

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 17, 2019

CLAIM NO. 201801466 & 201663396

PADUCAH AREA TRANSIT SYSTEM

PETITIONER

VS.

APPEAL FROM HON. BRENT DYE,
ADMINISTRATIVE LAW JUDGE

TERRY KEARNS
BEST ONE TIRE
and HON. BRENT DYE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

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

STIVERS, Member. Paducah Area Transit System (“PATS”) appeals from the June 19, 2019, Opinion and Award and the July 10, 2019, Order of Hon. Brent Dye, Administrative Law Judge (“ALJ”). In the June 19, 2019, decision, the ALJ awarded Terry Kearns (“Kearns”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for work-related pulmonary/reactive airway disease for which PATS bore the liability. Further, the

ALJ “prejudicially dismissed” Kearns’ claim against Best One Tire (“BOT”), concluding Kearns’ exposure to exhaust fumes during his employment at BOT did not constitute his last injurious exposure.

On appeal, PATS asserts the ALJ erred as a matter of law in determining BOT is not responsible for the award of benefits and dismissing Kearns’ claim against BOT.

The Form 102 in Claim No. 201801466, filed on October 8, 2018, alleges Kearns contracted pulmonary/reactive airway disease by virtue of his employment at BOT, and his last date of exposure was September 1, 2017.

The Form 102 in Claim No. 201663396, filed April 4, 2019, alleges Kearns contracted pulmonary/reactive airway disease by virtue of his employment at PATS, and his last date of exposure was September 1, 2017 [sic]. The ALJ consolidated the claims by order dated April 8, 2019.

Kearns was deposed on February 15, 2019. He worked for PATS from December 2014 through November 2016, and carried out the following work duties:

A: Drive a simulator truck, set it up, tear it down, teach the classes.

Q: Okay. What is or what was the simulator truck that you were hired to operate and then train others on?

A: It was a mobilized computerized driver training system. It had four systems inside of it. We trained four drivers at a time.

Kearns also handled marketing activities for PATS.

He testified concerning the occupational disease allegedly sustained while working for PATS:

A: I received – how do you put it? Chemical exposure from the exhaust off of the truck due to a broken manifold which caused me to actually at some point almost lose consciousness through drives. I had to pull off and stop repeatedly. From that point forward, it just got worse.

Q: On what date did that occur?

A: That, I believe, to the best of my knowledge, it was on like the 12th, I believe, of October.

Q: What year?

A: Of 2016.

Q: Were you en route operating the simulator truck at the time?

A: Yes. On our way back from Washington DC actually.

...

Q: What was the make and model of the tractor you were driving at the time?

A: It was a Freightliner Columbia day cab.

...

Q: Is that the truck or, I should say, tractor which you operated from December 2014 up until this DC trip?

A: Yes.

Kearns learned of the broken manifold after stopping at a truck stop in Roanoke, Virginia on his way back from Washington, D.C. He testified as follows: “We pulled it into a truck stop in Roanoke, Virginia which we’ve got the bills and everything for that. And they found the actual bolts were broken on the manifold and the manifold itself was cracked.” Kearns went directly to Urgent Care when he

returned to Paducah. PATS terminated Kearns' employment on November 15, 2016. Kearns was not informed why his employment was terminated.

Kearns began working for BOT on May 31, 2017. At the time he was hired, he was regularly using two prescribed inhalers– Spiriva and Symbicort – and he also had an emergency inhaler. He described his job duties at BOT as follows:

Q: What were you hired to do?

A: Actually, it was supposed to be mechanic. And we were supposed to do service calls.

Q: You were supposed to be hired as a mechanic?

A: Yes.

Q: Why do you use the word supposed to?

A: Because I spent more time out in the truck doing service calls than I did in the shop.

Q: And when you were doing service calls, what type of work were you doing for Best One Tire?

A: Changing tires pretty much.

Q: You thought you were being hired to work in the shop?

A: Yes, sir.

Q: To do what?

A: To be a mechanic to work on cars.

Q: Did you ever work in the shop?

A: Yes, I did. After a period of time, yes.

...

Q: How long did you work primarily on the service truck making service calls?

A: Oh, pretty much the whole time. It is just – I did service calls at night for them most of the time. I was on call.

Concerning his exposure to exhaust fumes while at BOT, Kearns testified:

A: Well, when we started working in the shop more, they – they would close the doors and they would leave vehicles running inside the shop and that tends to – when it lingers in the air and you don't have the ventilation, it tends to draw down.

Q: Who was leaving the engines running?

A: Whoever was working on the trucks. It could have been – Wayne might have been working on a truck on a lift. It could have been anybody moving the trucks in and out at any given point.

Q: What was the system by which the fumes were exhausted from the shop?

A: None that I knew of at that time, other than opening and closing the doors.

...

Q: Is it your claim that the fumes that you were exposed to would have been anything that came out of a combustible engine that was being worked on at the time?

A: Yes, sir.

Q: And more specifically, would that also be carbon monoxide?

A: It could be, yes, sir.

Q: Anything else that you are claiming?

A: Well, diesel exhaust has everything from sulfur in it to – you know, an oil-based chemical so there's a lot of stuff that comes through the exhaust system.

Q: Did you work on diesel while you were employed as a mechanic?

A: Yes.

Kearns missed a few days of work at BOT because of breathing problems. He explained why he finally quit: "I got to the point where I was getting more and more of the breathing issues and I just told Mr. Nevel I just – I couldn't keep going the way it was so I quit."¹ Kearns has not worked since he left BOT because of his breathing problems.

Kearns also testified at the May 8, 2019, hearing. He again testified regarding his job duties at BOT:

Q: And where did you start working, what position, I guess I should say. When you were at Best One, where did you start working? Were you in the shop or were you in the office?

A: I started in the front part of the shop is where I started out. And then I went to doing service calls and then working in the back side of the shop because the new building wasn't ready to be moved into yet.

Q: When you say service calls, were you driving a normal pickup truck or was it a tractor trailer?

A: No, it was a normal pickup.

Q: So it wasn't a diesel?

A: No.

Concerning when he began experiencing breathing problems at BOT, he testified:

A: Yeah, when they first started moving into the building, just staying in the shop more than I was out on the road.

¹ The record reflects Mr. Nevel was Kearns' supervisor at BOT.

Because we had enough service techs to take the service calls where I didn't have to be out all the time.

Q: When you say the shop, and I don't know if I have my lingo correct here, but how many bays does Best One Tire have to work on trucks? Are they called bays?

A: Yeah, they're called bays. When I first started, they had one truck bay that was useable. Because the new building had just been built and they couldn't use the building because the floors hadn't been cured or any of that thing. So I was working in the back shop at the time. And then when they opened the new building, we went into the new building, but that was right before I left.

Q: What kind of building is it, is it brick or –

A: No, it's a metal building.

Q: A metal building. Did Best One service just tractor trailers, or is it all kinds of automobiles?

A: No, it's everything. If it's a tractor trailer, it doesn't matter what it is. If it has a tire on it, they'll work on it.

Q: So there were diesel automobiles worked on at Best One while you were there?

A: Oh, yes.

Q: I guess when you started having issues, did you notice the smell or whatever of diesel fumes?

A: Oh, yeah.

Q: And when the mechanics were working on vehicles at Best One, were the garage doors up or down?

A: It just depend [sic] on what kind of day it was.

Q: Did they ever work on vehicles with the garage [sic] downs [sic]?

A: Oh, yes, especially during heavy rains.

Q: Were the engines on any of those vehicles ever running while they were, I guess, within the bay in the shop?

A: Yeah, definitely, definitely.

Q: Are you saying they were running all the time or just –

A: No, it'd just depend on what they were doing with the vehicle at the time.

Q: Okay.

A: Because they have to pull it in and out. It'd just depend on what they're doing. If they're doing front end alignments, you still have to be able to check the vehicles and stuff, so –

Q: After you stopped doing the service calls or maybe you said you cut back on them, you said you went to work in the shop.

A: Yes.

Q: Is it one big area, or are there multiple shops?

A: No, actually, there's two separate shops.

Q: Okay. But when you say shop, you were in an area where vehicles were being serviced?

A: Yes.

Q: Is that about the time whenever your condition seemed to worsen?

A: Yes.

Q: As far as your breathing?

A: Yes, I was keeping my inhaler with me all the time then.

Dr. Fred Rosenblum's January 8, 2019, Form 108- OD University

Evaluation Report was filed in the record on February 15, 2019. In both the "Plaintiff

History” and “Employment History,” Dr. Rosenblum noted Kearns tried to return to work as a mechanic at BOT but “could not tolerate the exhaust fumes.” After examining Kearns, Dr. Rosenblum set forth the following diagnosis:

There is little doubt that this patient developed occupational asthma after would [sic] sounds like several months of exposure to exhaust fumes from a cracked manifold in his truck. He continues to have significant symptoms as well as evidence of limitation on the cardiopulmonary stress test. The elevated fractional excretion of nitric oxide further confirms that he has ongoing inflammation. He [sic] had no significant respiratory symptoms or history of airway disease prior to this exposure.

Dr. Rosenblum further opined the “[c]lear history of prolonged exposure to exhaust fumes as documented” caused Kearns’ disease, and he assessed a 26% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”).

Dr. Rosenblum was deposed on April 23, 2019. Importantly, the following question and answer exchange took place at the deposition:

Q: It’s my understanding that you’re aware that he also worked at Best One Tire?

A: I thought it was Big O.

Q: Best One.

A: Best One. You’re right. Yeah, that was afterwards.

Q: Correct. Correct. And that was his last exposure to industrial fumes; is that correct?

A: Yes, he said he couldn’t tolerate it and he couldn’t work anymore in that industry.

Q: Is it your opinion that the exposure at Best One contributed to his occupational disease?

A: No, I think it just demonstrated that he really was hurt by the prior exposure.

Later in the deposition is the following testimony:

Q: Let me pose it to you this way: could the fumes at Best One Tire have contributed to Mr. Kearns' occupational disease?

A: They could have added to it, yes, sir.

The Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: “injury” under the Act, work-relatedness/causation, notice (BOT), AWW (PATS), TTD benefits, KRS 342.730 benefits, and unpaid or contested medical expenses. Under other contested issues is the following: “The Defendants concede these are the last alleged exposure dates. They, however, contest whether the alleged exposure caused a work-related injury or injuries.”² Also noted on the BRC Order is the following:

PAT’s issues: Besides the above marked issues, PATS reserves: injurious exposure, subsequent/last injurious exposure, & medical liability.

BOT’s issues: Besides the above marked issues, BOT reserves: injurious exposure, occupational disease while in BOT’s employment, & medical liability.

In the June 19, 2019, Opinion and Award, regarding last injurious exposure, the ALJ set forth the following findings of fact and conclusions of law:

B) Last injurious exposure

Carbon monoxide and exhaust exposure are the hazards that caused Kearns’ occupational disease. The next

² Stipulations include the following dates for the last exposure for each employer: October 12, 2016 (PATS) and September 1, 2017 (BOT).

inquiry is which employment last “injuriously” exposed Kearns to these hazards. KRS 342.316(10), in pertinent part, states that “...the employer in whose employment he...was last injuriously exposed to the hazard of the disease...shall alone be liable therefore, without right to contribution from any prior employer...[.]” When there are exposures with multiple employers, the key factor, in determining which employer is liable, is ascertaining which employment constituted the last “injurious” exposure. *See Begley v. Mountain Top, Inc.*, 968 S.W.2d 91 (Ky. 1998); KRS 342.316(1)(a); KRS 342.316(10); KRS 342.316(11)(b).

KRS 342.0011(4) establishes that an injurious exposure is “exposure to [an] occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made.” KRS 342.011(4) only requires exposure that could independently cause the disease - not exposure that did cause the disease. *Childers v. Hackney’s Coal Co.*, 337 S.W.2d 680, 683 (Ky. 1960); *Miller v. Tema Isenmann, Inc.*, 542 S.W.3d 265 (Ky. 2018). The *Begley* Court explained that “...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.” *Id.*

Lay testimony may establish the claimant’s work environment caused exposure. However, the exposure’s magnitude, frequency, intensity, and nature, determine whether expert or only lay testimony is necessary to prove the exposure was injurious. *See Dupree v. KY Dept. of Mines and Minerals*, 835 S.W.2d 887 (Ky. 1992); *Howell v. Shelcha Coal Co.*, 834 S.W.2d 693 (Ky. App. 1992); *Victory Processing Co., Inc. v. Gamblin*, 1999-CA-001774-WC (Ky. App. Jun. 9, 2000)(unpub.)(the Supreme Court affirmed on Apr. 26, 2001).

When the exposure’s magnitude is minimal, infrequent, not intense, or inconstant, medical expert testimony is necessary to prove the last exposure was injurious. *Dupree, supra.* In *Dupree*, the claimant taught safety classes above ground, when the mine was not in production. The claimant testified that wind carried coal dust particles and he inhaled them while outside the classroom. The *Dupree* Court stated that “[w]hile such

lay testimony may prove that claimant was at times exposed to coal dust and that he inhaled coal dust, such evidence alone cannot, as a matter of law, prove that the exposure claimant received...was of such a magnitude and frequency as would have independently caused the disease for which he was claiming benefits.” Id.

The Dupree Court further expounded that “[s]uch proof of causation requires competent medical evidence, and there was no medical evidence as to this particular fact.” Id. The Supreme Court’s Gamblin decision reaffirmed this principle. Gamblin, supra. The Gamblin Court stated that “...in cases where the claimant’s exposure to the hazard of occupational disease is minimal, lay testimony alone is insufficient to prove that the exposure was injurious [citation omitted]. Under such circumstance, the claimant must prove injurious exposure through competent medical evidence.” Id.

When the exposure’s magnitude is extensive, frequent, intense or constant, lay testimony is sufficient to prove the exposure was injurious. Howell, supra. Moreover, when the exposure’s magnitude is extensive, frequent, and intense, an ALJ may infer the exposure was injurious from the work history, environment, and diagnosis. Id.

The Howell Court, following these principles, determined that an underground miner’s testimony, establishing he continuously worked around coal and coal dust, was sufficient to establish an injurious exposure despite the fact the claimant only worked two hours for his last employer. The Gamblin Court further stated that “...in cases where the intensity of the exposure to coal dust was relatively constant and did not decrease, it can be inferred from the diagnosis and work history that the last exposure was injurious.” Id.

The policy and reason behind the last injurious exposure rule is that “...although a particular employment may not have been the actual cause of [the claimant’s disease], liability flows from the recognition that the injurious exposure received in the employment did, to some extent, contribute to the worker’s condition.” Begley, supra at 96.

i) Exposure at BOT

BOT mainly works on tires, brakes, and performs front-end/tire alignments. Kearns admitted his BOT employment primarily required working outside the shop, and performing “service calls.” He testified, “...most of my job was out on the road doing service calls.” These service calls occurred outdoors and Kearns predominantly changed tires.

Kearns, however, also sometimes worked inside the shop. The shop had several large, bay doors. Kearns explained that, during inclement weather, BOT would close the doors, and occasionally start vehicles. When this occurred, Kearns encountered fumes/exhaust. Kearns has not worked since he left BOT. Based on his testimony, the ALJ finds Kearns was last exposed to fumes/exhaust, while working for BOT, on September 1, 2017.

ii) Whether BOT’s exposure was the last “injurious” exposure

After reviewing the medical evidence, testimony, and law, the ALJ finds Kearns and PATS did not meet their burdens. They did not prove the last injurious exposure occurred in BOT’s employment. Kearns and PATS do not have a medical expert opinion on this issue. Although Dr. Rosenblum testified Kearns was last exposed to fumes/exhaust while working for BOT, he did not address whether this exposure, if continued, could/would independently and eventually cause pulmonary/reactive airway disease.

Dr. Rosenblum did not directly address whether the BOT exposure was injurious. Again, the record does not contain any medical opinions on this issue. Although Kearns testified he encountered fumes/exhaust at BOT, and they caused him problems, his lay testimony is insufficient to prove the exposure was “injurious.” The reason is Kearns’ testimony establishes the exposure’s magnitude was infrequent and inconstant.

As previously outlined, Kearns primarily worked outside the shop and performed service calls. This required driving a service truck and changing tires. There is not any evidence that the BOT service truck had a cracked manifold or any another exhaust problems like the one Kearns drove for PATS. There is not any evidence Kearns

extensively, frequently, intensely, or constantly, encountered hazardous fumes/exhaust while driving the BOT service truck.

There is not any evidence that changing customers' tires, while performing the BOT service calls, extensively, frequently, intensely, or constantly, exposed Kearns to hazardous fumes/exhaust. A person can change a vehicle's tire without having its engine running. The credible evidence shows that any fume/exhaust exposure Kearns encountered while performing his primary job, which was making service calls, at most, was minimal, infrequent, inconstant, and not intense.

The same is true, when Kearns worked in the shop. The credible evidence shows BOT did not constantly have the large, bay doors closed. Instead, the doors were only closed during inclement weather periods. The vehicles were also not constantly kept running in the shop. Kearns also did not constantly work in the shop. The credible evidence establishes: (1) Kearns did not constantly work in the shop; (2) the shop's large, bay doors were not constantly closed; and (3) vehicles were not constantly running in the shop.

Although Kearns encountered fumes/exhaust while working in BOT's shop, the evidence shows the exposure's magnitude was minimal, infrequent, not intense, or inconstant. Kearns' testimony is insufficient to establish the BOT exposure was injurious. Kearns and PATS required medical expert testimony. The medical expert testimony, however, also does not support the BOT exposure was injurious.

The policy, again, behind the last exposure rule is "...liability flows from the recognition that the injurious exposure received in the employment did, to some extent, contribute to the worker's condition." Begley, supra at 96. Dr. Rosenblum testified the BOT exposure did not contribute to Kearns' occupational disease. He explained the BOT exposure also did not contribute to Kearns' impairment, need for medical treatment, or his restrictions/limitations.

Dr. Rosenblum essentially opined Kearns' occupational disease waxes and wanes, and its effects simply waxed during the BOT employment. Kearns' testimony also

supports this opinion and finding. Kearns admitted that, when BOT hired him, he still had breathing difficulties and used three inhalers.

Based on the evidence's totality, the ALJ finds Kearns and PATS did not prove, through competent medical evidence, that the last "injurious" exposure occurred in BOT's employment. The result is the ALJ is prejudicially dismissing Kearns' claim against BOT. BOT does not have any liability.

PATS filed a petition for reconsideration making the same arguments it now makes on appeal.

In the July 10, 2019, Order, the ALJ denied PATS petition and provided the following additional findings:

...

It is hereby **ORDERED**: The ALJ is **Denying** PATS' petition for reconsideration.

KRS 342.281 outlines a petition for reconsideration's parameters. It, in pertinent part, states that "[t]he [ALJ] shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision...[.]"

The ALJ may not reweigh the evidence, when considering and deciding a petition for reconsideration. Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky. 1971). Moreover, KRS 342.281 "precludes an ALJ...from reconsidering the case on the merits and/or changing the findings of fact." Garrett Mining Co. v. Nye, 122 S.W.3d 513 (Ky. 2003).

It is not enough for a party to show the record contained some evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). If substantive evidence supports an ALJ's findings, then the evidence does not compel a different result. Special Fund v. Francis, 708 S.W.2d 641, 642 (Ky. 1986).

In its petition for reconsideration, PATS asserts the ALJ did not understand and/or misinterpreted the evidence,

as well as the appropriate legal standard. The ALJ disagrees, and will address PATS' individual arguments.

First, PATS stated the ALJ inappropriately relied on the Dupree v. Ky. Dept. of Mines & Minerals, 835 S.W.2d 887 (Ky. 1992) case, because the Court decided it on a statute of limitations issue. The ALJ did not indicate that Dupree and the Plaintiff's case were completely analogous, and on all fours. The ALJ did not use the Dupree case for stare decisis purposes. Instead, the ALJ cited Dupree, as well as several other cases, in formulating and explaining the applicable legal standard.

Secondly, PATS stated the ALJ erred, because "...Kearns worked in the same or more intensive exposure to carbon monoxide for Best One Tire than he did with Paducah Area Transit." The ALJ disagrees. The ALJ's decision analyzed and described the BOT exposure. The ALJ made factual-findings concerning it. This analysis is in the decision - on pages 23 and 24.

The ALJ found that the PATS exposure was more intense. The credible evidence shows the Plaintiff's PATS exposure was significant and very intensive. It occurred over several hours, while the Plaintiff drove a truck to and from Virginia. The truck's cracked manifold and exhaust problems essentially turned its small, enclosed cab into a gas chamber. As the ALJ found, the BOT exposure was, at most, minimal, infrequent, inconstant, and not intense.

Third, PATS stated that "[i]n Begley v. Mountain Top, Inc., 968 S.W.2d 91 (Ky. 1998), the Court found that the employer with the last exposure was liable regardless of proof of progression of the disease." This statement is partially inaccurate. Simply having the last exposure is not enough. The Begley Court held that the last exposure must be "injurious."

Fourth, PATS asserted the ALJ ignored the "fact" that the Plaintiff "worked exposed for" BOT longer than for PATS. The ALJ addressed this statement two paragraphs above. The ALJ did not ignore this argument. Again, the Plaintiff's PATS exposure was significant and very intensive, while the BOT exposure was minimal, infrequent, inconstant, and not intense. Occasionally encountering exhaust/fumes in a large, open area is not equivalent to driving a truck for several hours, to and

from Virginia, with a cracked manifold that essentially turned the truck's small, enclosed cab into a gas chamber.

Fifth, PATS asserted the ALJ ignored the "fact" that "Kearns was able to return to work after Paducah Area Transit but he was unable to return to work for Best One Tire." Sixth, PATS asserted the ALJ ignored the "fact" that "Kearns' breathing test were normal after he left Paducah Area Transit but were abnormal after he worked for Best One Tire."

These two points are closely related, so the ALJ will address them together. The ALJ did not ignore these "facts." The credible evidence shows the Plaintiff advised BOT he actively experienced breathing problems immediately before his BOT employment even began. The evidence also shows the Plaintiff still used three inhalers when his BOT employment began. Dr. Rosenblum essentially opined that the Plaintiff's occupational disease naturally waxes and wanes. The ALJ determined the Plaintiff's condition waned after he stopped working at PATS, and naturally waxed during his BOT employment.

Finally, PATS asserted the ALJ ignored that "Dr. Rosenblum admitted that Kearns' employment with Best One Tire could have caused his disease." This is a completely inaccurate statement, and mischaracterizes Dr. Rosenblum's testimony. Dr. Rosenblum testified, "[t]hey could have added to it, yes, sir [,]" when asked "could the fumes at Best One Tire have contributed to Mr. Kearns' occupational disease?"

This testimony, however, is not equivalent to Dr. Rosenblum opining that "... Kearns' employment with Best One Tire could have caused his disease [,]" as PATS asserted. Dr. Rosenblum's testimony only establishes that the BOT exposure could have potentially "added" to the Plaintiff's occupational disease. Dr. Rosenblum did not testify that the BOT exposure could and/or would have independently caused the Plaintiff's occupational disease.

Dr. Rosenblum did not testify, and there is not any medical evidence, establishing that the Plaintiff's infrequent, inconstant, and non-intensive exhaust/fume exposure, while working for BOT, could and/or would have independently caused the Plaintiff's occupational

disease. Dr. Rosenblum testifying that the BOT fumes that the Plaintiff occasionally encountered “could have added to the Plaintiff’s occupational disease” is not equivalent to Dr. Rosenblum testifying that the BOT fumes could and/or would have independently caused the Plaintiff to contract the occupational disease.

This is a significant distinction. Just because exposure could add to an occupational disease does not necessarily mean the exposure’s magnitude (frequency, intensity, etc.) could and/or would independently cause the occupational disease. Potentially adding onto something does not equate to potentially causing it. Just because occasional exposure could have potentially affected an already pre-existing, active, symptomatic condition does not mean the occasional exposure could and/or would have independently caused the underlying condition and/or disease.

The ALJ determined that the Plaintiff and PATS did not meet their burdens. KRS 342.316(10), in pertinent part, states that “...the employer in whose employment he or she was last injuriously exposed to the hazard of the disease...shall alone be liable therefore, without right to contribution from any prior employer...[.]” (emphasis added). The Begley Court indicated that, when there are exposures with multiple employers, the key factor, in determining which employer is liable, is ascertaining which employment constituted the last “injuriously” exposure. *Id.*; KRS 342.316(1)(a); KRS 342.316(10); KRS 342.316(11)(b).

KRS 342.0011(4) establishes that an injurious exposure is “exposure to [an] occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made.” KRS 342.011(4) only requires exposure that could independently cause the disease - not exposure that did cause the disease. Childers v. Hackney’s Coal Co., 337 S.W.2d 680, 683 (Ky. 1960); Miller v. Tema Isenmann, Inc., 542 S.W.3d 265 (Ky. 2018).

The Begley Court explained that “...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.” *Id.* PATS

did not meet this standard. Dr. Rosenblum's testimony, and the other medical evidence, do not establish that the BOT exposure was "injurious." Just because an occasional rain shower could potentially add to an existing flood does not mean an occasional rain shower could and/or would independently cause the underlying flood.

Despite Dr. Rosenblum's testimony that the BOT exposure could have "added to" the Plaintiff's occupational disease, the ALJ had to review Dr. Rosenblum's entire testimony and place it into the proper context. The ALJ must consider an expert's opinion within its total meaning. The Supreme Court has stated that "...substance should prevail over form, and the expert's testimony should be examined in its total meaning, rather than word-by-word." Young v. L.A. Davidson, Inc., 463 S.W.2d 924, 926 (Ky. 1971). The ALJ must weigh the evidence, and consider its totality. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

After reviewing all the medical evidence and lay testimony, the ALJ determined PATS and the Plaintiff did not meet their burdens. Although PATS and the Plaintiff proved that the last exposure occurred at BOT, they did not prove this exposure was "injurious" – that it could and/or would independently cause the Plaintiff's occupational disease.

The ALJ respectively asserts he properly reviewed, summarized, and understood, the evidence. The ALJ cited the applicable legal standards. The ALJ made the necessary factual-findings, and applied them to the appropriate standards.

We affirm the ALJ's dismissal of Kearns' claim against BOT and the award of income and medical benefits to be paid by PATS.

KRS 342.0011(4) defines "injurious exposure" as "that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made." Pursuant to KRS 342.316(1)(a) and KRS 342.316(10), liability for benefits in an occupational disease

claim rests on the employer in whose employment the employee was last exposed to the hazard of the occupational disease.

Unquestionably, Dr. Rosenblum attributed Kearns' pulmonary/reactive airway disease to his exposure to exhaust fumes. As held by the ALJ in both the June 19, 2019, Opinion and Award and the July 10, 2019, Order, while there is evidence supporting Kearns being last exposed to exhaust fumes during his employment at BOT, there is no medical testimony supporting that exposure being "injurious" as defined by KRS 342.0011(4). We acknowledge that, in his report, Dr. Rosenblum twice noted Kearns was unable to work as a mechanic at BOT because of the exhaust fumes, thereby corroborating Kearns' own testimony on the subject. Also, in his deposition, Dr. Rosenblum was asked if Kearns' employment at BOT was his last exposure to exhaust fumes, and Dr. Rosenblum answered "yes." However, the ALJ ultimately relied upon the following testimony in Dr. Rosenblum's deposition to conclude that, while Kearns was exposed to fumes during his tenure at BOT, this exposure was not "injurious":

Q: Is it your opinion that the exposure at Best One contributed to his occupational disease?

A: *No, I think it just demonstrated that he really was hurt by the prior exposure.* (emphasis added).

He further testified as follows:

A: Can I – let me just interrupt because we kind of went through this and I think I can simplify your – what you need. I think the variability in those PFTs would not change my opinion, but – and you represent Best One Tire; correct, sir?³

³ The record reflects "PFT" stands for "pulmonary function test."

Q: You're correct.

A: I don't think you have any responsibility for this man's impairment. I think he already had the reactive airways or asthma when he tried to go back to work and he just couldn't work in your – in the environment there because his lungs were already – had asthma from this previous exposure. So I don't think any of the impairment is your responsibility. Does that save you from asking all the questions about the prior PFTs? (emphasis added).

Q: Doctor, I have no further questions. Thank you, sir.

While it was unnecessary for PATS to have proven Kearns' employment at BOT *caused* Kearns' pulmonary/reactive airway disease, PATS was required to prove, through competent medical testimony, 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." Begley v. Mountain Top Inc., 968 S.W.2d 91, 95 (Ky. 1998). The Supreme Court of Kentucky further instructed in the case of Miller v. Tema Isenmann, Inc., 542 S.W.3d 265, 271 (Ky. 2018) by stating as follows:

We have held the statute requires only that exposure could independently cause the disease—not that it did in fact cause the disease. "All that is required ... is that the exposure be such as could cause the disease independently of any other cause." Childers v. Hackney's Coal Co., 337 S.W.2d 680, 683 (Ky. 1960)

Here, Dr. Rosenblum testified that, Kearns' exposure to exhaust fumes at BOT *did not* contribute to his pulmonary/reactive airway disease. He also testified BOT is not responsible for *any* of Kearns' impairment because Kearns "already had the reactive airways or asthma" before his employment with BOT.

This Board acknowledges the following exchange at the conclusion of Dr. Rosenblum's deposition:

Q: Let me pose it to you this way: could the fumes at Best One Tire have contributed to Mr. Kearns' occupational disease?

A: They could have added to it, yes, sir.

However, 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 inadequate 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, Dr. Rosenblum had previously answered "no" when asked if Kearns' exposure to exhaust fumes at BOT could have contributed to his pulmonary/reactive airway disease, and the ALJ was free to rely upon this differing testimony. Further, assuming, *arguendo*, the ALJ had chosen to rely upon Dr. Rosenblum's latter testimony indicating the exhaust fumes at BOT "could have" added to Kearns' pulmonary/reactive airway disease, it is doubtful this statement, on its own, could be deemed tantamount to an opinion indicating Kearns' exposure at BOT independently caused Kearns' illness. However, we need not decide that here.

As there is substantial evidence in support of the ALJ's determination Kearns' exposure to exhaust fumes at BOT was not "injurious" exposure as defined by KRS 342.0011(4), we affirm.

Accordingly, the ALJ's June 19, 2019, Opinion and Award and the July 10, 2019, Order are **AFFIRMED**.

ALL CONCUR.

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