OPINION ENTERED: June 14, 2013

CLAIM NO. 201177488

EMERSON ELECTRIC CO. PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

DELBERT STRADER
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Emerson Electric, Co. ("Emerson") seeks review of the opinion and order rendered February 15, 2013 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), awarding Delbert Strader ("Strader") permanent partial disability ("PPD") benefits and medical benefits. Emerson also appeals from the orders on reconsideration entered March 14, 2013, and March 26, 2013, denying its petition

for reconsideration, and assessing a 3.8 multiplier pursuant to KRS 342.730(1)(c)1 & 3.

On appeal, Emerson argues there is no evidence supporting the ALJ's determination Strader is no longer able to perform the work he was performing at the time of the injury. Therefore, he is not entitled to an enhancement of his award pursuant to KRS 342.730(1)(c)1 & 3. Because the ALJ's decision is supported by substantial evidence, we affirm.

Strader filed a Form 103 on August 13, 2012, alleging a work-related hearing loss due to working around loud machinery at Emerson. He alleged he was first informed he had a hearing loss on May 3, 2011. He supported his claim with the May 3, 2011 office note of Dr. Robert Labadie, Associate Professor of Otolaryngology at the Vanderbilt University Medical Center. Dr. Labadie noted complaints of increased hearing loss over the two years prior to the examination. He stated Strader has a bilateral mild to moderate hearing loss. In a letter dated April 17, 2012, Dr. Strader stated, "It is reasonable to conclude his hearing loss is the result of unprotected exposure to loud noise at his place of employment."

Strader testified by deposition on October 13, 2012, and at the hearing held December 17, 2012. Strader

was born on August 13, 1937, and is a resident of Todd County, Kentucky. He completed the ninth grade, and received some machinist and electrical training at the vocational school in Hopkinsville. He began working at Emerson on November 10, 1966, and last worked there on May 18, 2012 when he retired. Strader testified he retired because his hearing loss interfered with his ability to take instructions from his supervisor. He stated although he generally wore hearing protection, he did not do so during the ten years he worked in the winding room. He stated the winding room was noisy, but not as noisy as the die cast area where he worked the majority of his forty-five and a half years with the company.

Strader stated he was evaluated by Dr. Labadie in May 2011 due to the worsening of his hearing, which continued to deteriorate after that examination. He stated Emerson refused to provide hearing aids recommended by Dr. Labadie. He stated physically he could continue to perform his job, but the hearing loss necessitated his retirement.

Strader filed the April 17, 2012 letter from Dr. Labadie, in addition to the reports filed with the Form 103. Dr. Labadie stated Strader was under his care for treatment of hearing loss. Dr. Labadie stated as follows:

> I have reviewed his audiograms and based on the AMA 6th edition, his total impairment is 11% due to his hearing loss. It is reasonable to conclude his hearing loss is the result of unprotected exposure to loud noise at his place of employment.

Dr. Barbara Eisenmenger, an audiologist with the University of Louisville, evaluated Strader on August 30, 2012. In her report, Dr. Eisenmenger stated Strader complained of hearing loss due to repeated noise exposure. She stated his hearing loss was established by audiogram. She opined the hearing loss was caused by repetitive exposure to hazardous noise over the extended period of his employment. She assessed an 18% impairment rating pursuant to the American Medical Association, Guides to Evaluation of Permanent Impairment, 5th Edition. She further stated as follows:

> Hearing protections devices should be worn whenever exposed to loud noise. Restrictions on work activities should be based on ability to perform job requirements using hearing protection devices.

In the opinion and order rendered February 15, 2013, the ALJ found as follows:

> **Extent & Duration**
>
> The only real issue presented in this case is the extent and duration of plaintiff's impairment/disability.

Plaintiff maintains he is totally disabled as a result of his hearing loss considered within the context of his age, education and work history. Conversely, the defendant maintains plaintiff is not totally disabled and even retains the physical ability to return to the job he held at the time of his injury.

Having reviewed the evidence of record, the Administrative Law Judge is first persuaded plaintiff is not totally disabled as a result of his hearing loss. Although plaintiff is 65 years of age and has only a ninth grade education his testimony and appearance at the final hearing persuade the Administrative Law Judge the plaintiff is capable of performing activities which are not consistent with total disability. Moreover the experts of record have not precluded plaintiff from returning to all employment due to his hearing loss. For these reasons, even considering plaintiff's age education and work history, it is determined plaintiff is not permanently and totally disabled.

Instead, it is determined plaintiff has an 18% impairment rating based on the opinion of the University evaluator, Dr. Eisenmenger. Moreover, it is determined plaintiff does not retain the physical ability to return to his former position with the defendant employer due to his hearing loss. In reaching this conclusion, it is noted that plaintiff took voluntary retirement and even that plaintiff testified he could physically perform his prior duties. However, the Administrative Law Judge is also persuaded that plaintiff's hearing loss continued to worsen between the time he was diagnosed and the time he ceased his employment which leads the

> Administrative Law Judge to further conclude that plaintiff's return to his former job would cause additional injury to plaintiff in the form of a continued hearing loss. For these reasons, it is determined plaintiff is entitled to application of the 3X multiplier set forth in KRS 342.730(1)(c)1.
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> In addition, as plaintiff testified he took early retirement in part due to his embarrassment associated with his occupational hearing loss, it may be argued he is entitled to the application of the 2X multiplier set forth in KRS 342.730(1)(c)2. However having considered both possible multipliers the Administrative Law Judge is persuaded the 3 multiplier is most appropriate. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Plaintiff's award of benefits is therefore calculated as follows:
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> $675.48 x 2/3 = $450.32 x .18 x 3.6 = $291.81 per week.
>
> **Medical Expenses**
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> Because plaintiff has a compensable injury, he is entitled to reasonable and necessary medical expenses including hearing aids as recommended by the University Evaluator.

Both Strader and Emerson filed petitions for reconsideration. Strader argued the ALJ erred by using the 3.6 multiplier instead of the 3.8 based upon the additional age and education multipliers found in KRS 342.730(1)(c)3. Emerson argued the ALJ's application of multipliers was unsupported by the evidence. In an order entered March 14,

2013, the ALJ denied Emerson's petition for reconsideration, and granted Strader's. However, while agreeing the 3.8 multiplier was applicable instead of 3.6, he did not change the weekly award. Strader filed a second petition for reconsideration, and by order entered March 26, 2013, the ALJ corrected the weekly award.

The issue on appeal is whether the ALJ erred in enhancing Strader's award of PPD benefits with a 3.8 multiplier. We find he did not.

As the claimant in a workers' compensation proceeding, Strader had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Strader was successful in his burden, the question on appeal is whether substantial evidence of record exists to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

"Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D

Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility, or by noting other conclusions or reasonable inferences that otherwise could have been

drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Here, the ALJ explained his basis for assessing the multipliers pursuant to KRS 342.730(1)(c)1 & 3. While Emerson is correct Strader testified he is physically able to perform his previous job, he also testified he retired due to his hearing loss that continued to progress after he saw Dr. Labadie in 2011 which made it difficult to perform his job because he could not understand verbal directions from his supervisors. Therefore, it was reasonable for the ALJ to conclude Strader is unable to continue to perform his job due to his progressive hearing loss, and does not retain the capacity to perform his previous work. It is well established the ALJ 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, 19 S.W.3d 88 (Ky. 2000).

Accordingly, the decision rendered February 15, 2013, by Hon. Grant S. Roark, Administrative Law Judge, as well as the orders ruling on the petition for reconsideration entered March 14, 2013 and March 26, 2013, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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