

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 21, 2015

CLAIM NOS. 201400988 & 201400987

HOPKINS COUNTY COAL, LLC INACCURATELY
NAMED ALLIANCE COAL, LLC

PETITIONER

VS.

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

WILLIAM D. MORSE
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. Hopkins County Coal, LLC ("HCC") appeals from the February 6, 2015 Opinion, Order and Award and the April 6, 2015 Remand Order on Petition for Reconsideration rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). HCC argues the ALJ's decision is unsupported

by substantial evidence, and the ALJ erred in awarding income benefits for hearing loss because the issue was not properly preserved. For the reasons set forth herein, we affirm.

William Morse ("Morse") filed two claims, alleging a right shoulder injury and hearing loss. The ALJ determined Morse's shoulder injury is not work-related, and that decision has not been appealed. Therefore, we will discuss the evidence only insofar as it relates to the hearing loss claim.

Morse worked in the underground coal mining industry for approximately 41 years, the final six of which were with HCC. He operated a shuttle car and heavy equipment. Morse testified he was provided with ear plugs but they were impractical and unsafe to wear because he could not hear overhead ceiling cracks and pops, which warned him of an imminent fall. He also was unable to hear instructions and communications from other miners when wearing hearing protection.

Morse underwent a university evaluation on July 22, 2014, conducted by Dr. Brittany Brose. Dr. Brose determined Morse suffers greater hearing loss than would be expected for someone his age, and the hearing loss is work-related. She recommended hearing aids or other assistive

listening devices. Regarding work restrictions, she stated, "Hearing protection devices should be worn whenever exposed to loud noise. Restrictions on activities should be based on ability to perform job requirements using hearing protection devices." She assessed a 21% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Morse quit working on May 23, 2012, and alleged he became aware of his work-related hearing loss on March 6, 2014. He testified he was able to work underground despite his hearing loss by asking co-workers to speak louder. He did not quit work due to the effects of his hearing loss. According to Morse, he was unable to continue working after the non-work-related shoulder injury which required surgery. Further, in early 2014, Morse was diagnosed with Parkinson's disease.

Relying on Dr. Brose's evaluation and finding no reason to reject her report pursuant to KRS 342.315, the ALJ concluded Morse suffers work-related hearing loss resulting in a 21% whole person impairment. The ALJ then determined Morse is permanently totally disabled as a result of the hearing loss. He explained:

"Permanent total disability" is defined in KRS 342.0011 (11) as being the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury.

As used in the definition of "permanent total disability," the word "work" is defined in KRS 342.0011 (34) as meaning, "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

In determining whether one's occupational disability falls within the above-quoted definitions, an analysis must be done, as defined in accord with *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky., 2000). This test requires consideration of several factors, an injured worker's age, education, vocational skills, post-injury medical restrictions, and the likelihood of resuming work.

AGE: On or about March 3, 2014 Plaintiff suffered a cumulative trauma hearing loss. On that date he was 61 years old. Per KRS 342.730 (1) (c) 3, this is an age that has, simply due to age, a negative impact on his post-injury earning capacity. Plaintiff's age suggests he is permanently totally disabled.

EDUCATION: The extent of Plaintiff's education is 11th grade. Again, referring to KRS 342.730 (1)(c)3, one with only an 11th grade education has suffered a negative impact on his post-injury earning capacity. Plaintiff's limited and old education suggests he is permanently totally disabled.

SKILLS: Plaintiff has worked in underground coal mines for 40 years and for most of the time drove shuttle cars. Plaintiff has the skill of operating shuttle cars but otherwise very few, if any, transferable skills. The absences of transferable skills suggest Plaintiff is permanently totally disabled.

POST-INJURY MEDICAL RESTRICTIONS: Because of Plaintiff's hearing loss he has the medical restriction of wearing hearing protection devices whenever he is exposed to loud noise. Dr. Brose noted "Restrictions on work activities should be based on ability to perform job requirements using hearing protection devices." Plaintiff has explained how it is unreasonable and unsafe to wear hearing protection devices in the noisy underground work environment. Plaintiff's post-injury medical restrictions suggest Plaintiff is permanently totally occupationally disabled.

LIKELIHOOD OF RESUMING "WORK": When one combines the reality of Plaintiff's age, education, lack of skills and post-injury work restrictions it is unlikely Plaintiff can resume some type of "work" under normal employment conditions, and, consequently Plaintiff is deemed permanently totally occupationally disabled.

HCC filed a petition for reconsideration, arguing the issue of permanent total disability ("PTD") benefits was not preserved for review. It also contested the ALJ's determination Morse is permanently totally disabled as a result of the hearing loss alone. The ALJ provided the

following analysis on reconsideration as to the preservation issue:

A review of the BRC Order rendered in this claim indicates certain issues were reserved; "benefits per KRS 342.730", and it was specifically noted, "PTD being sought." The BRC Order also indicated there were specific issues to be determined regarding Plaintiff's alleged shoulder injury, being work-relatedness /causation, notice, unpaid or contested medical expenses, injury as defined by the Act, and exclusion for pre-existing disability/impairment.

The ALJ acknowledges the BRC Order, could, due to the undersigned's writing, be read as indicating the issue of benefits per KRS 342.730 pertained only to Plaintiff's alleged shoulder injury, but that was not the intention. Defendant contends, "it is abundantly clear that PTD and "benefits per KRS 342.730" were being preserved as issues ONLY" for the shoulder injury, not hearing loss." (Emphasis original)

On May 5, 2014 Plaintiff filed a Form 103 alleging a hearing loss injury due to his constant noise exposure in the course of employment with Defendant. The only Defendant/Employer listed on the Form 103 was Alliance Coal (subsequently correctly identified as Hopkins County Coal, LLC).

On July 9, 2014 the required, University Evaluation report was filed. In that report it was indicated Plaintiff had a 21% whole person impairment (WPI) as a result of his work-related hearing loss. Under the restrictions section of the report it was indicated, in pertinent part, "restrictions on work activities should

be based on ability to perform job requirements using hearing protection devices."

Obviously Plaintiff filed, and had pending, a hearing loss claim against Defendant at the time of the BRC, and, that being accurate, it was obvious it would be necessary to determine the issue of the extent of Plaintiff's occupational disability due to his documented hearing loss. Throughout the course of this litigation, at least until now, no objection was made by Defendant contending the issue of the extent of Plaintiff's work-related occupational disability resulting from his hearing loss was not an issue.

A review of Defendant's 15 - page brief, indicates on page 1, "The Plaintiff is alleging hearing loss and a cumulative injury to his right shoulder... while employed by Hopkins County Coal." On page 13 of its brief Defendant wrote, "neither Mr. Morse nor any doctor advised that Mr. Morse is unable to return to work due to his hearing loss. Dr. Brose advised that he will do well with hearing aids, which would obviously allow him to work underground at the same rate of pay, setting aside his Parkinson's and alleged shoulder injury (which is being contested by the employer)... The hearing loss impairment rating is not being contested: however, there is absolutely no evidence whatsoever that it should be enhanced by a multiplier."

1. Defendant's contention that the extent of Plaintiff's occupational disability due to his hearing loss was not an issue to be determined by the ALJ is unfounded.

Plaintiff's filing of the Form 103 the University Evaluation report, and the content of the parties' briefs show the extent of Plaintiff's occupational disease due to his hearing loss was an issue for determination. In addition to the obvious, the principle of "implied consent" is operative. As noted by the Board in *Steel Creations, Inc. v. Insured Workers Pharmacy*, Claim No. 2007 (August 26, 2014), claims are to be decided on their merits rather than on the basis of gamesmanship. The Board explained one of the reasons for the rule is to take cognizance of issues that were actually tried. If issues were not clearly raised in the pleadings (which is not the case herein) were tried with the implied consent of the parties, the issues are treated as if they had been raised.

Based upon the above, the first point upon which Defendant seeks reconsideration is overruled.

The ALJ next considered HCC's argument on reconsideration that the evidence does not support a finding Morse is permanently totally disabled as a result of the hearing loss. In denying the petition for reconsideration on this issue, he explained:

As above noted, an issue to be determined by the ALJ was the extent of Plaintiff's occupational disability due to his hearing loss. As set forth in the Opinion (pages 12 to 15), an in-depth assessment of Plaintiff's severe occupational disability due to his documented hearing loss was conducted. Before conducting an analysis using the criteria set forth in *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d

48 (Ky. 2000), it was noted in the Opinion, "Dr. Brose conducted a Communication Needs Assessment and determined Plaintiff had "a severe perceived hearing handicap and decreased communication ability." Dr. Brose's treatment recommendations were for claimant to wear hearing aids or other assistive listening devices. Dr. Brose's work restrictions included, "hearing protection devices should be worn whenever exposed to loud noise. Restrictions on activities should be based on ability to perform job requirements using hearing protection devices."

As noted on pages 3 through 5 of the Opinion, "During the course of his (claimant's) mining work he ignited dynamite and blew the face of the mine, ran a pinner machine, operated a shuttle car, and hung curtains." These were tasks involving exposure to loud, very loud, noise.

Plaintiff testified earplugs and muffs were available, but it was not practical or safe to wear such. He explained a miner could not wear earplugs because then he could not hear the overhead ceiling rock pop and crack before falling. Plaintiff also explained earplugs and muffs would keep him from hearing communications and instructions from his fellow miners, and hearing such was vital for one to work safely in an underground mine.

Based upon what Dr. Brose suggested for Plaintiff - wear hearing aids or other assistive listening devices - and, based upon Plaintiff's testimony - a miner could not wear earplugs or other assistive listening devices because he could not hear the overhead ceiling rock pop before it fell nor could he hear

vital communications and instructions - it would seem apparent claimant could be deemed to have a substantial permanent occupational disability, maybe, after considering all the factors set forth in *Watson*, supra, even total. Determination of whether Plaintiff's occupation disability was of a partial or total nature requires an analysis based upon the criteria set forth *Watson*, supra.

On pages 13, 14, and part of 15 of the Opinion, there is set forth a review of Plaintiff's predicament using the criteria set forth in *Watson*, supra. Having made this analysis it was apparent to the undersigned Plaintiff was permanently totally occupationally disabled as a result of his work-related severe hearing loss.

A re-review and re-weighting of the findings and determinations in an opinion are not allowed pursuant to a party's petition for reconsideration. *Wells v. Ford*, 714 S.W.2d 481 (Ky. 1986). As set forth in the Opinion, ample substantial evidence, was presented, allowing the undersigned to conclude Plaintiff was permanently totally occupationally disabled as a result of his hearing loss.

Defendant's Petition for Reconsideration on this issue is overruled.

HCC now appeals, again arguing PTD benefits resulting from the hearing loss were not preserved as a contested issue. It also challenges the sufficiency of the evidence supporting the award of PTD benefits.

We first address the issue of preservation. In the Order on Reconsideration, the ALJ explained why he believed the issue of extent of disability resulting from the hearing loss was preserved as a contested issue at the benefit review conference, notwithstanding an admittedly confusing notation on the order. Regardless, the ALJ further determined that the issue had been tried by the implied consent of the parties.

If issues are not specifically raised in the pleadings, they are nonetheless treated as if they had been raised if they were tried by the express or implied consent of the parties. Kroger Co. v. Jones, 125 S.W.3d 241, 246 (Ky. 2004). The Kentucky Supreme Court has taken the view that the "theory of implied consent rest[s] on absence of actual prejudice, i.e., the ability to present a defense." Id. The determination of whether an issue was tried by consent rests within the sound discretion of the ALJ. Nucor Corp. v. General Electric Co., 812 S.W.2d 136, 145-46 (Ky. 1991).

The ALJ provided a thorough explanation why he believed the issue had been tried by consent and no prejudice resulted to HCC. He specifically noted HCC was aware of the work restrictions recommended by Dr. Brose, and statements from HCC's final hearing brief which discussed

the extent of Morse's impairment as a result of the hearing loss. For this reason, it cannot be said the ALJ abused his discretion in concluding the issue had been tried by the consent of the parties.

We next turn to the award of PTD benefits. As the ALJ correctly noted, permanent total disability is "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury." KRS 342.0011(11). Work means the ability to provide "services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011(34). In considering whether an injured employee is permanently totally disabled, the ALJ is required to conduct an individualized analysis of the injured worker's age, education, vocational skills, post-injury medical restrictions, and the likelihood of resuming work. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The ALJ conducted an individualized analysis of Morse's condition, including a discussion of his advanced age, his limited education, his work history consisting entirely of underground coal mining work, and Dr. Brose's recommendation that Morse wear hearing protection while

working. Furthermore, the ALJ considered the recommendation for hearing protection in light of Morse's testimony describing why it is impractical to wear ear plugs in the mine. The ALJ's analysis in the February 6, 2015 Opinion, Order and Award was thorough, individualized, and based on substantial evidence in the record.

In the Order on Reconsideration, the ALJ again explained his rationale, but offered the following statement:

Based upon what Dr. Brose suggested for Plaintiff - wear hearing aids or other assistive listening devices - and, based upon Plaintiff's testimony - a miner could not wear earplugs or other assistive listening devices because he could not hear the overhead ceiling rock pop before it fell nor could he hear vital communications and instructions..

On appeal, HCC argues Morse never testified he could not wear "assistive listening devices" in the mine, and therefore the ALJ's decision is not based on substantial evidence. Furthermore, HCC points out Dr. Brose did not caution against wearing "assistive listening devices" in the mine; in fact she recommended hearing aids for Morse. HCC emphasizes Morse continued working with compromised hearing until he finally retired due to the effects of his shoulder injury, a fact it believes was not adequately considered by the ALJ.

We acknowledge the ALJ, in the above-quoted sentence, referenced "assistive listening devices." However, we believe this is merely a clerical error and the ALJ was referring to "protective listening devices." We base this conclusion on several circumstances. The entirety of the ALJ's analysis in the February 6, 2015 Opinion refers to "protective devices" and discusses why ear plugs are not practical when working underground. When the April 6, 2015 Order on Reconsideration is read in context, it is clear the ALJ reiterated his original reasoning, and intended to again express his finding that it would be impractical for Morse to wear hearing protection while working underground, as recommended by Dr. Brose. When read within the context of the original Order, as well as the Order on Reconsideration, we believe the ALJ merely committed a clerical error in referencing "assistive listening devices."

Furthermore, we reject HCC's argument that the ALJ considered Morse's shoulder injury and Parkinson's disease diagnosis in concluding he is permanently totally disabled. The ALJ's analysis of Morse's hearing loss references neither his testimony nor the medical evidence concerning the effects of these conditions. We find no indication, other than mere conjecture, that the ALJ improperly

considered these conditions in reaching the conclusion Morse is permanently totally disabled.

The ALJ conducted an individualized analysis as required by Ira A. Watson, and thoroughly articulated his reasoning when considering the extent of Morse's disability. 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). Although HCC emphasizes the evidence which would support a different outcome than reached by an ALJ, such 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). Here, the ALJ's analysis is based on substantial evidence in the record.

For the foregoing reasons, the February 6, 2015 Opinion, Order and Award and the April 6, 2015 Remand Order on Petition for Reconsideration rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

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