OPINION ENTERED: December 9, 2011

CLAIM NO. 201000707

MICHAEL HUNT PETITIONER

VS. **APPEAL FROM HON. HOWARD E. FRASIER, JR., ADMINISTRATIVE LAW JUDGE**

MUBEA, INC.
and HON. HOWARD E. FRASIER, JR.,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman; COWDEN and STIVERS, Members.

ALVEY, Chairman. Michael Hunt ("Hunt") seeks review of a decision rendered July 7, 2011 by Hon. Howard E. Frasier, Jr., Administrative Law Judge ("ALJ"), dismissing his claim for workers' compensation benefits against Mubea, Inc. ("Mubea"). Hunt also appeals from an order issued July 29, 2011 denying his petition for reconsideration.

On June 22, 2010, Hunt filed a Form 103, Application for Resolution of Hearing Loss Claim, alleging

a work-related hearing loss with a last injurious exposure date of February 18, 2009 while working for Mubea. The ALJ rejected the opinion of the university evaluator who performed an evaluation pursuant to KRS 342.215, and determined Hunt failed in satisfying his burden of proving his complaints were causally work-related or had worsened due to hazardous exposure to noises present in the work place at Mubea.

On appeal, Hunt argues:

> The Administrative Law Judge's conclusion is not supported by substantial evidence and it must be reversed as a matter of law, since the evidence was compelling and the determination of the ALJ was arbitrary and capricious.

We affirm.

Hunt testified by deposition on February 3, 2011, and again at the hearing held May 23, 2011. Hunt was born September 2, 1960 and is a resident of Dry Ridge, Kentucky. He is a high school graduate and took some vocational courses in supervision and management. Hunt testified he began having trouble hearing approximately three years before he saw Dr. Manning for a hearing test at his attorney's request in May 2010.

Hunt entered Mubea's employ in April 2002, where he worked as a maintenance technician. His job duties

included repairing and maintaining cutting machines. Hunt graduated from high school in 1978 and began working in surface mining for the next ten years. He described while working as a surface miner, he was constantly exposed to loud noise. He did not wear hearing protection while working in the mines. He began working for manufacturing facilities in 1988, and continued to perform that type work until February 2009. Hunt described this work, at each of the factories where he worked, as very noisy. However, he wore hearing protection at all times.

Hunt last worked for Mubea on February 18, 2009 due to a non-work injury which prevented his return. Hunt testified a storm had taken a portion of the shingles from the roof of his home. As he was placing a tarpaulin at the direction of his insurance adjuster, he fell approximately 15 feet onto his back. He has not worked since then.

Hunt testified he was unaware he had a hearing loss until he was sent to Dr. Manning. He had noticed he talked loud and listened to television at a high volume before that evaluation. Hunt testified his left ear bothers him more than the right. He also testified he hunted in the past, but had not done so for approximately ten years prior to the accident. He did not wear hearing protection when hunting. Hunt further testified he does

not have hearing aids, although they have been recommended, because he cannot afford them. He stated if he had known his hearing problem was so bad before he left work with Mubea, he would have obtained hearing aids through his health insurance.

Hunt supported his claim with the report of Dr. Robert Manning, an Otologist, who administered a hearing test on May 4, 2010. Dr. Manning stated Hunt was a 49 year old with a thirty year history of loud noise exposure who had not worked since February 2009 when he fell and broke his pelvis. Dr. Manning assessed Hunt a 12% impairment rating based upon the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), and recommended hearing amplification.

Subsequent to the filing of the claim, an evaluation was scheduled with Dr. Barbara Eisenmenger for July 29, 2010, pursuant to KRS 342.315, as required by 803 KAR 25:010 Section 11 (1). On that date, Hunt completed paperwork and Dr. Eisenmenger checked his ears. She advised him to have ear wax removed in the left ear prior to the evaluation. This was done by Dr. Willoughby in August 2010. Dr. Eisenmenger subsequently performed an evaluation on September 9, 2010.

In the Form 108-HL medical report completed on September 9, 2010, Dr. Eisenmenger reported Hunt was fifty years old with a history of gradual hearing loss. She stated the testing administered established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the work place. She opined Hunt's hearing loss was due to repetitive exposure to hazardous noise and assessed a 17% impairment rating based upon the AMA Guides.

Dr. Eisenmenger subsequently testified by deposition on January 13, 2011. She is a board certified Audiologist. She stated the examination consisted of testing and looking in Hunt's ears. Hunt gave a history of working in noisy environments but wearing ear plugs. She administered a tympanogram, an objective test, which demonstrated normal results. She also administered acoustic reflex testing, which produced borderline normal results. The remainder of the testing was subjective in nature. Dr. Eisenmenger believed Hunt had a noise related component to his hearing loss, but not all was due to work. She testified she was unable to apportion what may be work-related from what may not be work-related. Dr. Eisenmenger further testified Hunt needed hearing protection, but this would not protect him from hearing loss due to factors unrelated to noise.

Dr. Robert Dudley Woods, II, an Otolaryngologist, or ENT, evaluated Hunt at Mubea's request on November 1, 2010. Dr. Woods prepared a report based upon that evaluation which was attached to his deposition taken November 8, 2010. Dr. Woods first stated Dr. Manning is not a medical doctor. Dr. Woods testified he administered testing twice to Hunt during the course of the evaluation. He stated the first set of testing yielded inconsistent results, and the second set demonstrated malingering or pseudohypacusis. Dr. Woods noted the history provided him established Hunt wore hearing protection although he worked in noisy environments.

Dr. Woods testified the results from the audiograms administered by Dr. Eisenmenger were consistent with age related, not noise induced hearing loss. He disagreed with Dr. Eisenmenger that Hunt's hearing loss was caused by noise exposure in high frequencies. Dr. Woods pointed to numerous inconsistencies in Dr. Eisenmenger's report. Dr. Woods stated the results from the testing he administered were not reliable enough to make an assessment of functional impairment for hearing loss. He did not believe it was appropriate for Dr. Eisenmenger to assess a 17% impairment rating based upon her unreliable test results. He noted Hunt's speech discrimination testing was

almost perfect and inconsistent with other testing. Dr. Woods did not believe Hunt has a hearing loss caused by noise exposure in the high frequencies.

In the report attached to his deposition, Dr. Woods specifically stated:

> My diagnosis is malingering or pseudohypacusis. He may have some hearing loss but I am unable to determine to what degree he would have hearing loss because the testing is inaccurate due to his malingering. Within a reasonable degree of medical probability, I do not think Mr. Hunt has significant hearing loss and I doubt that it is connected with noise exposure at work. His hearing test[sic] show a flat hearing loss which is generally not seen in noise induced hearing loss.

Mubea also introduced records from Hunt's Social Security claim. Specifically, Hunt did not allege hearing loss as a basis for his application for benefits. Likewise, an examination performed June 12, 2010, by Dr. Malhotra at the request of the Social Security Administration indicated Hunt had equal hearing bilaterally and he had no impairments affecting his hearing or vision.

After considering the above evidence, the ALJ rendered a decision on the merits dismissing Hunt's claim. In so ruling, the ALJ reasoned as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1)The Plaintiff bears the burden of proof and the risk of non-persuasion with respect to every essential element of the claim. Caudill v. Maloney's Discount Store, Ky.,[sic] 560 S.W.2d 15 (1977). In regard to the effect of a University Evaluation, the Kentucky Supreme Court has held that:

> By operation of KRS 342.315(2), the clinical findings and opinions of the university evaluator are presumed to accurately reflect the claimant's medical condition. For that reason, unless evidence is introduced which rebuts the clinical findings and opinions of the university evaluator, they may not be disregarded by the fact-finder. To the extent that the university evaluator's testimony favors a particular party, it shifts to the opponent the burden of going forward with evidence which rebuts the testimony. If the opponent fails to do so, the party whom the testimony favors is entitled to prevail by operation of the presumption. Stated otherwise, the clinical findings and opinions of the university evaluator constitute substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder.

Magic Coal Company v. Fox, Ky.[sic], 19 S.W.3d 88, 96 (2000).

(2)Having closely reviewed the reports and depositions of Dr. Eisenmenger and Dr. Woods, and the earlier report of Dr. Manning, the undersigned finds that the opinion of Dr. Woods is more credible and has

sufficiently rebutted the opinion of the University Evaluator to support the rejection of the university evaluation conclusions in this instance. Despite her forgetfulness about requesting that the hearing test be reset after the Plaintiff had significant ear wax in one ear, Mr. Hunt testified that he was sent home to remove ear wax which was then later removed by Dr. Threlkeld. Based on common sense, it would appear that testing after the removal of an obstruction in the ear would cause an improvement, but the testing actually showed a decrease in hearing in the left ear.

However, the more significant objection is the opinion of malingering or pseudohypacusis. Dr. Woods explained that the Plaintiff has "too good of [an] ability to figure out words for the degree of hearing loss that he was presenting or giving in his results." (Dr. Woods Depo., p. 34). At the hearing, Mr. Hunt had no trouble in understanding the questions of the attorneys even though according to the raw testing results, his hearing declined after each subsequent hearing test. The more technical arguments are less clear. However, Dr. Eisenmenger also had no explanation of why the hearing loss in the lower frequencies was more extreme. Mr. Hunt did not exhibit the typical prominent 4k notch that would be expected in noise induced hearing loss.

The Defendant having rebutted the opinion of the University Evaluator, the undersigned finds that the Plaintiff has not met his burden to then tip the scales in his favor of showing a work-related hearing loss based on the original opinion of Dr. Manning of 12% or the calculated

> impairment of 23% based on the testing results with Dr. Woods. Of course, Dr. Woods chose to do a retest and then rejected both tests he performed as invalid.
>
> Further, the Plaintiff did not complain about any hearing loss while he was working for the Defendant and did not include hearing loss in his social security application. Although these factors alone may not support a rejection of a hearing loss claim, the failure to check the block indicating any hearing loss impairment on June 12, 2010, would seem to at least infer a lack of any concern about hearing loss at that time. Of course, this was done after the date of Dr. Manning's report of May 4, 2010.
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> Now, the Plaintiff is not only pursuing a hearing loss claim, he is actually alleging in his brief to have total occupational disability, and in the alternative, the inability to return to his former work. Both allegations seem extreme based on the problems with the hearing tests and his ability to clearly understand all the questions during the hearing.
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> (3)Having found no work-related hearing loss, the remaining issues are moot.
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> (4)The undersigned finds the facts as stipulated.

Authority establishes Hunt, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of his cause of action before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

Among those elements was causation/work-relatedness of the occupational disease/injuries alleged. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Hunt was unsuccessful in that burden, the question on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence which is 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).

KRS 342.285 designates the ALJ as the fact-finder. In that role, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence which would have supported a different outcome than that reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969). In this instance, the evidence was conflicting concerning whether Hunt developed an occupational hearing loss during his employment with Mubea. Where the evidence concerning an issue is conflicting, the ALJ as fact-finder is free to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003).

Dr. Woods' expert medical testimony plainly qualifies as substantial evidence upon which the ALJ, as fact-finder, was free to rely. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). It is apparent from the ALJ's analysis he found the medical history and

expert opinions conveyed by Dr. Woods to be most credible. Based on Dr. Woods' reported findings, we believe the ALJ could reasonably conclude Hunt's hearing loss was unrelated to his employment with Mubea. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979).

Moreover, we find the ALJ's analysis to be sufficiently adequate to apprise the parties of the basis for his decision and to permit meaningful review on appeal. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Because the ALJ found Hunt's alleged complaints not to be causally work-related, any argument asserting his entitlement to income or medical benefits pursuant to the Act, temporary or permanent, is moot. For purposes of KRS Chapter 342, only work-related conditions are compensable. *See* KRS 342.0011(1) *and* (2); KRS 342.316; KRS 342.730.

We disagree with Hunt's assertion the ALJ erred in rejecting the findings and opinions of Dr. Eisenmenger, the university evaluator. While KRS 342.315(2) generally requires presumptive weight to be afforded the clinical

findings and opinions of the university evaluator, an ALJ has the discretion to reject such testimony where it is determined the presumption has been overcome by other evidence and he expressly states his reasons for doing so within the body of his decision. Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 891 (Ky. 2007); Morrison v. Home Depot, 197 S.W.3d 531, 534 (Ky. 2006); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Whether a party overcomes the presumption established under KRS 342.315(2) is not an issue of law, but rather a question of fact at all times subject to the ALJ's discretion as fact-finder to pick and choose from the evidence. Magic Coal Co. v. Fox 19 S.W.3d at 96.

In this instance, the ALJ expressly rejected the testimony of all physicians concerning causation, with the exception of Dr. Woods. As his reason, the ALJ cited to the inconsistency in testing and Dr. Woods' assessment Hunt was engaging in malingering or pseudohypacusis. In line with Dr. Woods' opinion, the ALJ was persuaded Hunt exaggerated his condition. Substantial evidence supports this finding which cannot be reserved on appeal. In light of these findings, we find no error.

The ALJ expressly stated sufficient reasons for rejecting the findings and opinions of Dr. Eisenmenger, the

university evaluator, pursuant to KRS 342.315(2). Moreover, given Dr. Woods' testimony, we cannot say the ALJ's decision dismissing Hunt's claim was so unreasonable under the evidence it must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the decision rendered July 7, 2010 and the July 29, 2011 order denying the petition for reconsideration by Hon. Howard E. Frasier, Jr., Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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