OPINION ENTERED: JULY 12, 2012

CLAIM NO. 201100458

SEQUOIA ENERGY PETITIONER

VS. **APPEAL FROM HON. RICHARD JOINER, ADMINISTRATIVE LAW JUDGE**

JAMES P. TURNER
and HON. RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. Sequoia Energy ("Sequoia") appeals from the February 2, 2012 Opinion and Award rendered by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") finding James P. Turner ("Turner") sustained an occupational hearing loss as a result of his employment with Sequoia. Sequoia also appeals from the March 2, 2012 Order denying its petition for reconsideration. On appeal, Sequoia argues the decision is not in conformity with the provisions of Chapter 342 and

current case law. Sequoia contends Turner had an injurious exposure with a subsequent employer, relieving Sequoia of any liability pursuant to KRS 342.7305(4). We affirm

Turner initially filed his claim against Sequoia on March 25, 2011 and later re-filed a corrected application alleging his occupational hearing loss arose on November 24, 2010 as a result of his work as a heavy equipment operator.

Turner testified by deposition on December 13, 2011 and at the formal hearing held December 19, 2011. Turner indicated he is currently employed with Justin Lamar Trucking ("Lamar"). He began working for Lamar on March 31, 2011. Over the past 20 years, Turner stated he worked primarily as a truck driver hauling coal and as a heavy equipment operator. He also worked driving a garbage truck for six months and delivered furniture for Heilig-Myers. Turner has also worked as an endloader and bulldozer operator. Turner indicated he wore hearing protection in these jobs whenever required, and whenever the protection was available. For most jobs, he wore protection 60% to 70% of the time. Turner indicated that in his most trucking jobs he drove a DM600, DM800 or an RD800. While working for Lamar and Vernon Lamar Trucking, Turner drove Mack Granite trucks. Turner stated these were newer trucks and were much quieter than other trucks. He stated driving a Mack Granite

truck was like driving a car. He stated they had an air ride so the cabs did not shake and they had tight doors. He compared the new Mack Granite trucks to the diesel pickups. He stated you could “hear the chatter of the diesel engine, about the only difference between it and another vehicle."

In his job with Lamar, most of his work involved hauling from "the strip" where he did not have to load the truck. Approximately one day out of every two to three weeks, he hauled from a deep mine which required loading. In addition, he occasionally used an endloader. He wore hearing protection when he got out to load the vehicle.

Turner stated his work for Sequoia involved running D11 and D10 dozers. Turner indicated the dozers made a lot of noise, most of which came from the tracks because, as they were moving, “it’s metal slapping metal”.

At the formal hearing, Turner again testified his work for Sequoia occasionally involved operating a coal loader. Turner indicated the Mack Granite truck he currently drives is much quieter than trucks he had driven in the past. He stated it had extra thick door seals and the cab was tighter than the older ones. It rides on air ride suspension so it does not jar. He stated the truck was extremely quiet. He stated it was similar to driving a diesel pickup truck.

He described his work with Sequoia as a bulldozer operator as follows:

> A bulldozer, you know, there's a constant noise of the tracks clinging together. It's metal to metal. It has no suspension as far as the ride. It's all solid steel. The job is pushing shot rock which is where they put shots off and it’s large rocks and it’s continuous beating and banging and clanging. So it's – it's pretty loud.

He indicated that, even with ear protection, his work at Sequoia was noisy. He indicated he wore hearing protection with Sequoia when it was available which was between 60% and 70% of the time. On cross-examination, Turner indicated it was not very loud when his truck was being loaded.

Turner submitted the March 15, 2011 report of Dr. Samir A. Guindi, who evaluated him on January 26, 2011. Dr. Guindi diagnosed sensorineural hearing loss, noise induced. Dr. Guindi assigned an 18% impairment rating based upon the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). He indicated the audiograms and other testing established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace and, within reasonable medical probability, Turner's hearing loss was

related to repetitive exposure to hazardous noise over an extended period of employment. He indicated it was not due to a single incident of trauma.

Dr. Matthew L. Bush and Dr. Abby B. Mattingly conducted a university evaluation pursuant to KRS 342.315 on October 25, 2011. Their report indicates audiograms and other testing established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. They indicated, within reasonable medical probability, Turner's hearing loss was related to repetitive exposure to hazardous noise over an extended period of employment. They indicated Turner's hearing loss was not due to a single incident of trauma. Pursuant to the AMA Guides, they assigned a 16% impairment rating.

In a report attached to the Form 108–HL, Dr. Bush noted Turner was currently employed by Justin Lamar Trucking. Turner reported he was exposed to some noise when hunting and at home using a lawnmower; however, he stated he used hearing protection at all times when engaged in these activities.

A benefit review conference was held December 7, 2011. The BRC Order and Memorandum lists “Benefits per KRS 342.7305” and “Has the claimant had subsequent injurious exposure?” as contested issues. On December 15, 2011,

Sequoia filed a motion to join Lamar, motion for an extension of time, and motion to cancel the final hearing. Sequoia alleged the record established Turner returned to work as a coal truck driver for Lamar after the filing of the hearing loss application and thus Lamar should be made a party to the claim. Sequoia alleged the first knowledge it had of the subsequent employment was when it received the University examination report on November 29, 2011. Sequoia acknowledged it was given time at the BRC to develop the defense of subsequent exposure, but only through the final hearing set for December 19, 2011. Sequoia noted Turner testified at his deposition and "did try his best to say his job with Justin Lamar Trucking was not loud." However, Sequoia notes he testified he occasionally loaded his truck with an endloader which was loud and, although he wore hearing protection when doing so, he could still hear the equipment. Sequoia argued this constituted injurious exposure. At the hearing, the ALJ discussed the motions with the parties and overruled Sequoia's motions.

The ALJ made the following findings relevant to this appeal:

> **Has the claimant had subsequent injurious exposure?** KRS 342.7305 provides, in part:

> (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.

KRS 342.0011(4) defines injurious exposure as:

> (4) "injurious exposure" shall mean that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made;

This has been construed to mean, in the Black lung context, that:

> The exposure incurred during the particular employment need not have been the actual cause of the disease in order for a causal connection to be established. Rather, all that is required is that the worker present evidence which proves that the type of exposure received during the subject employment would have eventually resulted in contraction of the disease. In other words, that it was injurious.

> It is a consideration of the quality of the environment, not the duration. Here, I find no evidence that the subsequent employment with Justin Lamar Trucking constitutes that type of employment that would cause hearing loss. The medical evidence is against that. It was shown that Mr. Turner had an 18% impairment after working for Sequoia Energy and that after six months of employment with Justin Lamar trucking, his impairment had declined to 16%. This, in and of itself, does not demonstrate that the employment with Justin Lamar Trucking is not an injurious exposure. However, it certainly is not evidence that there was any increase impairment resulting from the exposure that he did have, if any while working for Justin Lamar Trucking. According to the testimony of Mr. Turner, his employment with Justin Lamar Trucking had significantly less exposure to noise than his previous work. The impairment will be assessed against Sequoia Energy as the employer with whom Mr. Turner was last injuriously exposed to hazardous noise.

Sequoia filed a petition for reconsideration arguing Turner was exposed to occupational noise at Lamar and therefore Sequoia was relieved of any liability for the hearing loss claim.

Turner filed a response stating as follows:

> Comes the Plaintiff, James P. Turner, and in response to the Petition for Reconsideration filed on February 14, 2012, states that the same should be overruled. The Defendant had the burden of proof in showing that the Plaintiff

had sustained injurious exposure while working for a subsequent employer, and presented no evidence.

At most, the Defendant offers its own interpretation of the testimony of the Plaintiff that he occasionally has to load his own truck with a loader (ignoring the fact that the Plaintiff did so at the subsequent work while wearing hearing protection, as opposed to prior jobs where the protection was not always available). Along that line, Defendant asserts, incorrectly, that "Plaintiff's only protection from that noise is automotive glass, the same barrier that he testified enclosed the cab of the bulldozer he operated for the defendant–employer". This overlooks plaintiff's testimony that his protection from the noise on his jobs has been earplugs, available in his subsequent job on occasional times when he operates a loader, but not always available in those jobs where his exposure to noise was constant, including that of the defendant–employer.

Finally, Defendant argues (about Plaintiff) that "although he may not be subject to as much noise with his new employer, he still is subjected to occupational noise". As the ALJ correctly noted, the question is whether he received <u>injurious</u> exposure. Unless a worker is completely deaf, he or she always experiences "occupational noise" while on the job. Defendant's theory is that *any* instance of loud noise would be injurious and would shift liability to another, but without any evidence that it can point to of a noise sufficiently loud to be called injurious.

Ultimately, the burden of proof was on the Defendant-Employer on the issue of

> whether there was injurious exposure at a subsequent employer. The burden of proof that had been upon the Plaintiff was to show that he had injurious exposure to noise while in the employ for the Defendant. Plaintiff met his burden. The Defendant failed to meet its burden. There is no error that would merit a change in the outcome, no omission to be corrected by further findings under KRS 342.281. The petition should be overruled.

By order dated March 2, 2012, the ALJ noted a response to the petition had been filed and indicated he reviewed the record again. The ALJ then stated "The response reflects my analysis. I do not find patent errors appearing on the face of the award." Accordingly, the ALJ denied the petition for reconsideration.

On appeal, Sequoia argues Turner had an injurious exposure to noise while employed by Lamar subsequent to his employment with Sequoia. Thus, Sequoia argues pursuant to KRS 342.7305(4) it has no liability for Turner's occupational hearing loss. Sequoia notes issues of causation and worsening of impairment are irrelevant since an employee demonstrates "injurious exposure" by presenting evidence which proves the type of exposure received during the subject employment would have eventually resulted in the contraction of the disease, or, in this case, of hearing loss. In support of its position, Sequoia cites Howell v.

Shelcha Coal Co., 834 S.W.2d 693 (Ky. App. 1992), Begley v. Mountain Top, Inc., 968 S.W.2d 91 (Ky. 1998) and Jerry Keeton v. Greg's Construction, 2011-CA-000731-WC rendered September 16, 2011, currently on appeal to the Kentucky Supreme Court.

As fact-finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may weigh the evidence and draw any reasonable inferences therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any evidence and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

So long as there is any evidence of substance to support the decision of the ALJ, the Board ordinarily may not reverse on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Stated otherwise, the crux of the Board's inquiry is whether the ALJ's finding is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000).

Noise induced hearing loss is a form of cumulative trauma injury as defined by KRS 342.0011(1). Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003); Quebecor Book Co. v. Mikletich, 322 S.W.3d 38 (Ky. 2010). Generally, in cumulative trauma claims, the last employer with whom the employee suffers a harmful change bears liability for the entirety of the injury. Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001); Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999); Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). For the purpose of allocating liability for impairment resulting from workplace noise exposure, hearing loss claims are treated similar to occupational disease claims.

In Howell v. Shelcha Coal Co., *supra*, Howell worked for 13 years as an underground coal miner, became unemployed for one and a half years, then went to work for Shelcha Coal Company. After working less than two hours, he collapsed and did not return to work. The ALJ awarded retraining incentive benefits pursuant to KRS 342.732(1)(a) against Shelcha Coal Company. In affirming the award, the Court cited Childers v. Hackney's Creek Coal Co., 337 S.W.2d 680 (Ky. 1960) which held:

> All that is required under KRS 342.316(1)(b) is that the exposure be such as could cause the disease

> independently of any other cause. It will be noted that under neither of the cited subsections is there any minimum *time* requirement for the period of exposure. Accordingly, it is not required that the employee prove he *did* contract silicosis in his last employment, but only that the conditions were such that they could cause the disease over some indefinite period of time. Id. at 683.

The Court, in Howell, recognized there could be no serious dispute to finding the type of work Howell performed at Shelcha could, over time, rise to coal workers' pneumoconiosis. Therefore, the Court affirmed the ALJ's finding Howell's work at Shelcha constituted an injurious exposure. The Court specifically noted KRS 342.316(10)(c) provides that the employer in whose employment the employee was last exposed to the hazard of the disease shall alone be liable for the payment of a retraining incentive benefit awarded under KRS 342.732.

In Begley v. Mountain Top, Inc., 968 S.W.2d 91 (Ky. 1998), Begley testified he had received daily and continuous exposure to coal dust as a result of his underground mining with multiple employers. Begley further testified his last date of exposure had been with Mountain Top Mining and he had been unemployed since that time. However, Begley's initial claim was filed against a different employer, J & L Mining and he had worked for

another employer prior to his employment with Mountain Top. The Chief ALJ dismissed Begley's claim stating Begley presented no medical evidence indicating injury while at Mountain Top. The Kentucky Supreme Court, in interpreting KRS 342.316(1)(a) and 342.316(10) which places exclusive liability for benefits on the employer with whom the employee is last injuriously exposed, held Mountain Top was the responsible employer. In its ruling, the Court noted as follows:

> The exposure incurred during a particular employment need not have been the actual cause of the disease in order for a causal connection to be established. Rather, all that is required is that the worker present evidence which proves that the type of exposure received during the subject employment would have eventually resulted in contraction of the disease, in other words, that it was injurious. See KRS 342.0011(4); Howell v. Shelcha Coal Company, Ky. App., 834 S.W.2d 693 (1992); Childers v. Hackney's Creek Coal Co., Ky., 337 S.W.2d 680 (1960). Moreover, the statutes do not provide that a minimum time of exposure with a particular employer must be met as a prerequisite to that employer's liability. Howell, supra. Said otherwise, liability is based on the character of the exposure, not on its duration and not on whether it was the particular exposure associated with the first diagnosis of the disease or with the progression of the disease from one category or degree of respiratory impairment to another.

> . . . .
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> Therefore, it can be said that when determining the responsible employer in an income benefit claim when there have been successive employers, the relevant issue is which employment, as of the time the worker ceased working, constituted the worker's last injurious exposure. Herein, the evidence reflects that claimant's exposure to coal dust was consistent throughout his employment history, the medical evidence relates claimant's continued exposure to his illness, and Mountain Top has not asserted that the type of exposure claimant received during his employment therein was not injurious as defined in KRS 342.0011(4). Thus, Mountain Top is the employer responsible for payment of benefits.

Both cases are distinguishable from the case *sub judice*. Both involved exposure to coal dust in circumstances similar to the previous employment that could reasonably be found to produce injury if continued indefinitely. Here, there was little evidence concerning noise at Turner's last employment, and no testimony regarding the decibel level of the noise. Turner's testimony was general and he stated the level of noise inside his truck was similar to that one would experience in a car or a diesel pickup truck. In regard to the occasional loading of his truck while employed by Lamar, he only stated "it's not too bad." Nothing in his testimony indicates his

belief the level of noise at Lamar while operating the loader was harmful. There was no medical testimony indicating his work while loading the truck while using hearing protection would constitute hazardous noise. Based on the evidence, the ALJ could reasonably conclude the employment with Lamar did not constitute an injurious exposure.

Keeton, *supra* is likewise distinguishable. In Keeton, the claimant's last employment involved the operation of an open cab dozer. Keeton testified work with his last employer was loud and he noticed a worsening of his hearing while employed with the last employer. Based on the evidence before him, the ALJ concluded Keeton's last injuriously exposure was with the last employer.

Here Turner's employment with Lamar was primarily performed in a quiet truck. His occasional work loading the truck was performed in an enclosed loader and he stated he always used hearing protection when working outside the truck. There is simply no evidence sufficient to warrant a finding this exposure, if continued for an indefinite time, would have produced an occupational hearing loss. Sequoia's assertion that the subsequent employment with Lamar constituted an injurious exposure appears to be nothing more than speculation. We cannot say the ALJ's finding that

Turner was last injuriously exposed to hazardous noise while employed by Sequoia is clearly erroneous.

Accordingly, the ALJ's February 2, 2012 Opinion and Award and the March 2, 2012 Order denying Sequoia's petition for reconsideration rendered by Hon. Richard M. Joiner are hereby **AFFIRMED**.

ALL CONCUR.

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