Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 15, 2016

CLAIM NOS. 201500650 & 201500649

D&L MINING PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

JIMMY HENSLEY
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. D&L Mining Company, LLC ("D&L") appeals from the March 4, 2016 Opinion, Order and Award rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"). On appeal, D&L argues the evidence compels a determination Jimmy Hensley ("Hensley") did not suffer any injurious exposure to noise during his employment. It also argues Hensley is not entitled to enhanced benefits pursuant to

KRS 324.730(1)(c)(1). For the reasons set forth herein, we affirm.

Hensley worked as a heavy equipment operator in various industries for 32 years. His final employment was with D&L, where he worked from November 16, 2014 to December 18, 2014. Hensley was laid off when D&L shut down its operations on December 18, 2014 and he has not been employed since.

Hensley filed a Form 101 alleging cumulative trauma injuries to his back and shoulder, and a hearing loss claim. The subject of this appeal involves only the hearing loss claim. Hensley testified he intended to file a claim for hearing loss in 2013 after he was laid off from a prior employer. In anticipation of filing that claim, he underwent audiometric testing at Tri State Hearing Care Center which revealed his most comfortable listening level was 105 decibels in both ears. The results indicated a moderate to severe sensorineural loss, with speech discrimination at 75% in the right ear and 80% in the left. The technician recommended hearing aids.

Ultimately, Hensley found other employment in 2013 and he never filed a workers' compensation claim. After he was laid off from D&L, he was again tested for

hearing loss on March 12, 2015. This test again indicated moderately severe sensorineural loss binaurally, and Hensley's most comfortable listening level was 70 decibels in the right ear and 75 decibels in the left ear. Speech discrimination was 88% in the right ear and 90% in left. At the 2015 hearing test, Hensley complained of constant ringing in both ears. Again, hearing aids were recommended.

Dr. Barbara Eisenmenger performed a University Evaluation and was provided the 2015 audiometric testing results, but not the 2013 testing results. Based on the reported history of noise exposure, Dr. Eisenmenger diagnosed hearing loss resulting from long term noise exposure. She assessed a 17% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). She further opined no portion of Hensley's hearing loss resulted in an active impairment prior to acquiring the work-related condition. She recommended the use of hearing aids, and hearing protection whenever exposed to loud noise.

Lisa Koch, AuD performed an independent medical evaluation on January 26, 2016. She reviewed the reports

of Hensley's audiometric testing in 2013 and 2015, and determined the results of the two evaluations were similar. She concluded Hensley suffered an 18% whole person impairment pursuant to the AMA Guides, but suffered a pre-existing active impairment prior to starting work at D&L. Relying on the 2015 audiogram, she concluded Hensley did not suffer any additional hearing impairment during the limited time he worked at D&L.

Hensley testified he was constantly exposed to loud noise at D&L due to the heavy equipment being operated. He further testified he did not wear hearing protection while working there, and was not required to do so. He further explained he could not perform his job with hearing protection, as he needed to be able to hear the other equipment around him for safety reasons.

The ALJ determined Hensley suffered an injurious exposure to hazardous noise at the D&L worksite, and awarded benefits pursuant to KRS 342.7305. She relied on Dr. Eisenmenger's report and Hensley's testimony to reach this conclusion. The ALJ further determined that Hensley is unable to return to his pre-injury employment because he would be required to wear hearing protection, which would be unsafe as a heavy equipment operator. Accordingly, the

ALJ enhanced the award of benefits pursuant to KRS 342.730(1)(c).

D&L did not file a petition for reconsideration. On appeal, it argues the evidence requires a finding Hensley was not injuriously exposed to noise while employed at D&L. It relies upon the 2013 audiometric test results to support this position. Our analysis begins with KRS 342.7305(4), which states:

> 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.

D&L concedes Hensley's audiogram reveals a pattern of hearing loss compatible with that caused by hazardous noise exposure. It also does not explicitly challenge the determination Hensley demonstrated repetitive exposure to hazardous noise in the workplace. Rather, it claims the 2013 audiometric testing rebuts any presumption he suffered an injurious exposure at its worksite.

The Kentucky Supreme Court considered a somewhat similar factual situation in Greg's Construction v. Keeton, 385 S.W.3d 420 (Ky. 2012), one of the few reported cases construing KRS 342.7305(4). In Keeton, the claimant established his hearing loss was compatible with that caused by hazardous noise exposure. The claimant further testified he was exposed to loud noise repetitively over his 35 years of employment as a heavy equipment operator. The Court then considered whether the claimant sufficiently established he had sustained injurious exposure during the six months he worked for the defendant, Greg's, his last employer:

> The ALJ did not err by determining that the claimant sustained an injurious exposure to hazardous noise in his employment with Greg's. Workers' Compensation is a statutory creation. KRS 342.0011(4) defines an injurious exposure as being "that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made." Although Chapter 342 considers noise-induced hearing loss to be a gradual injury for the purposes of notice and limitations, KRS 342.7305(4) treats the condition much like KRS 342.316(1)(a) and KRS 342.316(10) treat an occupational disease for the purpose of imposing liability. Mindful that none of these statutes makes an employer's liability contingent on a minimum period of exposure and that Chapter 342

contains but one definition of injurious exposure, we conclude that KRS 342.0011(4) defines the term not only with respect to a disease but also for the purpose of KRS 342.7305(4). Contrary to what Greg's would have us conclude, the final clause of KRS 342.7305(4) does not require a worker to prove that the last employment caused a measurable hearing loss. It refers to the type of exposure to hazardous noise that would result in a hearing loss if continued indefinitely.

Consistent with the practical reality that workers change jobs, sometimes frequently, as well as the medical realities that noise-induced hearing loss develops gradually and that audiometric testing is based to some degree on the worker's subjective responses, KRS 342.7305(4) imposes liability on the last employer with whom the worker was injuriously exposed to hazardous noise. Like KRS 342.316(1)(a) and KRS 342.316(10), KRS 342.7305(4) bases liability solely on the fact that the employment involved a type of exposure known to be injurious, *i.e.,* a repetitive exposure to hazardous noise.

The claimant worked as a heavy equipment operator for nearly 35 years and testified that he was exposed to loud noises throughout his career, including his work with Greg's. Nothing tended to disprove his testimony, such as evidence that heavy equipment operation did not involve an injurious exposure to hazardous noise; that the claimant's work for Greg's differed from his previous work; that the ear muffs he stated that he wore were of such a quality that they prevented exposure to hazardous noise; or that

> Greg's required employees to participate in a hearing conservation program that prevented exposure to hazardous noise.
>
> 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.
> (Internal citations omitted).

Hensley's case is similar to Keeton. KRS 342.7305 establishes a rebuttable presumption that hearing impairment is a compensable injury, "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." Audiometric testing established Hensley's hearing loss is compatible with that caused by hazardous noise exposure. This proof is unrebutted. Hensley testified he was exposed to hazardous noise at all of his prior worksites, including D&L. D&L offered no testimony to rebut the assertion Hensley was exposed to hazardous noise levels at its worksite. Thus, the

presumption that Hensley's hearing loss is a compensable work-related injury has not been rebutted.

Contrary to D&L's assertions on appeal, the rebuttable presumption created by KRS 342.7305(4) pertains only to the compensability of the hearing loss. The second clause in the statute, separated by a comma, conclusively establishes that the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits. Thus, having established his hearing loss is a compensable work injury, Hensely needed only to prove he was injuriously exposed to hazardous noise at D&L. He testified he was exposed to constant loud noise at D&L and this testimony was not rebutted. The claimant's testimony alone was sufficient to establish injurious exposure in Keeton. *See also* Maker's Mark Distillery v. Corbett, 2015 WL 3532905 (Ky. App. 2015)(interpreting Keeton to establish that the claimant's testimony is satisfactory to establish hazardous noise exposure in the workplace).

We acknowledge the very significant distinction between Keeton and the factual situation herein: unlike Hensley, the claimant in Keeton did not undergo audiometric testing prior to his employment with the defendant. We are

sympathetic to D&L's persuasive argument that the 2013 and 2015 audiometric testing arguably establishes Hensley's hearing loss did not worsen during his brief employment. However, we nonetheless are constrained by the plain language of the statute and are bound by the Supreme Court's pronouncements in Keeton. KRS 342.7305(4) expressly places exclusive liability on the employer with whom the employee was last injuriously exposed. Hensley testified to hazardous noise exposure at D&L, and this testimony was unrebutted. Despite this testimony, we are tempted to conclude Hensley's exposure at D&L, though perhaps hazardous, was not *injurious* as established by the audiometric testing. However, the Supreme Court, in Keeton, has rejected this argument by specifically interpreting the statute otherwise: "Contrary to what Greg's would have us conclude, the final clause of KRS 342.7305(4) does not require a worker to prove that the last employment caused a measurable hearing loss. It refers to the type of exposure to hazardous noise that would result in a hearing loss if continued indefinitely." Keeton, 385 S.W.3d at 425. Accordingly, the ALJ's award of benefits pursuant to KRS 342.7305 is supported by

substantial evidence and must be affirmed. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Furthermore, the ALJ's award of enhanced benefits is similarly supported by substantial evidence. KRS 342.730(1)(c)(1) permits the enhancement of benefits where the employee "does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury." Hensley operated heavy machinery at the time of the injury. He testified he could not wear hearing protection while operating heavy machinery because he would be unable to hear other equipment around him and the voices of other operators, thus creating a safety hazard. Dr. Eisenmenger recommended Hensley wear hearing protection at any time he was exposed to loud noise. This proof, when taken together, constitutes substantial evidence that Hensley lacks the physical capacity to return to any work as a heavy equipment operator. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). As such, we must affirm the ALJ's award of enhanced benefits pursuant to KRS 342.730(1)(c)(1). Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Accordingly, the March 4, 2016 Opinion, Order and Award rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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