OPINION ENTERED: December 7, 2012

CLAIM NO. 201000148

HENRY JAMES MAGEE PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

SIDNEY COAL/CLEAN ENERGY
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Henry James Magee ("Magee") appeals from the June 5, 2012, order on remand and the August 6, 2012, order overruling the petition for reconsideration of Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). On appeal, Magee asserts the ALJ erred by finding he failed to give due and timely notice of his hearing loss claim to Sidney Coal/Clean Energy (“Sidney Coal”).

The Form 101 (Claim No. 2008-96489) alleges on January 29, 2008, Magee sustained the following injuries in the following manner: "while walking around a piece of equipment slipped and twisted left knee, resulting in physical impairment and/or disability as well as psychological/psychiatric impairment/disability."

The Form 103 (Claim No. 2010-00148) asserts Magee sustained disabling occupational hearing loss on January 29, 2008, in the following manner: "constant exposure to job-related noise and sound frequencies." The Form 103 indicates Magee became aware of the condition on January 19, 2009, and gave notice "immediately" to his employer.

By order dated March 25, 2010, the ALJ consolidated both claims. As the issue on appeal pertains to Magee's hearing loss claim, only the relevant portion of the record will be discussed.

Sidney Coal filed a Form 111 denying the claim for the following reasons:

> (b) The alleged injury did not arise out of and in the course of employment.
> Explain: No injurious exposure to noise
>
> (c) The plaintiff did not give due and timely notice to employer of the injury.
> Explain: No notice until claim filed
>
> Other reason for denial.
> Explain: 8% threshold of KRS 342.7305

Concerning the issue of notice of Magee's hearing loss, the ALJ determined as follows in the March 10, 2011, opinion, order, and award:

> An ALJ's determination of whether notice of an injury was timely given is a mixed question of fact and law. [citations omitted].
>
> There is conflicting testimony by Plaintiff as to when he was told his hearing loss was related to his work in the underground mines. In his discovery deposition (p.20) he testified that, yes he was told by his prior employer's examining physician, some ten years before the work incident, that he had a work related hearing loss. Apparently he was told this after each annual hearing test he underwent in the ten years preceding his work for Defendant. He knew he was plagued with this worsening problem when he started working for Defendant but apparently declined to tell Defendant about his occupational disease hearing loss. Per KRS 342.316 (2), notice of such an injury shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to appraise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur."[sic] With this statutory requirement it can be said Plaintiff should have given notice of his predicament on the first day he was given an opportunity to work for Defendant. He knew he had the problem of increasing hearing loss. But, on page 20 of the Final Hearing transcript, he answered, "No' to the

> question, 'Now, I realize you...you knew it but did the doctors actually say that?' On page 21, of the Final Hearing transcript he answered 'Yeah' to the question, 'Was that the first time a doctor (Manning) actually told you that?' He saw Dr. Manning one time on January 19, 2009, and filed his hearing loss claim on January 26, 2010. His Final Hearing testimony squarely contradicts his Discovery Deposition testimony. This ALJ is not persuaded Plaintiff gave timely notice of his hearing loss.
>
> It is also noteworthy that Plaintiff did not present any proof that his hearing loss increased after commencing to work for Defendant. To prove such a point it would be necessary for Plaintiff to compare the last of his prior test results more recently obtained.

Magee filed a petition for reconsideration asserting, in relevant part, as follows:

> The plaintiff would also respectfully request that the finding be reconsidered that the plaintiff did not give notice to his employer concerning his hearing loss. As noted by this judge, Mr. Magee testified that he was first advised that he had hearing loss when he worked for Martin County Coal. However, as testified to by Mr. Magee, Martin County Coal and the current defendant, Sidney Coal, are both owned by Massey Coal Company. Therefore, Mr. Magee had the same employer when working for Martin County Coal as he did when he worked for Sidney Coal, merely working at different mines owned by the same company. Accordingly, as Mr. Magee worked for the same employer while working at Martin County Coal and

> the mine at Sidney Coal, Mr. Magee properly gave notice to the defendant. Accordingly, the finding that notice was not properly given should be reconsidered.

By order dated November 14, 2011, the ALJ overruled Magee's petition for reconsideration.

Magee appealed to this Board asserting the ALJ erred by finding Magee failed to give timely notice of his hearing loss. On February 23, 2012, this Board determined as follows:

> We next turn to the ALJ’s determination Magee did not provide due and timely notice of a work-related hearing loss. As noted by the ALJ, the evidence regarding when Magee first learned he had a hearing loss, and when he was first apprised it was work-related is equivocal at best. Magee underwent annual hearing tests for years prior to working for Sidney Coal which he claims demonstrated a gradual worsening of his hearing. Magee may or may not have been advised his hearing loss was work-related, although his testimony is unclear. The evidence does not establish whether Sidney Coal ever inquired if he had a hearing loss, nor even required a pre-employment physical examination or hearing test. Magee began working for Sidney Coal in 2007. He had a work-related injury to his left knee on January 29, 2008, from which he never returned to work. A hearing test was performed by Dr. Manning on January 19, 2009 advising Magee he had a work-related hearing loss. No notice was provided to Sidney Coal until the filing of the Form 103 on January 26, 2010, a year and seven

days later, not seven days as Magee argued in his brief before the ALJ.

In the case *sub judice*, the ALJ determined Magee first knew of his hearing loss prior to working for Sidney Coal. Hearing loss is a cumulative trauma injury within the context of the definition of injury pursuant to KRS 342.011(1). Cumulative or gradual trauma injuries must be distinguished from acute trauma injuries where a single traumatic event causes the injury. The Supreme Court in Hill v. Sextet Min. Corp., 65 S.W.3d 503, 507 (Ky. 2001) noted:

Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion.

In Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to cumulative trauma injuries holding the date of injury is "when the disabling reality of the injuries becomes manifest." In Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999), the Supreme Court of Kentucky defined "a manifestation of disability" in a cumulative trauma or gradual injury claim as follows:

In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

Id. at 490.

In other words, a cumulative trauma or gradual injury manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma or gradual injury. *See* American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness.

In this instance, we do not believe Magee was required to provide notice of a work-related hearing loss when he was hired by Sidney Coal, and we therefore vacate that portion of the ALJ's decision dismissing the hearing loss claim for failure to notify Sidney Coal of a work-related hearing loss when he was hired. As pointed out by the ALJ, Magee stated "yeah" in response to an inquiry as to whether he was advised he had a work-related hearing loss prior to his employment with Sidney Coal. It is also noted Magee responded "no" to the same inquiry only a few moments later. Despite his equivocal testimony, the evidence does not clearly establish Magee knew he had a work-related hearing loss at the time he was hired, and the extent of that loss. No documentation of previous hearing tests outlining either a hearing loss or a determination of work-relatedness of hearing loss was submitted. We deem the ALJ's basis for determining Magee did not provide due and timely notice to be insufficient to permit meaningful review on appeal. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

> That said, Magee underwent a hearing test by Dr. Manning at the request of his attorney on January 19, 2009. No notice was provided to Sidney Coal of Dr. Manning's assessment of a work-related hearing loss until January 26, 2010, a year and seven days later. On remand, the ALJ must determine whether Magee provided due and timely notice of his hearing loss, after his evaluation by Dr. Manning. We are not attempting to substitute our judgment for that of the ALJ. The ALJ may well determine due and timely notice of the hearing loss was not provided subsequent to being apprised of the work-related hearing loss by Dr. Manning.
>
> Accordingly, the decision rendered March 10, 2011, and the orders ruling on the petitions for reconsideration rendered on May 3, 2011, and November 14, 2011, by Hon. Otto D. Wolff, Administrative Law Judge, are hereby **AFFIRMED** in part**, VACATED** and **REMANDED,** for further findings consistent with the views expressed in this opinion.

In the June 5, 2012, order on remand, the ALJ determined as follows:

> This matter is before this Administrative Law Judge (ALJ) pursuant to a February 23, 2012 Kentucky Workers' Compensation Board Opinion Affirming in Part, Vacating and Remanding the ALJ's March 10, 2011 Opinion, Order and Award and the ALJ's November 14, 2011 Order denying Defendant's Petition for Reconsideration.
>
> The facts of this claim are well set forth in Plaintiff and Defendant's briefs filed with the ALJ and Board and in the Opinions of the Board and ALJ.

Reference is made to those documents for a complete setting forth of the facts.

The issue on remand concerns Plaintiff's hearing loss claim. In the original proceeding before the ALJ, Plaintiff's hearing loss claim was dismissed, because it was determined Plaintiff failed to give due and timely notice to Defendant when he started working for Defendant in 2007.

The Board was dissatisfied with this dismissal, writing ‘We deem the ALJ's basis to determine Magee did not provide due and timely notice to be insufficient to permit meaningful review on appeal.'

On remand the Board instructed the ALJ to 'determine whether Magee provided due and timely notice of the hearing loss, after his evaluation by Dr. Manning.' Pursuant to his attorney's instructions Plaintiff went to Dr. Manning on January 19, 2009 for a hearing loss test. Dr. Manning's evaluation was performed on January 19, 2009 and Plaintiff was advised he had a work-related hearing loss. Plaintiff did not give notice of his loss until he filed his Form 103 on January 26, 2010, a year and seven days later.

Plaintiff began working for Defendant in 2007 and last worked for Defendant on January 29, 2008. He quit working for Defendant on that date due to a leg injury. He has not worked for any one since January 29, 2008.

Twice in the remand opinion, the Board wrote almost identical phrases, 'A hearing test was performed by Dr. Manning on January 19, 2009 advising Magee he had a work-related hearing

loss. No notice was provided to Sidney Coal until the filing of the Form 103 on January 26, 2010, a year and seven days later.' Based upon this input by the Board, the question to be addressed is whether the filing of Plaintiff's Form 103, a year and seven days after becoming aware that his hearing loss was work related, constitutes due and timely notice to the employer.

The only proof regarding what occurred from January 19, 2009 through January 26, 2010, comes from Plaintiff's discovery deposition and Final Hearing testimony. In his May 19, 2010 deposition Plaintiff did not testify about the specific question being addressed herein. In Plaintiff's January 26, 2011 Final Hearing testimony, Plaintiff testified Dr. Manning was the first physician who told him his hearing loss was due to his work.

Discussion and Determinations

As set forth in the Board's Opinion, hearing loss is a cumulative trauma injury. A cumulative trauma injury manifests when a worker discovers an injury has been sustained and was caused by his work. [citation omitted]. A worker is not required to self-diagnose the cause of such an injury rather a physician must diagnose the condition and its work-relatedness and advise the employee accordingly. [citations omitted]. When the employee receives this information from a physician, his time to file a claim commences to run.

KRS 342.185 and KRS 342.190 requires notice be given to the employer as soon as practicable. The purpose of this requirement is three fold: 1) to enable

> the employer to provide prompt medical treatment in an attempt to minimize the worker's ultimate disability and the employer's liability, 2) to enable the employer to make a prompt investigation of the circumstances of the accident, and 3) to prevent the filing of fictitious claims. [citations omitted] Herein, Plaintiff's more than a year delay in giving notice, denied Defendant the opportunity to investigate the circumstances of the loss and possibly take steps to minimize the likelihood that such a loss will occur again, and denied Defendant the opportunity to minimize the filing of fictitious claims. This delay denied Defendant the three opportunities that exist when timely notice is given to an employer.
>
> KRS 342.200 provides exceptions to the requirement of giving timely notice. An exception exists if a worker gives a reasonable explanation for the delay. Herein, Plaintiff did not present any explanation for the delay.
>
> A lack of employer prejudice does not waive a delay in giving notice. [citations omitted]
>
> It is determined Plaintiff's delay, for more than a year, to give Defendant notice of his confirmed hearing loss, does not satisfy the timely notice requirement. Based upon this determination Plaintiff's hearing loss claim is dismissed.

In his petition for reconsideration, Magee asserted as follows:

> Comes the plaintiff, Henry J. Magee, by and through counsel, and would respectfully request reconsideration of

the order on remand as issued on June 5, 2012. In the order on remand, it was found that the plaintiff's hearing loss claim should be dismissed due to the failure of the plaintiff to give timely notice to the employer. The plaintiff would respectfully request that such order be reconsidered.

It was found that the plaintiff's delay in giving notice denied the defendant the opportunity to possibly minimize its liability, denied the defendant a timely opportunity to investigate the circumstances of the loss, to possibly take steps to minimize the likelihood that such a loss would occur again, and denied the defendant the opportunity to minimize the filing of fictitious claims. The plaintiff would submit that none of the grounds apply to the plaintiff's claim.

The plaintiff had already ceased his employment with the defendant employer when he was examined by Dr. Manning for his hearing loss in January of 2009. Therefore, as any liability would have been in existence at that time, based upon the hearing loss examination by Dr. Manning, there would have been no opportunity for the defendant to minimize the loss. Furthermore, there was no likelihood of such a loss occurring to the plaintiff again, as the plaintiff had ceased his employment with the defendant. Therefore, the grounds for finding notice not to be timely are in error.

The plaintiff would further submit that the decision is in error due to the fact that the decision does not find notice to have been timely based upon the plaintiff advising the employer of his work-related hearing loss while the plaintiff was still employed by the

> employer. Mr. Magee testified that he was examined several years ago, while still employed by the employer, by a physician for his hearing problems and was advised that his hearing loss had been contributed to by his work-related noise exposure. [citation omitted] Mr. Magee testified that he contacted his employer, Massey Coal Company, which is the same corporation for which he worked at the time of the injury complained of herein, and requested payment for hearing aids. [citation omitted] Thus, the employer properly received notice when it was advised by Mr. Magee, while he was still working for the employer, that he did have work related hearing loss. Therefore, the decision on remand should be reconsidered.

Magee's petition for reconsideration was overruled by order dated August 6, 2012.

On appeal, Magee asserts the ALJ erred by finding he failed to give timely notice. Magee maintains as follows:

> It was found that the plaintiff's delay in giving notice denied the defendant the opportunity to possibly minimize its liability, denied the defendant a timely opportunity to investigate the circumstances of the loss, to possibly take steps to minimize the likelihood that such a loss would occur again, and denied the defendant the opportunity to minimize the filing of fictitious claims. The plaintiff would submit that none of the grounds apply to the plaintiff's claim.

The plaintiff had already ceased his employment with the defendant employer when he was examined by Dr. Manning for his hearing loss in January of 2009. Therefore, as any liability would have been in existence at that time, based upon the hearing loss examination by Dr. Manning, there would have been no opportunity for the defendant to minimize the loss. Furthermore, there was no likelihood of such a loss occurring to the plaintiff again, as the plaintiff had ceased his employment with the defendant. Therefore, the grounds for finding notice not to be timely are in error.

The plaintiff would further submit that the decision is in error due to the fact that the decision does not find notice to have been timely based upon the plaintiff advising the employer of his work-related hearing loss while the plaintiff was still employed by the employer. Mr. Magee testified that he was examined several years ago, while still employed by the employer, by a physician for his hearing problems and was advised that his hearing loss had been contributed to by his work-related noise exposure. (Magee's depo, 5/19/10, pp. 19-20). Mr. Magee testified that he contacted his employer, Massey Coal Company, which is the same corporation for which he worked at the time of the injury complained of herein, and requested payment for hearing aids. (T.E., pp. 27-28). Thus, the employer properly received notice when it was advised by Mr. Magee, while he was still working for the employer, that he did have work related hearing loss. Therefore, the decision on remand should be reconsidered.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim, including proper and timely notice of an injury. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). Kentucky law holds when the party with the burden of proof before the ALJ was unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Since Magee, the party with the burden of proof on the issue of notice, failed in carrying his burden, our inquiry is focused on whether the record compels a different result. Here, it does not.

In the first appeal to the Board, we vacated that portion of the March 10, 2011, opinion, order, and award dismissing Magee's hearing loss claim for failure to notify Sidney Coal of a work-related hearing loss when he was hired since the evidence failed to establish Magee knew he

had work-related hearing loss at that time. We remanded the case to the ALJ for a determination of whether Magee provided due and timely notice of his hearing loss following his evaluation by Dr. Manning on January 19, 2009. On remand, the ALJ determined Magee did not provide due and timely notice following the examination by Dr. Manning, as he failed to give notice until he filed the Form 103 on January 26, 2010. Our task is to determine if this determination is supported by substantial evidence.

Our review of the evidence in the record indicates substantial evidence supports the ALJ's conclusion in the order on remand. Attached to the Form 103 is an audiology report by Dr. Manning dated January 19, 2009. This report does not state the hearing loss is work-related. However, at the January 26, 2011, hearing, Magee testified as follows:

> Q: Let me ask you this. When you saw Doctor Manning, did he tell you that your hearing loss was related to work or did he talk to you about it?
>
> A: He said it was due to the- to the work.
>
> Q: Okay. Was that the first time a doctor actually told you that? That a doctor actually told you that? [sic]
>
> A: Yeah. I'd say. Yeah.

The ALJ found Magee gave notice of his work-related hearing loss when he filed his Form 103 and determined as follows:

> Herein, Plaintiff's more than a year delay in giving notice, denied Defendant the opportunity to possibly minimize its liability, and denied Defendant a timely opportunity to investigate the circumstances of the loss and possibly take steps to minimize the likelihood that such a loss will occur again, and denied Defendant the opportunity to minimize the filing of fictitious claims. This delay denied Defendant the three opportunities that exist when timely notice is given to an employer.

The above-cited evidence constitutes substantial evidence supporting the ALJ's determination that when Magee filed his Form 103 he provided notice to his employer over one year *after* Dr. Manning’s diagnosis of work-related hearing loss and this was not timely notice. Despite Magee's assertions, we believe the ALJ could reasonably conclude Magee’s delay denied Sidney Coal the opportunity to minimize its liability, the ability to investigate the claim, and the opportunity to minimize the filing of a fictitious claim. At a minimum, in the year between Magee's examination by Dr. Manning and the filing of Magee's Form 103, Sidney Coal could have sent Magee to a doctor of its choosing and begun to investigate the

assertion of work-related hearing loss. It is wholly irrelevant that Magee was no longer working during this time period.

Further, we find no merit in Magee's claim the ALJ erroneously failed to find notice was timely because Magee had advised his employer of his work-related hearing loss while still employed. Magee insists his testimony he contacted his employer, Massey Coal Company, the same corporation for which he worked at the time of his alleged hearing loss, requesting payment for hearing aids establishes he gave timely notice. In remanding this claim, this Board instructed the ALJ to determine whether Magee provided due and timely notice of his hearing loss after his evaluation by Dr. Manning. The fact Magee may have provided notice prior to the evaluation of Dr. Manning is not relevant to this appeal and was not germane to the ALJ's task on remand. The decision of this Board was not appealed and is therefore the law of the case. In Inman v. Inman, 648 S.W. 2d 847 (Ky. 1982) the Supreme Court said:

> The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions and law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present

> discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." [citation omitted]

Id. at 849.

Therefore, our direction to the ALJ is the law of the case, and the ALJ was only required to determine if due and timely notice of Magee's hearing loss was provided after Dr. Manning's examination.

That said, it is obvious the ALJ chose to believe no notice of the hearing loss was provided to Sidney Coal until after Dr. Manning's examination.

The ALJ followed the Board's instructions on remand and concluded Magee failed to provide due and timely

notice. This determination will not be disturbed, as it is supported by substantial evidence.

Accordingly, the June 5, 2012, order on remand and the August 6, 2012, order overruling the petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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