that the ALJ cannot rely upon Dr. Morris' opinions because she did not perform the Stinger Interference level testing. We have already addressed this issue. The ALJ's reliance upon Dr. Morris' opinion is proper and will not be disturbed.

Finally, Combs Logging asserts substantial evidence does not support enhancement by the three multiplier. In the September 6, 2013, Opinion, Award, and Order, the ALJ made the following findings of fact pertaining to the applicability of the three multiplier:

> 24. The Plaintiff credibly testified that he has trouble driving because of his hearing and that he would be unable to perform the same job as well.
>
> 25. The ALJ therefore finds that the Plaintiff does not retain the ability to return to the same type of work.

No additional findings were given in the October 15, 2013, Order on Reconsideration despite a request by Combs Logging.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion with regard to every element of the claim. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). As

Combs was the party with the burden of proof regarding entitlement to enhancement of the award by the three multiplier and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W. 2d 367, 369 (Ky. 1971). Additionally, a claimant's testimony regarding his or her post-injury ability to work and level of pain is substantial evidence, as an injured worker’s credible testimony is probative of his ability to labor post-injury. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

Here, the ALJ relied upon Combs' testimony regarding his ability to return to the type of work he was performing at the time of the injury. At the July 24, 2013, hearing, regarding his ability to return to the work he was performing at the time of the injury, Combs testified as follows:

> Q: Could you go back and run the heavy equipment for Combs Logging right now?
>
> A: No.
>
> Q: Why not?
>
> A: I can't sit long there eight hours on account of my shoulders and hips and my ear drums.

Regarding his problems with driving, Combs testified as follows:

> Q: Do you have problems when you're driving looking from side to side to check out what's going on around you?
>
> A: Yeah, I constantly do that, too, where I can't hear out of my right side. I've got to look around and focus on everything.

While we acknowledge there is not a significant amount of testimony from Combs on this subject or a significant amount of analysis on the part of the ALJ, there is enough. The above-cited testimony comprises substantial evidence in support of the ALJ's determination to enhance Combs' income benefits by the three multiplier. As recited in the September 6, 2013, Opinion, Award, and Order, the ALJ was persuaded by the fact Combs testified he has trouble driving because of his hearing loss. It is proper for the ALJ to infer Combs' difficulty driving because of his hearing loss, prohibits him from returning to the type of work he was performing at the time of the

injury as a heavy equipment operator. Additionally, Combs attributed his inability to perform the same job to his "ear drums." This testimony, albeit scant, is sufficient. The enhancement of the PPD benefits by the three multiplier will not be disturbed.

Accordingly, regarding all issues raised on appeal, the September 6, 2013, Opinion, Award, and Order and the October 15, 2013, Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON KATHERINE M BANKS
P O BOX 1350
PRESTONSBURG KY 41653

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN WEATHERBY
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR
LEXINGTON KY 40511