Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 3, 2014

CLAIM NO. 201201789

MAKER'S MARK DISTILLERY, INC. PETITIONER

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

ROBERT CORBETT
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Maker's Mark Distillery, Inc. ("Maker's Mark") appeals from the February 10, 2014, Opinion, Order, and Award of Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") awarding Robert Corbett ("Corbett") medical benefits for a hearing loss incurred while in the employ of Maker's Mark. Because the impairment rating caused by the hearing loss did not meet the threshold contained in KRS

342.7305(2), the ALJ did not award income benefits. Maker's Mark also appeals from the March 18, 2014, Order denying its petition for reconsideration.

Corbett filed a Form 103 alleging a work-related hearing loss.[1] Pursuant to KRS 342.315, Corbett underwent a university evaluation performed by Dr. Barbara A. Eisenmenger. Maker's Mark introduced Dr. Eisenmenger's June 25, 2013, deposition. In addition, it introduced the report of Dr. Robert Wood and the report of Kentucky Labor Cabinet, Department of Workplace Standards, Division of OSH Education & Training ("Division of OSH Education & Training") prepared by Chris Hayes. Corbett introduced the report of Dr. Warren Bilkey.

The December 19, 2013, Benefit Review Conference Memorandum and Hearing Order reflects the parties stipulated to coverage under the Act and that the contested issues were: "benefits per KRS 342.7305, work-relatedness/causation, notice, unpaid or contested medical expenses, injury as defined by the Act as to injurious exposure."

[1] Corbett also filed an injury claim. As it is not the subject of this appeal, we will not discuss the claim.

After reviewing the lay and medical evidence, the ALJ provided an analysis, findings of fact, and conclusions of law which, in relevant part, follows:

> With respect to the Plaintiff's claim for hearing loss, I find the Plaintiff has suffered injurious exposure to noise at the Defendant/employer's work site. In making this finding I rely upon the opinion of Dr. Eisenmenger, the University evaluator, and Dr. Bilkey. Dr. Eisenmenger opined on the Form 107-H (and also after extensive examination and cross-examination during her deposition) that Plaintiff's hearing loss resulted from an occupation-related noise induced hearing loss. Dr. Eisenmenger opined Plaintiff retained 4% whole body impairment as a result of his binaural impairment. Dr. Eisenmenger recommended Plaintiff use hearing aids. KRS 342.315(2) states that a university evaluator's clinical findings and opinions "shall be afforded presumptive weight. . . and the burden to overcome such findings and opinions shall fall on the opponent of that evidence." I accept Dr. Eisenmenger's report and deposition testimony and find that Plaintiff has 4% impairment due to work-related noise exposure. The Plaintiff's impairment is less than 8% and, therefore, he is not entitled to income benefits pursuant to KRS 342.3705.
>
> I further find that Plaintiff is entitled to payment of future medical expenses for his hearing loss, including hearing aids, pursuant to KRS 342.020(1). Combs vs. Kentucky River District Health Dept., 194 SW3d 823, 827 (Ky.App. 2006), holds that KRS 342.020(1) does not expressly condition

eligibility for medical expenses on eligibility for income benefits. Thus, a worker who has reached maximum medical improvement without a permanent impairment may remain eligible for payment of future medical expenses. *Id.* at 827. KRS 342.020(1) requires an employer to pay "for the cure and relief from the effects of an injury or occupational disease... as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease." Although KRS 342.3705 precludes an award of income benefits for a hearing loss of less than 8%, the statute places no similar restriction on the award of future medical expenses. Therefore, Plaintiff's 4% impairment rating is sufficient to support an award of future medical expenses. Caldwell Tanks vs. Roark, 104 SW3d 753, 756 (Ky. 2003).

. . .

In this instance, Dr. Eisenmenger was presented with not only the finding of the OSH consultation but also hypotheticals presented by Defendant/employer's counsel of little or no noise exposure at work. I found Dr. Eisenmenger's reasoning regarding the OSH findings reasonable and ultimately the most persuasive. Dr. Eisenmenger did not believe the OSH findings were a true and accurate report of the cumulative effect of noise exposure over 25 years. She also did not find the report took into consideration the multitude of different situations (and noise exposure) to which Plaintiff would have been exposed over the course of his employment. Ultimately, Dr. Eisenmenger

> remained steadfast in her opinion that Plaintiff suffered a work-related noise exposure that resulted in his impairment. Plaintiff also testified credibly of the many years he was exposed to noise at his work place. The weight and credibility to be afforded this testimony is a matter solely within the purview of the ALJ, as fact finder. Paramount Foods, Inc. vs. Burkhardt, 695 SW2d 418 (Ky. 1985). I find Plaintiff has sustained his burden of proof to causally link the work place noise exposure to his hearing loss. For this finding I rely on Dr. Eisenmenger, Dr. Bilkey and the testimony of the Plaintiff.

Maker's Mark filed a petition for reconsideration making the same arguments it now makes on appeal and requesting specific findings providing the objective evidence which demonstrated the noise levels where Corbett worked were high enough to constitute injurious exposure. It posited that in the absence of such evidence it was entitled to a finding Corbett had not met his burden of proof showing he sustained repetitive injurious noise exposure.

Finding Dr. Eisenmenger's opinion regarding causation convincing, particularly in light of the extensive cross-examination she underwent, the ALJ concluded additional findings of fact were unnecessary and denied Maker's Mark's petition for reconsideration.

On appeal, Maker's Mark argues the ALJ misinterpreted KRS 342.7305 in concluding Corbett sustained his burden of linking the exposure to workplace noise to his hearing loss. It argues Corbett did not provide any medical evidence establishing he was repetitively exposed to hazardous noise. Maker's Mark asserts KRS 342.7305 requires Corbett to demonstrate repetitive exposure to hazardous noise in the workplace and an injury which must be evidenced by objective medical findings. It posits a claimant demonstrates injurious exposure by presenting evidence which proves the type of exposure received during the subject employment was injurious. Consequently, the claimant is not permitted to issue a causation opinion and his opinion cannot be considered a medical opinion.

Maker's Mark also argues that not all noise rises to the level of hazardous or injurious. Thus, the relevant inquiry is whether the noise at its distillery was hazardous and injurious. It asserts Corbett has not presented any medical evidence demonstrating the noise at its facility was hazardous or injurious. In support of this assertion, Maker's Mark argues Dr. Bilkey did not provide the noise levels at Maker's Mark and Dr. Eisenmenger admitted she did not know the source of Corbett's noise exposure. It contends Dr. Eisenmenger also

conceded she did not know the extent of the noise to which Corbett was exposed over an eight hour period. It argues neither Dr. Bilkey nor Dr. Eisenmenger stated Corbett was exposed to hazardous injurious noise. Rather, they attempted to infer that fact from Corbett's testimony. Thus, there is no medical evidence indicating Corbett was exposed to hazardous or injurious noise. Maker's Mark asserts as follows:

> The question is *medically* did the noise at Maker's Mark rise to the level of hazardous and injurious noise exposure. That is a question that cannot be resolved by a layperson, and must be addressed by an appropriate expert.

Since Corbett failed to prove his job at Maker's Mark exposed him to hazardous or injurious noise, Maker's Mark argues his hearing loss claim must be dismissed. It cites to Corbett's testimony that he was unaware Maker's Mark had ever been cited for any type of noise exposure violations or that there had been other hearing loss claims filed. Further, Corbett admitted he had not obtained any measurements of the noise level at Maker's Mark during his employment. It notes the empirical testing of the noise levels conducted by the Division of OSH Education & Training at its plant indicates Corbett was not exposed to repetitive hazardous noise in the course and scope of his

position as a warehouse manager. Therefore, it requests the finding of work-related noise exposure be reversed and remanded to the ALJ, with instructions to find Corbett did not meet his burden of proof in showing he sustained repetitive and injurious noise exposure.

The February 4, 2013, Form 108—HL report of Dr. Eisenmenger, the university evaluator, reveals she obtained a history of Corbett's hearing problems and his employment history. Based on the diagnostic testing, Dr. Eisenmenger provided the following diagnosis:

> Mr. Corbett has greater hearing loss than would be expected for an individual of 55 years of age. Objective and behavioral measures are consistent and show a high frequency bulge pattern typical of that seen with long term noise exposure. Based on the reported history of noise exposure, the apparent absence of other factors associated with hearing loss, and the results of the hearing evaluation, the primary cause of this hearing loss is long term noise exposure.

Regarding causation, Dr. Eisenmenger stated the audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. She concluded Corbett's hearing loss is related to repetitive exposure to hazardous noise over an extended period of employment. Dr. Eisenmenger did not believe Corbett's hearing loss was due to a single

incident of trauma. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, she assessed a 4% impairment rating, none of which was an active impairment prior to acquiring the work-related condition.

As previously noted, Dr. Eisenmenger's June 25, 2013, deposition was introduced. She testified she very rarely receives the decibel levels to which an employee was exposed. Similarly, an individual who has undergone a hearing test has never provided the loudness of the noise. Rather, she receives a history of the noise to which he or she was exposed. Corbett told her the plant was noisy and ear plugs were available. She testified Corbett is experiencing significant communication problems based on the hearing loss detected upon testing. Dr. Eisenmenger would not change the opinions expressed in her previous report. Relative to the report prepared by the Division of OSH Education & Training, Dr. Eisenmenger stated as follows:

> Q: I noticed there is an entry on this which is Barrel Filler/Barrel Inspection. When I look at that it looks like Exposure. Do you see is [sic] 89.30?
>
> A: Correct.

Q: I look down to another Barrel Filler/Barrel Inspection, 86.47?

A: Yeah. And those were the kinds of things that he was telling me about. I mean, like I said, I'm not real –- just like you don't understand audiology very well, I don't understand some of the things you have to do. But he was talking about having to beat on -– fix barrels.

You know, they're made, they have to be – so they're banging on them, banging around them. That was kind of the noise exposure he was kind of reporting to me and those are higher than 85.

Q: That's my question. Those actually come in on this one day as being higher than 85, the OSHA line that they draw in the sand which there needs to be some action taken by the employer to correct that situation. Is that not what the purpose of the evaluations are?

A: Yes.

Q: And as I look through here, there seems to be several that are above 85 and would seem to me that based upon this OSHA report remedial action should be taken by Maker's Mark to correct the noise levels there at that facility; is that correct?

A: Yes.

Q: Now, Doctor, the question I've got as well, the OSHA folks – and we don't know anything other than what this report says what they did that day or what level the operations were being run. There's days that they bottle more bottles of Maker's Mark than others. There's days that it's noisier than others.

> But in particular you identify – based upon the history and everything Mr. Corbett told you, you do not feel that the natural aging process is the major component to this?
>
> A: No. That’s correct.
>
> Q: You do not feel –
>
> A: Yes, I do not feel that.
>
> Q: Right. You do not feel hereditary issues are here?
>
> A: (Shakes head.)
>
> Q: You do not feel any IV medicines and stuff that you identified that might be a problem is here?
>
> A: No, I do not.
>
> Q: And taken as a whole again, your opinion is that the hearing loss that you’ve identified and the AMA rating that you’ve identified is from – primarily from his work environment?
>
> A: Yes.

Regarding the test results provided in the report of the Division of OSH Education & Training, Dr. Eisenmenger testified:

> Q: So this was very unusual to receive this type of report?
>
> A: Yes, it is.
>
> Q: But in this report it also confirms the high exposure levels at the work activities at Maker’s Mark?
>
> A: Uh-huh. Which I assume is why they’re doing the hearing tests annually.

Corbett testified at the December 19, 2013, hearing that he worked for Maker's Mark from May 17, 1987, to March 17, 2012. When he was first hired he worked in the warehouse rolling barrels which he characterized as a noisy environment. Approximately, a year later he moved to the third shift as a guard where he worked for almost a year. He characterized this position as occasionally noisy. Corbett then went to the distillery running a mash tub and working in the yeast room both of which he characterized as a noisy environment. In 1991, he went to the warehouse as an assistant supervisor. There, he filled, dumped, and rotated barrels. Again, Corbett characterized the warehouse as a noisy environment. In 1994, he went to the distillery as an assistant supervisor, which in part entailed performing the work of an absent employee. Similarly, he characterized this area as a noisy environment. Corbett returned to the warehouse in 2001 and worked as a warehouse manager until March 2012. Corbett explained the warehouse manager was a working position which required him to help fill, dump, and rotate barrels. He also inspected barrels. In March 2012, he went to the guard position where he worked for approximately two or three weeks. He conceded there was no injurious exposure to noise during this period.

Corbett explained when he worked in the “cistern regage building” filling, dumping, or inspecting barrels the noise level ranged from six to seven on a scale of one to ten. As a warehouse manager he regularly worked with barrels. He also worked quite a bit in the mechanical room where he estimated the noise level to be ten on a scale of one to ten. Corbett also worked in the air compressor room where he estimated the noise level to be nine on a scale of one to ten. In the winter, he worked on tractor trailers which he estimated exposed him to a noise level of seven on a scale of one to ten. He explained he was provided ear plugs, but because he could not hear what was said he had to remove his ear plugs in order to converse with the employees.

Corbett testified he developed hearing problems after he moved to the management position. He explained that sometime after he became a manager, Maker’s Mark personnel advised him a hearing test revealed he had hearing problems. Those hearing problems progressively worsened from that point. Corbett explained he worked in the warehouse for ten or eleven years repeatedly hearing the same noise. Significantly, Dr. Eisenmenger was the first physician to tell him his hearing loss was work-related.

Since Corbett, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show there was some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, ordinarily we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, Maker's Mark argues the ALJ's conclusion Corbett's condition was caused by work is unsupported by substantial evidence. While medical causation usually requires proof from a medical expert, the ALJ may properly infer causation, or a lack of causation, from the totality

of the circumstances as evidenced by the lay and expert testimony of record. *See* Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981); Cf. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995).

An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, supra; Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969).

In this instance, we believe the ALJ could easily conclude, based upon the lay and medical testimony, that Corbett's hearing loss was caused by his work activities at Maker's Mark. KRS 342.7305(4) reads as follows:

> (4) 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.

Maker's Mark's assertions to the contrary, Dr. Eisenmenger's opinions expressed in her report and during

her deposition constitute substantial evidence establishing there was repetitive exposure to hazardous noise in the workplace which was the cause of Corbett's hearing loss. Dr. Eisenmenger testified that the employees have never provided her with the noise level to which they are exposed during their employment. Corbett worked for twenty-five years at Maker's Mark and explained he had moved from various areas of the plant, many of which, including the warehouse, he characterized as being extremely noisy. Dr. Eisenmenger was entitled to rely upon Corbett's history and her test results in concluding Corbett sustained a hearing loss due to regular exposure to hazardous noise at Maker's Mark. Her opinions along with Corbett's testimony constitute substantial evidence supporting the ALJ's decision. Further, KRS 342.315(2) mandates her findings and opinions shall be afforded presumptive weight.

In addition, although we will not endeavor to interpret the report prepared by the Division of OSH Education & Training, Dr. Eisenmenger's testimony firmly establishes that at certain locations in Maker's Mark's facility, Corbett was exposed to noise levels which the state of Kentucky deemed to be hazardous. In fact, Dr. Eisenmenger's testified the report of the Division of OSH

Education & Training confirmed there was exposure to high noise levels at the Maker's Mark plant.

Moreover, the report was based on a study performed after Corbett's employment terminated. The report contains the following disclaimer:

> Conditions during the visit were considered normal. The identification of hazards and their classifications were based on the observations and conditions present during a brief period of time relative to the entire scope of your job duties and work descriptions. Hazard classification may change due to changes in work practices, production, employees, and chemicals in use. Therefore, we cannot guarantee that every hazard at Maker's Mark Distillery was identified or listed in this report.

Clearly, the report recognizes the testing was performed over a "brief" span of time and the noise level may change resulting in a hazardous environment.

In summary, Dr. Eisenmenger's testimony concerning the cause of Corbett's hearing loss is unequivocal and constitutes medical evidence establishing his hearing loss is due to injurious noise exposure at Maker's Mark. Fundamental to the ALJ's fact-finding authority is the ability to draw inferences from both the lay and medical testimony. Corbett's testimony and the opinions of Dr. Eisenmenger constitute substantial evidence

in support of the ALJ's determination Corbett sustained a work-related hearing loss meriting an award of medical benefits. The ALJ, in piecing together the testimony and upon viewing all of the circumstances, concluded that Corbett's hearing loss was work-related. In light of the record, we find that determination to be supported by substantial evidence. So long as the ALJ's determination is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Accordingly, the February 10, 2014, Opinion, Order, and Award and the March 18, 2014, Order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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