Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 23, 2021

CLAIM NO. 202000811 & 202000810

MUHLENBERG COUNTY COAL CO. PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE**

BILL WILDER
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

STIVERS, Member. Muhlenberg County Coal Co. ("Muhlenberg County") appeals from the June 23, 2021, Opinion, Award, and Order and the August 10, 2021, Order on Reconsideration of Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ"). The ALJ dismissed Bill Wilder's ("Wilder") claim for an injury alleged to have arisen out of cumulative trauma for failing to prove work-relatedness. However,

she awarded permanent partial disability ("PPD") benefits and medical benefits for his work-related hearing loss.

On appeal, Muhlenberg County asserts the ALJ's finding that it and/or Murray Energy Corp. ("Murray Energy") are liable for Wilder' hearing loss claim is inconsistent with KRS 342.7305.

BACKGROUND

The Form 103, filed on June 17, 2020, alleges Wilder sustained work-related hearing loss on December 28, 2019, in the following manner: "Exposure to loud noise each and everyday of coal mining employment." The Defendant/Employer named on the Form 103 is "Murray Energy Corp/Pride Mine." The Form 104 lists the following employers and date of employment: Muhlenberg County Coal Company-Pride Mine (February 2019 – December 2019), Ken America Resource (April 2013 – February 2019), Southern Coal (April 2010 – May 2012), Bledsoe Coal (February 2009 – April 2010), Console Energy Inc. (May 2008 – February 2009), Bell County Coal (March 1996 – May 2008), and RB Coal Co. Inc. (May 1993 – March 1996).

The Form 101 alleges Wilder sustained work-related injuries to multiple body parts on December 28, 2019, in the following manner: "Over the course of 30 years working in the coal mines, I have suffered significant injuries to my neck, hips, knees, shoulders, and my lower back. My body is worn out." As the dismissal of this claim is not at issue, there will be no further discussion of this claim.

The June 19, 2020, Form 111 lists the following reasons for denial of Wilder's claims: dispute concerning the amount of compensation, alleged injury did

not arise out of and in the course of employment, and failure to provide due and timely notice.

Wilder's July 23, 2020, deposition contains little to no relevant testimony. Wilder also testified at the April 19, 2021, hearing. He provided the following testimony regarding his employment history in the mines:

> Q: How long had you been a coal miner?
>
> A: All my life. It's about the only thing I've done, pretty much. I've worked one job outside of that, I think.
>
> Q: What mines have you worked in?
>
> A: What mines?
>
> Q: Yes, sir.
>
> A: The last one?
>
> Q: Just walk me through your vocational history.
>
> A: Well, okay. I started with Mullins Coal, Owensboro, Kentucky, worked a few years there and I went to CVC and worked a few years there. I worked at RB Coal, I've worked for Nylacran. (Spelled phonetically.) I think that's about it now, hold up. I worked for some other small outfits and I worked for Bell County Coal. I worked for, which is Lee Coal and I worked for a whole lot of places.
>
> Q: And hen [sic] where did you last work?
>
> A: I worked for Murray Energy out here in Western Kentucky.
>
> Q: So it was it [sic] the mines were shutting down and you moved out to –
>
> A: From out West to relocate, yeah.
>
> Q: And you got on with what company?

A: KA, which was Murray energy, Ken America.

Q: Right. And how long did you work for Murray Energy about?

A: Altogether, both mines?

Q: Yes.

A: Both outfits, around about seven, eight years, I guess.

….

Q: Sure. And just so I can understand, when you moved out here, you worked for what company?

A: I worked for Murray Energy.

Q: At which mine?

A: KA first.

Q: And that stands for Ken American?

A: That's Ken American.

Q: Okay. What happened with the Ken American mine?

A: I don't really know what happened. I think they couldn't – the cost was too high.

Q: So they closed it?

A: So they closed it.

Q: When they closed Ken American, what happened next?

A: I went to Muhlenberg County Coal, Murray Energy.

Q: So same company, just a different mine?

A: Yeah, just a different mine.

He quit working for Murray Energy in December 2019.

On August 5, 2020, Murray Energy filed a "Notice of Correct Employer" stating as follows: "Comes the Defendant, and for clarification purposes, notifies the parties that the Plaintiff last worked for Muhlenberg County Coal Company, as insured by Zurich. This employment lasted from February 2019 through December 28, 2019, at which point he was laid off."

In the August 12, 2020, Motion to Amend Form 103, Wilder sought to amend the Form 103 "to include Muhlenberg County Coal, a subsidiary of Murray Energy, as his last employer/real party in interest." The motion explains as follows:

> The Plaintiff respectfully submits that due to the character/letter limitations contained in the LMS system, the Plaintiff was not permitted to include the full name/relationship of the employer to the Plaintiff. The Plaintiff further submits that the inclusion of Murray Energy in this claim is necessary as the Plaintiff worked under the Murray Energy Corporate umbrella since April, 2013, when he worked for Ken America Resources, another subsidiary of Murray Energy Corporation.

By Order dated August 25, 2020, the ALJ sustained Wilder's motion.

By Order dated August 25, 2020, Hon. Paul Whalen, Administrative Law Judge consolidated the claims.

The March 11, 2021, Benefit Review Conference Order and Memorandum ("BRC") lists the following contested issues: "work-related injury/causation, notice, permanent income benefits per KRS 342.730, TTD benefits, ability to return to work, exclusion for pre-existing impairment, and proper use of the AMA Guides." Under "Other contested issues" is the following: "Hearing Loss 342.730; Injury & Causation Under Act."

Muhlenberg County argued before the ALJ, in relevant part, as follows:

> KRS 342.7305 provides: '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 for a minimum duration of one (1) year of employment shall be exclusively liable for benefits.' Id. emphasis added. Both the Plaintiff's Form 104 and his testimony confirm that he worked for the Defendant/Employer from February 2019 to December 2019. This length of employment does not meet the minimum one-year requirement for hearing loss liability pursuant to KRS 342.7305. As a result, Plaintiff's hearing loss claim against Muhlenberg County Coal Company should be dismissed.

The June 23, 2021, Opinion, Award, and Order contains, in relevant part, the following findings of fact and conclusions of law which are set forth *verbatim*:

> 3. Benefits pursuant to KRS 342.7305
>
> Wilder satisfied his burden of proving he sustained a work-related hearing loss during his employment with Murray and is entitled to benefits. The ALJ find he sustained a 14% whole person impairment because of his occupational hearing loss. KRS 342.7305 provides that income benefits shall not be payable where the binaural hearing impairment converted to impairment of the whole person results in impairment less than 8%. KRS 342.315(2) states that an ALJ must give a University Evaluator's opinion presumptive weight and that the burden to overcome the evaluator's findings is on the opponent of that evidence. Further, *Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky. 2003) held that when faced with unrefuted evidence of hearing impairment in the relevant period, the ALJ is both

authorized and required to consult the appropriate edition of the AMA *Guides* to convert the hearing impairment into an AMA whole-body impairment.

It is undisputed that Wilder has sustained a work-related hearing loss. Dr. Roof, the University Evaluator, and the audiogram of James Browning show Wilder has an occupationally induced hearing loss. Dr. Roof diagnosed a mixed hearing loss bilaterally with steeply sloping configuration in bone conduction thresholds. He opined Wilder had a prior active impairment for middle ear dysfunction and surgery. Dr. Roof assigned 21% hearing loss. He explained that without prior 8 hearing tests he could not provide the percentage of hearing loss due to the prior condition.

Although Dr. Roof did not have any baseline testing to assess impairment for the prior middle ear dysfunction, Wilder submitted hearing test data from 2009, 2014, March 2020, and August 2020. A comparison of the test results show Wilder's hearing steadily declining from 2009 to 2020. Under Caldwell Tanks, the ALJ is authorized and required to consult the AMA Guides to convert the hearing loss to the percentage of whole person impairment. Table 11-2 converts the hearing loss data to binaural hearing loss impairment. Table 11-3 converts the binaural hearing loss impairment to whole person impairment. Using these tables, Wilder's 2009 binaural hearing loss is 19.4 and his whole person impairment 7%. Although there is no baseline of impairment prior to Wilder's mining employment, the 2009 impairment provides a baseline for Wilder's declining hearing due to occupationally induced hearing loss. Carving out the 7% impairment, the ALJ finds Wilder has a 14% whole person impairment.

Wilder's benefits shall be calculated as follows: $1312.36 x 66 2/3% ($734.25) x 14% x 1 = $102.80

The ALJ's Order states, in relevant part, as follows:

…

2. Plaintiff, Bill Wilder, shall recover for his occupational hearing loss from Murray Energy/Muhlenberg County Coal and/or its insurance carrier, permanent partial disability benefits at the rate of

> $102.80 per week commencing on December 20, 2019 and continuing for 425 weeks, thereafter together with interest at the rate of 6% per annum on all due and unpaid installments of such compensation, provided, however, that the period of payment of permanent partial disability benefits shall be suspended during any intervening period of temporary total disability. The defendant/employer shall take credit for any payment of such compensation heretofore made. Pursuant to KRS 342.730 (4), all income benefits shall terminate as of the date upon which the Plaintiff reaches the age of 70 years, or 4 years after the injury or last exposure, whichever last occurs.
>
> 3. Plaintiff, Bill Wilder, shall recover from Murray Energy/Muhlenberg County Coal, and/or its insurance carrier such medical expenses including but not limited to providers' fees, hospital treatment, surgical care, nursing, supplies and appliances pursuant to KRS 342.020 as may be reasonably required for the cure and relief from the effects of occupational hearing loss. The defendant's obligation shall be commensurate with the limits set by the Kentucky Medical Fee Schedule. The Defendant's obligation for medical expenses expires 780 weeks from the date of injury on December 20, 2019, unless Plaintiff applies for and is granted a continuation of those benefits. The Department of Workers' Claims (DWC) will mail Plaintiff a notice letter 26 weeks before the 780-week anniversary date of the injury explaining that the Defendant's liability will expire on that date unless Plaintiff successfully applies for an extension. Plaintiff shall notify the DWC of any changes to her physical or electronic mailing addresses to ensure receipt of the notice letter. The application for continuation of medical benefits must be filed within 75-days prior to the termination of the 780-week allowance for medical benefits.

Muhlenberg County filed a Petition for Reconsideration asserting the same arguments put forth on appeal. The August 10, 2021, Order provides the following additional findings and amendment to paragraph 2 of the June 23, 2021, award which are set forth *verbatim*:

IT IS HEREBY ORDERED the Petition is SUSTAINED to the extent the ALJ shall provide clarification. The ALJ did not specifically address the issue of last employer for a year or longer because it was not reserved as an issue at the BRC. Bill Wilder filed Applications for Resolution of a Hearing Loss Claim and for an injury due to cumulative trauma against Murray Energy Corp./Pride Mine. Murray Energy filed a notice of correct employer advising Muhlenberg County Coal Company was the last place Wilder worked. Wilder filed a motion to amend the Form 101 to include Muhlenberg County Coal Company. On August 25, 2020, the claim was amended to include Muhlenberg County Coal Company. The order did not dismiss Murray Energy and it remained a party. The same counsel represented both Murray Energy and Muhlenberg County Coal. Wilder testified he worked at Ken American before working for Muhlenberg County Coal and that Murray Energy owned both companies. Wilder established he worked in excess of one year for Murray Energy. In the Order section of the Opinion the ALJ referenced Murray Energy and Muhlenberg County Coal together as Murray owned Muhlenberg and a distinction between the two was not clarified since the issue of last employer for a year or longer was not specifically reserved as an issue at the BRC. The ALJ's opinion specifically referenced Wilder's work for Murray Energy. For clarification, paragraph #2 under Order shall be amended as follows:

Plaintiff, Bill Wilder, shall recover for his occupational hearing loss from Murray Energy and/or its insurance carrier, permanent partial disability benefits at the rate of $102.80 per week commencing on December 20, 2019 and continuing for 425 weeks, thereafter together with interest at the rate of 6% per annum on all due and unpaid installments of such compensation, provided, however that the period of payment of permanent partial disability benefits shall be suspended during any intervening period of temporary total disability. The defendant/employer shall take credit for any payment of such compensation heretofore made. Pursuant to KRS 342.730 (4), all income benefits shall terminate as of the date upon which the Plaintiff reaches the age of 70 years, or 4 years after the injury or last exposure, whichever last occurs.

ANALYSIS

On appeal, Muhlenberg County asserts the ALJ's finding that it and Murray Energy are liable for Wilder's work-related hearing loss is erroneous and not consistent with KRS 342.7305. We reverse and remand with instructions to dismiss Muhlenberg County as a party to these proceedings. Further, on remand, the ALJ must determine the extent of Murray Energy's liability pursuant to KRS 342.7305(4) and applicable case law.

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 for a minimum duration of one (1) year of employment shall be exclusively liable for benefits.** (emphasis added.)

The language in Greg's Construction v. Keeton, 385 S.W.3d 420 (Ky. 2012) is instructive. In Keeton, the ALJ determined the Claimant sustained work-related hearing loss and that KRS 342.7305(4) placed the entire liability for income and medical benefits on Greg's Construction, the employer with whom the Claimant was last injuriously exposed to hazardous noise. This Board and the Kentucky Court of Appeals affirmed. Greg's Construction appealed to the Kentucky Supreme Court asserting Keeton failed to offer sufficient evidence to entitle him to the presumption that he sustained an injury due to his employment or that his employment with Greg's Construction represented his last injurious exposure; that the evidence rebutted the presumption that the injury resulted from his employment with Greg

Construction; and that the statute does not preclude apportioning liability among employers where the evidence so permits. The Supreme Court disagreed and affirmed, stating as follows:

> Repetitive exposure to loud noise produces noise-induced hearing loss, a form of injury caused by the traumatic effect of the vibrations produced by loud noise on the membranes of the inner ear. Although KRS 342.0011(1) defines a compensable injury generally, the General Assembly enacted KRS 342.7305 in 1996 specifically to govern the compensability of occupational hearing loss due to hazardous noise exposure. KRS 342.7305(4) . . . sets forth the requirements for proving causation and imposing liability for noise-induced hearing loss
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> . . .
>
> The ALJ did not err by determining that the claimant sustained an injurious exposure to hazardous noise in his employment with Greg's. Workers' Compensation is a statutory creation. KRS 342.0011(4) defines an injurious exposure as being "that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made." Although Chapter 342 considers noise-induced hearing loss to be a gradual injury for the purposes of notice and limitations, KRS 342.7305(4) treats the condition much like KRS 342.316(1)(a) and KRS 342.316(10) treat an occupational disease for the purpose of imposing liability. Mindful that none of these statutes makes an employer's liability contingent on a minimum period of exposure and that Chapter 342 contains but one definition of injurious exposure, we conclude that KRS 342.0011(4) defines the term not only with respect to a disease but also for the purpose of KRS 342.7305(4). Contrary to what Greg's would have us conclude, **the final clause of KRS 342.7305(4) does not require a worker to prove that the last employment caused a measurable hearing loss. It refers to the type of exposure to hazardous noise that would result in a hearing loss if continued indefinitely.**

> **Consistent with the practical reality that workers change jobs, sometimes frequently, as well as the medical realities that noise-induced hearing loss develops gradually and that audiometric testing is based to some degree on the worker's subjective responses, KRS 342.7305(4) imposes liability on the last employer with whom the worker was injuriously exposed to hazardous noise.** Like KRS 342.316(1)(a) and KRS 342.316(10), KRS 342.7305(4) bases liability solely on the fact that the employment involved a type of exposure known to be injurious, *i.e.,* a repetitive exposure to hazardous noise.
>
> . . .
>
> Finally, the ALJ did not err by refusing to apportion liability among Greg's and the other defendants. Regardless of whether ALJs may apportion liability in other types of gradual injury claims, **KRS 342.7305(4) is unambiguous with respect to liability for noise-induced hearing loss. The statute imposes liability "exclusively" on the employer with whom the employee was last injuriously exposed to hazardous noise. We presume that the legislature intended to say what it said.**

Id. at 424-426. (emphasis added.)

The second clause in the statute conclusively establishes the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits.

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).

As an initial matter, we note an error appears within in the Award and Order. In the June 23, 2021, Opinion, Award, and Order, the ALJ assessed liability for Wilder's hearing loss income and medical benefits against both Murray Energy and Muhlenberg County. However, in the August 10, 2021, Order on Reconsideration, the ALJ amended the award of PPD benefits to hold only Murray Energy liable. This is erroneous, as the ALJ cannot award PPD benefits to be paid by one party and medical benefits to be paid by two parties. However, we vacate the award on different grounds, and remand with instructions for the ALJ to make additional findings in accordance with the views set forth below.

As acknowledged by the Court in Keeton, the pertinent language in KRS 342.7305(4) is unambiguous: "…the employer with whom the employee was last injuriously exposed to hazardous noise **for a minimum duration of one (1) year of employment** shall be exclusively liable for benefits." (emphasis added.) As the Keeton Court held, "KRS 342.7305(4) is unambiguous with respect to liability for noise-induced hearing loss. The statute imposes liability 'exclusively' on the employer with whom the employee was last injuriously exposed to hazardous noise. We presume that the legislature intended to say what it said." Id. at 425. The basic tenets of statutory interpretation apply here. "The most commonly stated rule in statutory interpretation is that the 'plain meaning' of the statute controls." Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). Where the language of a statute is clear and unambiguous, it is not open to construction or

interpretation and must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008).

As noted on Wilder's Form 104 and conceded in the August 5, 2020, "Notice of Correct Employer" of Murray Energy, Wilder was employed by Muhlenberg County from February 2019 – December 2019. Consequently, he does not meet the requisite threshold of "a minimum duration of one (1) year of employment" as set forth in KRS 342.7305(4) to impose liability upon Muhlenberg County. While the issue of Muhlenberg County's relationship with Murray Energy was never formally resolved, clearly Wilder's employment with Muhlenberg County did not meet the requisite threshold of time mandated in KRS 342.7305(4). Consequently, Muhlenberg County, regardless of whether it is a subsidiary of Murray Energy or an entirely separate entity, cannot, as a matter of law, be the liable employer and; therefore, must be dismissed as a party to the proceedings.

The ALJ's determination, as set forth in the August 10, 2021, Order that the issue of Wilder's last employer was not made an issue at the BRC is erroneous, as this issue is fully encompassed in "Hearing Loss 342.730" which is listed under "Other contested issues."[1] Further, Muhlenberg County asserted that it should be dismissed as a party in Wilder's hearing loss claim in its brief to the ALJ. Also, assuming, *arguendo*, that the issue was not properly raised, this Board, pursuant to KRS 342.285(2), is authorized to determine whether an award conforms with Chapter 342 regardless of whether the particular error was contested by a party or

[1] It is clear this is a typographical error and the ALJ meant to cite "KRS 342.7305(4)" with the inclusion of the phrase "Hearing Loss" and the pertinent statute is KRS 342.7305(4).

whether the initial award was appealed on a different ground. As the Court of Appeals instructed in the case of AGI Transportation, Inc. v. Adkins, Claim No. 2018-CA-000861-WC, rendered November 30, 2018, Designated Not To Be Published, "'[w]hether an award conformed to Chapter 342 was a question of law that a court should review, regardless of whether contested by a party….[citation omitted].'"

On remand, the ALJ must determine the extent of Murray Energy's liability pursuant to KRS 342.7305(4) and the applicable case law. There is limited testimony indicating Murray Energy, a party to this litigation, owns both Muhlenberg County and Ken America Resource. However, the ALJ never analyzed the relationship between these entities, nor the employment relationship between Wilder and Murray Energy if one exists, under the erroneous belief Wilder had not properly preserved the issue for review. On remand, the ALJ must do so and make a determination as to what liability, if any, falls upon Murray Energy. This means, pursuant to KRS 342.7305(4) and Keeton, the ALJ must determine whether Murray Energy constitutes the employer with whom Wilder was last injuriously exposed to hazardous noise and was employed for a minimum of one year.

Accordingly, the ALJ's award of PPD and medical benefits for Wilder's work-related hearing loss, as set forth the June 23, 2021, Opinion, Award, and Order and the August 10, 2021, Order, is **REVERSED**. The claim is **REMANDED** to the ALJ with instructions to dismiss Muhlenberg County as a party. Further, on remand, the ALJ must determine the extent of Murray Energy's liability, if any, pursuant to KRS 342.7305(4) and applicable case law.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON DONNIE NIEHAUS **LMS**
P O BOX 22610
LEXINGTON KY 40522

COUNSEL FOR RESPONDENT:

HON THOMAS E SPRINGER III **LMS**
18 COURT ST
MADISONVILLE KY 42431

ADMINISTRATIVE LAW JUDGE:

HON MONICA RICE-SMITH **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601