**OPINION ENTERED: SEPTEMBER 11, 2012**

CLAIM NO. 198603431

MONTGOMERY COUNTY FIRE DEPARTMENT PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

PHILLIP WELCH,
KENTUCKY EYE INSTITUTE HEARING SERVICES
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION AFFIRMING**

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

**SMITH, Member.** Montgomery County Fire Department ("Montgomery County") appeals from the March 7, 2012 Opinion, Award and Order rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), determining the request for medical treatment for hearing loss including bilateral hearing aids was related to the cure and relief of the effects of the work injury Philip Welch ("Welch") sustained on January 10, 1986. Montgomery County also

appeals from the ALJ's order on petition for reconsideration issued April 18, 2012. The sole issue before this Board is whether the request for hearing loss treatment is barred since it was not asserted during the original litigation of the injury claim, nor was it mentioned in the settlement agreement.

Welch timely filed a Form 101 alleging he was injured on January 10, 1986 fighting a fire when a container of gasoline exploded causing burns over 45% of his body.

Welch testified the source of the explosion was traced to gasoline which went under his fire suit. He was transported by helicopter to Louisville and does not remember anything of the next fourteen days. He required extensive medical treatment including 72 surgeries. One of his ears was burned off in the explosion and was reattached and he also required multiple skin graft surgeries, scar revisions, and implants in both eyes.

Welch testified that he never paid attention to his hearing loss problems until he got out of the hospital and started therapy. He then began to notice a constant sensation of hearing crickets and grasshoppers chirping in a tobacco barn. However he was more concerned with trying to survive all of his other injuries so hearing loss was not his main concern. Recently, as part of his annual

examination, the staff measured his hearing capacity and recognized his diminished hearing.

The ALJ, in his Opinion, Award and Order rendered March 7, 2012, issued the following findings of fact and conclusions of law relative to the issues in this appeal:

> This is a medical fee dispute in which the defendant/employer challenges compensability of treatment for plaintiff's hearing loss including bilateral hearing aids on the basis of causation/work-relatedness. Plaintiff retains the burden of proof on the issue of work-relatedness in a medical fee dispute. *Addington Resources, Inc. v. Perkins,* 947 S.W.2d 421 (Ky. App. 1997). There is no contention that the contested treatment is either unreasonable or unnecessary.
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> Having carefully reviewed the evidence submitted by the parties, both medical and lay, the ALJ is persuaded that the plaintiff has satisfied his burden of proving that his hearing loss is directly and causally related to the explosion of January 10, 1986. In so finding, the ALJ finds the opinion of plaintiff's long-time treating physician, Dr. Roberts, to be the most persuasive medical evidence presented. Dr. Roberts' opinion, based upon years of hands-on treatment and face-to-face contact and examination is consistent with the plaintiff's testimony regarding the onset of hearing loss symptoms from the time of the explosion. While Ms. Schmidt indicates that she is essentially unable to relate the hearing loss to the 1986 work injury, she is a "hearing

instrument specialist", and there is no indication that she has any medical training whatsoever or is otherwise qualified to express a medical causation opinion, and the ALJ, therefore, finds her equivocal statement as lacking in probative value. Further, while it is unknown what type of tests, if any, were performed by Dr. Zerga leading to his conclusion that the plaintiff had normal hearing, it is clear from the plaintiff's testimony that Dr. Zerga never performed standard audiometric testing, nor was he asked to. Dr. Zerga was treating the plaintiff primarily for dysesthesias related to his burns and scarring injury. He would have had little reason to test plaintiff's hearing on a formal basis, particularly in the absence of any complaint to him by the plaintiff of difficulty in hearing. Moreover, although Dr. Zerga's most recent treatment note, from February 22, 2010, indicates that plaintiff's hearing is normal, that result cannot be squared with the results of audiometric testing performed slightly more than a year later, on June 15, 2011, reflecting significant hearing loss at higher frequency levels bilaterally. The defendant provides no alternate explanation as to why the plaintiff's hearing would be "normal" on February 22, 2010 and then sufficiently impaired to require hearing aids only 16 months later. While Dr. Podoll, an occupational medicine specialist, is skeptical of the causal relationship between the explosion and plaintiff's present hearing loss that skepticism seems to be founded in his belief that "normally" when a patient suffers an explosion-related hearing loss they complain of that at the time and are tested at the time. Because whatever

medical records that were provided to Dr. Podoll do not reflect that the plaintiff was complaining of hearing loss at the time of the explosion, he concludes that that condition is not work-related. I find, however, the plaintiff's testimony that he has experienced hearing loss/difficulty at all times subsequent to the explosion to be absolutely persuasive and credible. I also find Mr. Welch's testimony that he simply put up with the inconvenience of his hearing issues over time as he was more concerned with his more serious and immediate burn injuries and the residual effects of those injuries to be trustworthy. Having had the opportunity to observe and evaluate the plaintiff at the Formal Hearing, I found him to be a very credible witness and I am not only persuaded but convinced that he has stoically dealt with all of the effects of the explosion and burn injury of January 10, 1986 without complaint. Therefore, it comes as no surprise to the undersigned that medical records prior to Dr. Roberts' report do not reflect that the plaintiff complained of hearing difficulties up to that point in time nor that he did not complain of hearing difficulties closer in time to the actual explosion event itself. Simply stated, I find the plaintiff's testimony that he has experienced hearing difficulty since the time of the explosion to be more probative and persuasive than the absence of complaints of those difficulties in plaintiff's past medical records. Mr. Welch impresses the ALJ as being a man who has dealt with his misfortune without complaining about it. Further, the force of the explosion's mechanical and thermal impact on plaintiff's face and head are self-evident. Accordingly, in reliance

> upon the medical opinion of Dr. Roberts and the plaintiff's highly credible testimony, the ALJ finds that the plaintiff has carried his burden of proving that his hearing loss and tinnitus are directly and causally related to the explosion of January 10, 1986, and that he is, therefore, entitled to an award of medical benefits to treat that condition pursuant to KRS 342.020 including, but not limited to, bilateral hearing aids. This medical fee dispute, therefore, is resolved in favor of the plaintiff.

Montgomery County filed a petition for reconsideration on March 21, 2012 arguing Welch neither included this injury on his Form 101, Application for Adjustment of Claim, nor his Form 110 Settlement Agreement. Because Welch did not file any records indicating he actually complained of hearing loss at any point prior to 2010, Montgomery County argues the claim for hearing loss was barred.

The ALJ issued an order on reconsideration rendered on April 18, 2012, stating in pertinent part as follows:

> The defendant petitions the ALJ to reconsider the decision regarding the issue of whether plaintiff's hearing loss is "work-related and compensable." In support of its petition the defendant contends that the plaintiff did not include hearing loss as an injury on his Form 101 nor on the Form 110 settlement agreement and did not file any records indicating he actually complained of hearing loss at any point

> in time prior to 2010. According to the defendant, because plaintiff did not include hearing loss as an injury on his application or settlement, he is barred from claiming now that his hearing loss is related to the 1986 work incident. Moreover, the defendant contends that the determination that plaintiff's hearing loss is related to an incident 25 years ago "defies logic and is not supported by the facts and medical evidence in this case."
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> Turning to the defendant's argument that any claim for hearing loss is barred because it was not asserted at the time of litigation of the underlying claim, the ALJ notes that the defendant did not raise that issue in its motion to reopen and did not preserve waiver or bar under KRS 342.270(1) as interpreted in *Slone v. Jason Coal Co.*, 902 S.W.2d 820 (Ky. 1995) as a contested issue at the BRC. The issue of bar/waiver, therefore, was not before the ALJ in this medical fee dispute. Accordingly, the defendant's petition for reconsideration is OVERRULED.

On appeal, Montgomery County again argues Wilson's claim for hearing loss and related medical treatment was barred because Welch did not pursue the hearing loss claim in the original litigation. Montgomery County notes Welch did not mention or allege hearing loss when he filed his Form 101 in November 1990, nearly 5 years after the work injury and he did not allege hearing loss when the claim

was settled in 1992. Pursuant to Slone v. Jason Coal Co., 902 S.W.2d 820 (Ky. 1995), Montgomery County argues the failure to join the hearing loss claim at that time must result in a finding the claim is barred as waived by the employee.

Montgomery County did not appeal the ALJ's determination that the hearing loss was causally related to the work injury. The record contains substantial evidence supporting that determination.

The only contested issue listed in the Benefit Review Conference Order and Memorandum was "unpaid or contested medical expenses." Further, the parties filed their witness lists indicating the medical expenses were contested based upon the causal relationship between the hearing loss and the work injury. At the hearing, the ALJ confirmed the medical expenses remained the only contested issue. The issue of waiver or bar was not preserved as a contested issue before the ALJ. 803 KAR 25:010, Section 13(14) provides as follows regarding Benefit Review Conferences: "Only contested issues shall be the subject of further proceedings." Having failed to properly raise the issue of waiver or bar prior to the ALJ's decision, Montgomery County could not raise the issue via petition for reconsideration and the ALJ was bound to refuse

consideration of the issue on that ground. Likewise, the issue may not be raised on appeal to the Board. Since the only issue on appeal is the waiver or bar of the claim, we must affirm.

Accordingly, the Opinion, Award and Order rendered March 7, 2012, and the order on reconsideration rendered April 18, 2012, by Hon. Robert L. Swisher, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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