Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 6, 2016

CLAIM NO. 201500060

WESTERN BRANCH DIESEL, INC. PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

MAYNARD O'HAIR and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Western Branch Diesel, Inc. ("Western") appeals from the Opinion, Order and Award rendered November 16, 2015 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") awarding Maynard O'Hair ("O'Hair") permanent partial disability ("PPD") benefits and medical benefits for his occupational hearing loss. Western also seeks

review of the December 17, 2015 order denying its petition for reconsideration.

On appeal, Western argues O'Hair failed to prove he was exposed to hazardous noise while working, or in the alternative that his hearing loss is work-related. Because the ALJ's determination O'Hair sustained an occupational hearing loss due to repetitive exposure to hazardous noise while working for Western is supported by substantial evidence, we affirm.

O'Hair filed a Form 103 alleging he became disabled on September 5, 2014 due to an occupational hearing loss arising out of and in the course of his employment with Western due to excessive exposure to loud noise. The attached Form 104 work history indicates O'Hair worked for Western as a diesel technician from June 1999 through September 2014, where he was exposed to loud noise. Prior to his employment with Western, O'Hair worked as a diesel technician for five other companies beginning in August 1988.

O'Hair was born on July 15, 1962 and resides in Jackson, Kentucky. He stopped working for Western in September 2014 due to conditions unrelated to his hearing, and has not returned to any employment since. As a diesel technician for Western, O'Hair worked on bigger trucks,

short school buses and vans. He primarily overhauled engines, but also rebuilt transmissions and did electrical work. He worked at the Western facility in Lost Creek, Kentucky. O'Hair primarily worked in the front of the shop, which consisted of four bays with no partitions. He worked forty hours per week.

O'Hair described the noise level at Western as constant. The noise came from the tools he used, the vehicles he worked on, and that produced by co-workers working on vehicles in the other bays. O'Hair operated air impact tools, hammers, and screw drivers. On a daily basis, the loudest noise he was exposed to was running engines and air impact tools. The loudest noise he was ever exposed to was operating engines with the exhaust manifolds removed for overhauling. The level and duration of noise on any given day depended on the work volume in the shop. Western provided hearing protection, but he was not required to use it. O'Hair did not wear hearing protection when operating air impact tools, but did wear it when using the pneumatic hammer or operating an engine with the exhaust manifold removed. Hearing protection made it difficult to hear the intercom.

O'Hair testified he has a garage on his property, and worked on cars as a hobby from 1997 through 2007, where

he restored cars, and worked on four-wheelers. Because he was working full-time, O'Hair engaged in his hobby two to three days a week, two to three hours each day, either after work or on the weekends. He used some power tools, and wore hearing protection if he felt he needed it. O'Hair did not consider the noise environment in his garage very loud, particularly compared to his work environment at Western. O'Hair owns a power saw and chain saw which he does not use very often. He has owned a high powered rifle since 1995, as well as a pistol and shotgun. O'Hair states he cuts his grass using a riding lawn mower. He previously owned a motorcycle which he sold in 2012, which he rode every day in the summer.

O'Hair testified he has neither had prior problems with, nor has he received treatment for his hearing loss. O'Hair stated he first became aware of his hearing loss when he went to see Dr. Julie Helfen, Au.D. O'Hair stated he has trouble hearing the television or people talking if there is background noise. He also has constant ringing in both ears.

In support of his claim, O'Hair filed the report of the audiological evaluation performed on November 24, 2014 by Dr. Helfen, who noted O'Hair worked as a diesel mechanic for approximately thirty years with no history of

hearing problems. Dr. Helfen noted the audiogram shows mild to moderate bilateral sensorineural hearing loss. She assessed an 8% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Helfen further stated, "This type of high frequency hearing loss is associated with noise exposure."

Western filed the June 24, 2015 Report of Workplace Sound Levels conducted by Richard Lemker ("Lemker") of Spectra Tech, Ltd. The testing was performed at the Lost Creek facility on June 22, 2015, and was conducted primarily in the front repair bays. The results are as follows:

> A review of the test data indicates that the time-weighted noise exposure level (. . . 87.4 dB) for the 7-1/2 hour test period was less that the OSHA maximum permitted time-weighted exposure level of 90 dBA for an 8-hour workday. The maximum recorded noise level during the 7-1/2 hour test period (107.3 dB) was far less than the OSHA maximum permissible noise level for short duration exposure level of 140 dBA.

Lemker testified by deposition on August 10, 2015. Lemker has been a consultant in the noise vibration and acoustics business since 1983. He does not have any professional licensures or certifications, but is a member

of the Audio Engineering Society. Lemker explained the noise testing was conducted throughout the workday on June 22, 2015, in various locations throughout the Lost Creek facility. Lemker stated OSHA standards require hearing protection at 90 dB. Generally, if noise exposure is under 90 dB, a worker can tolerate it continuously for eight hours. In this instance, the time weighted average for that day was below 90 dB. OSHA standards also permit a maximum threshold of 140 dB for a short-term instantaneous peak of noise. On the day of testing, the maximum recorded noise level was just 107.3 dB. Lemker ultimately concluded the noise level records were less than the maximum levels specified by OSHA for safe work noise exposure.

Western's operations manager, J.P. Bowling ("Bowling"), testified by deposition on July 24, 2015. He confirmed O'Hair worked in the front bays of the shop and mostly rebuilt engines. Bowling stated O'Hair was exposed to noise from the air and power tools, and from engines and fans of the trucks they were working on, but not both at the same time. Bowling estimated in an eight hour day, there is noise approximately 60% of the time. Bowling testified Western provided earplugs to its employees. Bowling was present at the Lost Creek facility on the day the noise testing was conducted by Lemker on June 22, 2015.

Bowling stated June 22, 2015 was an accurate reflection of the noise environment O'Hair would have been exposed to in the years he worked for Western. In fact, that day was louder than most since they were working on the fan of a fuel tank truck.

Dr. Barbara Eisenmenger performed a university evaluation on April 22, 2015, and also testified by deposition on August 4, 2015. In the report, Dr. Eisenmenger stated O'Hair reported long-term noise exposure as a diesel technician. He reported gradual bilateral hearing loss and bilateral ringing. Dr. Eisenmenger noted O'Hair primarily complained of difficulty understanding speech of others, particularly when background noise is present, and hearing the television. O'Hair reported exposure to noise when cutting grass, riding a tractor, four-wheeler and dirt bikes, and from hunting. Dr. Eisenmenger reviewed the Form 104 work history. Audiological testing demonstrated a mild sloping to severe sensorineural hearing loss bilaterally. In the "Diagnosis" section, Dr. Eisenmenger stated as follows:

> Mr. O'Hair has greater hearing loss than would be expected for an individual of 52 years of age. Objective and behavioral measures are consistent and show a high frequency 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 marked "yes" to "Audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace." She also indicated, within reasonable medical probability, O'Hair's hearing loss is related to repetitive exposure to hazardous noise over an extended period of employment and is not due to a single incident of trauma. Pursuant to the AMA Guides, Dr. Eisenmenger assessed an 8% impairment rating, and declined to apportion any of the rating as a pre-existing active condition. Dr. Eisenmenger recommended O'Hair use hearing aids.

At her deposition, Dr. Eisenmenger testified regarding the history reported by O'Hair during the evaluation. She testified the pure tone audiometry test demonstrated a pattern consistent with noise-exposed hearing loss. Typically, when a person has hearing loss due to noise exposure, it is seen heavily in the high frequencies, with fairly normal hearing in the low frequencies. Dr. Eisenmenger stated this was the case for

O'Hair in the right ear and "sort of on the left." Dr. Eisenmenger was unable to explain the cause of the low frequency hearing loss since there are no prior medical records related to his hearing. Dr. Eisenmenger reiterated her assessment of an 8% impairment rating. She explained in the Form 108 under the "Impairment" section, the form notes the percentage of hearing loss is based on the total hearing loss, irrespective of cause. Since Dr. Eisenmenger had no previous hearing tests or records with exception to the one performed five months prior by Dr. Helfen, she was unable to apportion any of the rating to non-work-related causes.

Dr. Eisenmenger testified she reviewed the June 24, 2015 report on workplace sound levels. She agreed OSHA has established 90dB as the threshold for permissible noise exposure level. Dr. Eisenmenger explained, "Theoretically, if you're below the 90% - - 90 dB level, you're not getting enough noise to cause hearing loss." Dr. Eisenmenger expressed concern over the methodology of the testing, in particular the use of the time-weighted average method.

> Q: Now, would you consider the scientific quantifiable data an important factor in determining causation on where his hearing loss is coming from?

> A: [examines document] That - - that's how they calculated time-weighted average, and I understand time-weighted average . . . Sometimes I have trouble telling what is data and what is just charts. That - - that's another thing that's a little confusing in here.
>
> So all I can say is, based on a time weighted average, which they decided was the appropriate way to determine his noise exposure on a daily basis, his time-weighted average falls just barely below the action point for suspecting that the amount of noise that he's exposed to is significant and has to be limited - - at 90 has to be limited, I believe, to eight hours.
>
> Q: Okay. So, at that 87.4, if it does reflect what he was exposed to, does that fall below what OSHA deems to be hazardous noise exposure?
>
> A: It's - - it - - it falls at a level that requires him to be only in that exposed environment for eight hours.

Dr. Eisenmenger reiterated, "So, if you went by OSHA standards, theoretically, [O'Hair] should not have a noise induced hearing loss." However, Dr. Eisenmenger opined there is potential for hearing loss occurring at lower levels than the OSHA standard of 90 dB and individuals have varying susceptibilities to noise. Dr. Eisenmenger acknowledged it is very possible some of O'Hair's noise exposure from non-work-related activities caused some of his hearing loss, but she stated it is very difficult to

differentiate. Dr. Eisenmenger stood by her 8% impairment rating, but stated “I can’t break that down, because I don’t know how much of this may have been from work versus not work.”

In the November 16, 2015 opinion, the ALJ stated the primary issue is whether O’Hair’s noise induced hearing loss was caused by noise during his employment with Western. He noted Western relied upon the noise analysis report, O’Hair’s various extracurricular activities, and portions of Dr. Eisenmenger’s deposition testimony. The ALJ then stated as follows:

> Having considered the totality of evidence available, the [ALJ] first commends counsel for the defendant for his valiant effort in cross examining Dr. Eisenmenger. He doggedly pursued the issue of whether the facts, taken as a whole, including the noise analysis report, tend to show that plaintiff was not exposed to hazardous levels of noise at work. If the OSHA standard of what is considered a hazardous level of noise was the dispositive standard for Workers Compensation claims in Kentucky, then the defendant's efforts and Dr. Eisenmenger's testimony would establish that plaintiff was not exposed to hazardous levels of noise with the defendant.
>
> However, the [ALJ] is not aware of any case law or statute or regulation which defines hazardous noise in the workplace by reference to the OSHA standards. Certainly, the OSHA

> standards can be instructive and provide some basic parameters by which to determine whether there are hazardous levels of noise in the workplace. But in this case, Dr. Eisenmenger testified her belief that noise levels just below the OSHA standard of 90 dB for a time weighted average may still be hazardous. Dr. Eisenmenger also testified that what is hazardous to one person may not be hazardous to another as individual susceptibility varies. Considering these facts, along with plaintiff's 15 year history with the defendant, and also taking into account that the noise analysis report shows only "snapshot" readings of noise exposure, the Administrative Law Judge is ultimately persuaded by Dr. Eisenmenger's testimony and that of plaintiff that plaintiff was exposed to hazardous noise at work.
>
> Moreover, Dr. Eisenmenger testified there was no way to apportion how much of plaintiff's hearing loss could be due to noise at work versus noise from activities outside of work. Accordingly, it is determined the entirety of plaintiff's hearing impairment is compensable.

The ALJ assessed an 8% impairment rating based upon Dr. Eisenmenger's opinion, and awarded PPD benefits and medical benefits.

Western filed a petition for reconsideration raising essentially the same arguments now raised on appeal. It did not request any additional findings of

fact. The ALJ summarily denied Western's petition in an Order dated December 17, 2015.

On appeal, Western argues the ALJ's finding O'Hair was exposed to hazardous noise during his employment resulting in hearing loss is not supported by substantial evidence. Western heavily relies upon the June 24, 2015 Report of Workplace Sound Levels which stated noise testing conducted on June 22, 2015 revealed noise levels under OSHA standards, and Bowling's testimony establishing that day accurately represented the noise level O'Hair was exposed to on a daily basis. Western also cites to various portions of O'Hair's and Dr. Eisenmenger's testimony. Western quotes to short portions of Dr. Eisenmenger's testimony where she agreed, pursuant to OSHA standards, hearing loss will not occur at noise levels below 90dB and that Western's noise levels were permissible. Western argues, "by simple inference, anything below 90dB cannot constitute hazardous by the legislatures' definition."

In a related argument, Western argues O'Hair did not meet his burden in proving his hearing loss is related to hazardous noise during his employment with Western. It states Dr. Helfen did not connect noise exposure to O'Hair's employment and he "submitted no additional medical evidence establishing a causal connection between his

hearing loss and hazardous noise while working for the Employer." Western points to O'Hair's testimony regarding his various non-work-related extra-curricular activities and Dr. Eisenmenger's testimony the 8% impairment rating was assessed regardless of cause.

O'Hair, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since O'Hair was successful in that burden, the question on appeal is whether there is substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn

from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

That said, Western's arguments regarding causation ignore the April 22, 2015 university evaluation report by Dr. Eisenmenger which reflects the test results revealed a mild sloping to severe sensorineural hearing loss bilaterally. In the "Diagnosis" section, Dr. Eisenmenger stated:

> Mr. O'Hair has greater hearing loss than would be expected for an individual of 52 years of age. Objective and behavioral measures are consistent and show a high frequency 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 marked "yes" to "Audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace." She also marked "yes" to the question, "Within reasonable medical probability, is plaintiff's hearing loss related to repetitive exposure to hazardous noise over an extended period of employment." Dr. Eisenmenger did not apportion any of the 8% impairment rating to an active impairment prior to acquiring the work-

related condition. This is consistent with her deposition testimony during which she agreed it was possible some of O'Hair's noise exposure from non-work-related activities caused some of his hearing loss, but she could not separate it.

The ALJ had the discretion to exclusively rely upon the statements made in Dr. Eisenmenger's report regarding causation and disregard her equivocal deposition testimony. KRS 342.285 designates the ALJ as the finder of fact, and he is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

KRS 342.7305(4) states as follows:

> 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.

We also note the Kentucky Supreme Court held in Greg's Construction v. Keeton, et. al., 385 S.W.3d 420, 425 (Ky. 2012), as follows:

> Substantial evidence supported the factual findings entitling the claimant to a rebuttable presumption that his hearing impairment was an injury covered by Chapter 342, *i.e.,* a work-related injury. Dr. Jones reported that the claimant exhibited a pattern of hearing loss "compatible with that caused by hazardous noise exposure in the workplace" and opined that the hearing loss resulted from "repetitive exposure to hazardous noise over an extended period of employment." Moreover, the claimant testified that he was exposed to loud noise repetitively throughout his nearly 35 years of work as a heavy equipment operator.

While we acknowledge Dr. Eisenmenger's deposition testimony is confusing regarding causation, her medical report is not. The Form 104 attached to O'Hair's Form 103 indicates he was exposed to loud noise while employed by Western since 1999. O'Hair provided extensive testimony regarding the loud noises he was exposed to throughout his employment as a diesel technician. Thus, the rebuttable presumption stated in KRS 342.7305(4) is applicable, and

the ALJ is able to infer the 8% impairment rating assessed by Dr. Eisenmenger is entirely work-related.

We decline to adopt Western's argument hazardous noise in the workplace should be determined or defined by the standards outlined in the OSHA regulations. Western cites to no statute or case law supporting this argument. We likewise are unable to find authority to support this argument. The ALJ acted well within his discretion in considering the noise testing report, and ultimately finding it unpersuasive. Therefore, because the ALJ's determination that O'Hair sustained work-related hearing loss is supported by substantial evidence, we will not disturb his decision.

Accordingly, the November 16, 2015 Opinion, Order and Order and the December 17, 2015 order on petition for reconsideration by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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