Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 1, 2014

CLAIM NO. 201301469

WARREN CAMPBELL PETITIONER

VS. **APPEAL FROM HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE**

INTERNATIONAL COAL GROUP, INC.
and HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Warren Campbell ("Campbell") seeks review of the decision rendered April 9, 2014 by Hon. J. Gregory Allen, Administrative Law Judge ("ALJ"), awarding permanent partial disability ("PPD") and medical benefits for an occupational hearing loss against International Coal Group ("ICG"), but refusing to apply additional multipliers

pursuant to KRS 342.730(1)(c) 1 & 3. No petition for reconsideration was filed.

On appeal, Campbell argues the ALJ's determination he is not entitled to the application of the multipliers is not in conformity with KRS 342.010 *et. seq*. He also argues the ALJ's decision is arbitrary or capricious and constitutes an abuse of discretion. Because we determine the ALJ's determination is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Campbell filed a Form 103 on September 26, 2013 alleging a work-related hearing loss due to his years of working as a heavy equipment operator. His last exposure was December 2, 2011 when Campbell was laid off by ICG due to a reduction in force, and he has not returned to work since that time. He was not working at the time he filed the Form 103. His work history includes employment as a heavy equipment operator in both coal mining and construction. He has also worked as a laborer in a manufacturing facility, and as a utility person in construction.

Campbell testified by deposition on January 6, 2014, and again at the hearing held February 27, 2014. He is a resident of Viper, Kentucky, and was born on September 4, 1951. He is a high school graduate, and has no

specialized vocational training. Campbell last worked for ICG as a dozer operator for two years. He testified at his deposition he had no difficulty with his hearing prior to the layoff, but at the hearing he stated he had some difficulty listening to others to obtain instructions via the radio. He stated the inability to distinguish radio commands and communications would make it unsafe for him to return to work.

Campbell testified he first noticed his hearing loss while he was engaged in rabbit hunting after he was laid off. He stated he could not hear his dogs barking unless they were close. He subsequently had his hearing tested.

Campbell stated he missed no work due to hearing difficulty. He stopped working due to a layoff, and worked consistently for ICG until that time. He had no work accidents or injuries to his ears. He was hospitalized thirty years in the past for an ear infection. He stated he is drawing Social Security benefits for reasons other than his hearing loss. He drew unemployment benefits from the date of layoff until he was awarded Social Security benefits.

Campbell supported his claim with the August 8, 2013 report from the Beltone Hearing Care Center in Corbin,

Kentucky. That report notes he had sensorineural hearing loss in both ears.

After the claim was filed, Campbell underwent a university evaluation performed by Dr. Raleigh Jones, and Dr. Trey Cline at the University of Kentucky on December 16, 2013. Campbell was determined to have sustained a work-related hearing loss due to repetitive noise exposure over a period of time. An 11% impairment rating was assessed pursuant to the American Medical Association, Guides to Evaluation of Permanent Impairment, Fifth Edition. Dr. Jones noted Campbell had worn hearing protection intermittently over the past few years. He diagnosed bilateral noise induced sensorineural hearing loss. He recommended the use of bilateral hearing aids, and the use of hearing protection when he was around noise.

A benefit review conference ("BRC") was held on February 27, 2014. The BRC order and memorandum reflects the issues preserved were benefits per KRS 342.7305 with multipliers, and whether Campbell retained the physical capacity to return to the type of work performed at the time of injury.

The ALJ rendered his decision on April 9, 2014. He noted Campbell's testimony regarding his inability to hear and distinguish sounds, and the allegation it would be

unsafe for him to seek employment. The ALJ also recited the medical evidence. The ALJ specifically found as follows:

> Defendant filed the plaintiff's personnel record as evidence. These records included a pre-employment audiogram report. Following the pre-employment testing the plaintiff was found to be a physically able candidate to operate a motor vehicle and was approved for employment without restrictions. It does not appear those recommendations changed following his termination from employment.
>
> The ALJ can appreciate the plaintiff's testimony at the final hearing that he felt his loss of hearing would cause safety issues in a return to work in mining. However, the plaintiff's concerns do not appear to be borne out by medical findings or restrictions contained in the only medical evidence in the file.
>
> As the report of Dr. Jones stands uncontradicted on the sole issue reserved for consideration, the ALJ finds that the plaintiff does have an 11% whole person impairment due to work-related hearing loss and that he does have the ability to return to his former job duties within the recommendations of Dr. Jones. Therefore, the plaintiff’s benefits will be calculated pursuant to KRS 342.7303 (1)(b) as follows:
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> $540.00 x 11% x 1.00= $59.40 per week

No petition for reconsideration was filed by either party.

As the claimant in a workers' compensation case, Campbell 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). Since he was unsuccessful in his burden of proving entitlement to the multipliers pursuant to KRS 342.730 (1)(c) 1 & 3, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

"Compelling evidence" is defined as evidence 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). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, the record contains substantial evidence supporting the ALJ's decision and a contrary result is not compelled. In making his determination, the ALJ specifically noted the only recommendation or restriction was for Campbell to wear hearing protection when exposed to noise. He noted Campbell had apparently worn hearing protection on an intermittent basis prior to his termination. He also relied upon Dr. Jones who opined Campbell has the ability to return to his former job duties.

Campbell points to Sidney Coal Company, Inc. v. Kirk, 364 S.W.3d 168 (Ky. 2012) in support of his argument a contrary result is compelled. In Kirk, unlike the case *sub judice*, the ALJ applied the multipliers pursuant to KRS 342.730(1)(c)1 & 3. The Court determined the ALJ had the authority to make such a determination but did not direct such a result was compelled. If the ALJ here had applied

the multipliers, his decision would have been affirmed as a proper exercise of his discretion. Here the ALJ determined Campbell was not entitled to the application of the multipliers. It was within his discretion to do so, and a contrary result is not compelled. The ALJ properly considered all evidence of record, weighed that evidence, and reached a decision supported by substantial evidence and in conformity with the law. Thus, we are without authority to direct a different result.

Accordingly, the April 9, 2014 decision rendered by Hon. J. Gregory Allen, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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