Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 9, 2021

CLAIM NO. 202000878

QUAD/GRAPHICS, INC. PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

ROBERT BARTOLOMEO and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Quad/Graphics, Inc. ("Quad") appeals from the February 19, 2021[1] Opinion, Award, and Order and the March 15, 2021 Order overruling its Petition for Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ determined Robert Bartolomeo ("Bartolomeo") has

[1] The ALJ dated the Opinion as rendered on February 19, 2020, a typographical error.

an occupational hearing loss for which she only awarded medical benefits. On appeal, Quad argues the ALJ erred in awarding medical benefits for Bartolomeo's occupational hearing loss since Dr. Raleigh Jones opined it did not worsen during his seven-year employment with Quad. For the foregoing reasons, we affirm.

Bartolomeo filed a Form 101, Claim Number 2020-00877, on June 29, 2020 alleging he sustained injuries to his head, neck, back, left leg, and left foot caused by cumulative trauma in the course and scope of his employment with Quad. The Form 101 was subsequently amended to include injuries to his left shoulder and bilateral thumbs also allegedly caused by cumulative trauma. Bartolomeo also filed a Form 103, Claim Number 2020-00878, alleging occupational hearing loss due to repetitive exposure to loud noise at the workplace, identifying March 27, 2020 as his date of last exposure. The claims were consolidated on August 25, 2020. The ALJ de-consolidated the claims on February 19, 2021, the same day she rendered her decision. This particular appeal concerns only the occupational hearing loss claim. Therefore, we will not analyze or discuss the evidence related to Bartolomeo's other alleged injuries.

Bartolomeo testified by deposition on October 5, 2020 and at the hearing held January 12, 2021. Bartolomeo was born in October 1958 and resides in Harrodsburg, Kentucky. Bartolomeo worked for Quad from April 2013 through March 27, 2020, when he was furloughed due to COVID-19. Bartolomeo has not returned to any employment since March 27, 2020. Prior to his employment with Quad, Bartolomeo worked at Max Daetwyler as an electronics control specialist for approximately 18 years. Prior to that, Bartolomeo worked as a maintenance

technician, a maintenance electro mechanic, a service manager, and a shift mechanic. Bartolomeo testified he was exposed to loud noise at some of his prior work places.

Bartolomeo began working for Quad as a corporate electrician in April 2013 based in Charlotte, North Carolina, for two years repairing machinery. He was exposed to loud noise and stated the loudest machines he was exposed to were the printing presses. Bartolomeo moved to the Quad facility in Versailles, Kentucky in 2015 working as an electronic control specialist, and then a master electrician. He repaired and added equipment, modified programs, and maintained printing presses, finishing equipment, binding equipment, compressors, and compactors.

Bartolomeo underwent a hearing test at Quad's request in 2013. He could not recall the diagnosis, but he did not receive further hearing aid treatment as a result. Bartolomeo testified he wore hearing protection while working for Quad "a hundred percent of the time." At the deposition, Bartolomeo testified he was exposed to loud noise during his employment at Quad. He testified the loudest machine he worked on was the "MAN Roland" which ran ultra-high speeds. Bartolomeo testified he worked on this particular machine "quite a bit" in the six months after it was added to the facility.

At the hearing, Bartolomeo similarly testified he was exposed to loud noise during his employment with Quad emphasizing the press areas were the noisiest. Bartolomeo testified it was important for him to hear well to carry out his job duties at Quad, particularly while troubleshooting equipment. Bartolomeo began to notice hearing issues while working for Quad. Bartolomeo continues to have

hearing difficulty as he has to increase the volume of the television, and has difficulty hearing people speak.

Quad filed the October 10, 2013 hearing test from Examinetics, which it had requested. The report concluded, "The current test shows a hearing loss configuration that is not commonly associated with noise exposure due to the significant hearing loss in the low frequencies. This hearing loss should be evaluated by a physician as it may be correctable." Bartolomeo did not sign the hearing test report. It also included a document titled, "Hearing Test History" from Examinetics. This document provides the raw data from hearing tests administered in 2013, 2014, 2015, 2016, 2017, and 2018.

Bartolomeo attended an evaluation pursuant to KRS 342.315 at the University of Kentucky. Drs. Lyndsey Ferrell and Jones completed a Form 107 and a letter dated September 25, 2020. Dr. Ferrell administered a comprehensive audiometry and tympanometry. Dr. Jones noted Bartolomeo worked as a master electrician for Quad for seven years. Dr. Jones opined audiograms and other testing establish Bartolomeo's hearing loss is compatible with that caused by hazardous noise exposure in the workplace. He further opined Bartolomeo's hearing loss is related to repetitive exposure to hazardous noise over an extended period of time. Dr. Jones assessed a 7% impairment rating for Bartolomeo's occupational hearing loss pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment.

In the October 1, 2020 letter, Dr. Jones noted Bartolomeo worked in a printing factory as an electrician for the last seven years where he was exposed to

loud noise on a regular basis. Bartolomeo was previously exposed to noise in various jobs. Dr. Jones noted Bartolomeo wore hearing protection regularly over the last few years. Dr. Jones noted Bartolomeo has a family history of hearing loss. Dr. Jones stated as follows:

> His hearing test reveals a sloping bilateral high frequency sensorineural hearing loss. While I cannot rule out a possible congenital component due to the fact that his sisters have a problem, this hearing test today and his history are most consistent with a (sic) occupational-related noise-induced sensorineural hearing loss.

Dr. Jones recommended hearing aids and again assessed a 7% impairment rating.

Dr. Jones also testified by deposition on December 9, 2020. He testified Bartolomeo's hearing loss was most likely noise-induced based upon the shape of the hearing test. Dr. Jones reviewed the 2013 hearing test and opinion, and disagreed with the statement that the hearing loss pattern is not commonly associated with noise exposure. Dr. Jones stated, "I don't believe that it points toward congenital abnormality." Dr. Jones further questioned the integrity of the 2013 testing since he was unfamiliar with equipment used or the unnamed audiologist. Assuming the 2013 testing was correct, Dr. Jones assessed an 8% impairment rating. Dr. Jones reiterated his assessment of 7% based upon his September 25, 2020 evaluation, and agreed there had been no demonstrable worsening of his hearing condition since 2013.

Dr. Jones opined Bartolomeo's hearing loss is related to workplace noise exposure. However, he could not directly relate the hearing loss to noise

exposure experienced between 2013 and 2018 since the audiograms performed during that timeframe indicate very little, if any, damage. On cross-examination, Dr. Jones opined Bartolomeo was exposed to noise while working for Quad, but he did not experience substantial hearing loss during that time.

The ALJ found Bartolomeo's testimony indicates he sustained injurious exposure to hazardous noise while working for Quad. The ALJ further determined the hearing loss is work-related, relying upon Dr. Jones' opinion and Bartolomeo's testimony. The ALJ determined an award of permanent partial disability benefits is prohibited pursuant to KRS 342.7305(2) since Dr. Jones assessed an impairment rating below the 8% threshold. The ALJ further stated as follows, *verbatim*:

> This ALJ fully considered Quad's argument, but finds it is not entirely supported by case law or statute. KRS 342.7305 (4) places the entire liability for income and medical benefits on the last employer, which was Quad. KRS 342.7305 (4) treats the condition much like KRS 342.316(1)(a) and KRS 342.316(10) treats an occupational disease for the purpose of imposing liability. Importantly, none of these statutes makes an employer's liability contingent on a minimum period of exposure. After reviewing the evidence, this ALJ concludes Bartolomeo sustained injurious exposure during his employment with Quad, and this exposure renders this portion of his claim compensable.

In the Order section, the ALJ failed to award Bartolomeo medical benefits for his occupational hearing loss.

Both parties filed Petitions for Reconsideration. Bartolomeo requested the ALJ award medical benefits for his occupational hearing loss. Quad made the same arguments it now asserts on appeal.

The ALJ sustained Bartolomeo's petition and amended the Order to include an award of medical expenses for occupational hearing loss. The ALJ overruled Quad's petition, stating as follows, *verbatim*:

> This matter comes before this Administrative Law Judge upon the Defendant's petition for reconsideration in the Plaintiff's hearing loss claim. The Defendant asserts it was an error to find the Plaintiff sustained injurious exposure during his employment with the Defendant. Furthermore, the Defendant maintains it overcame the rebuttable presumption outlined in KRS 342.315. The Defendant maintains the only expert opined that none of the impairment was related to the Plaintiff's work with the Defendant.
>
> KRS 342.7305 (4) 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.
>
> The rebuttable presumption provided in KRS 342.7305 (4) applies upon proof of: (1) a pattern of hearing loss compatible with that caused by hazardous noise exposure, and (2) an employee's demonstration of repetitive exposure to hazardous noise in the workplace. First, the Plaintiff's audiograms revealed a pattern of hearing loss compatible with that caused by hazardous noise exposure. Dr. Jones opined, within a reasonable degree of medical probability, the Plaintiff's hearing loss was consistent with the pattern typical of long-term exposure to occupational hazardous noise. Contrary to the Defendant's argument, 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. Greg's Construction v. Keeton, 385 S.W.3d 410 (Ky. 2012). The Plaintiff provided unrebutted testimony that he was exposed to loud occupational noise while working for the Defendant. Furthermore, his audiograms established a pattern of noise exposure. Thus, his occupational hearing loss claim is compensable.

On appeal, Quad argues the ALJ's award of medical benefits for Bartolomeo's hearing loss is erroneous as a matter of law. Quad argues the ALJ erred to find a compensable hearing loss attributable to it since Dr. Jones opined Bartolomeo's hearing loss did not change or worsen substantially from 2013 to now. Quad asserts this testimony rebuts the presumption established in KRS 342.7305(4). Quad asserts there is no medical evidence establishing Bartolomeo's hearing loss was caused by his work at Quad. Quad argues Greg's Construction v. Keeton, 385 S.W.3d 410 (Ky. 2012) is distinguishable since that case dealt with apportionment of an impairment rating. Here, the issue is limited to entitlement to future medical benefits.

As the claimant in a workers' compensation proceeding, Bartolomeo had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Bartolomeo was successful in that burden, the question on appeal is whether there was 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). Although a party may note evidence that would have supported a different outcome than that 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).

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.

Contrary to Quad's assertions, Greg's Construction v. Keeton, supra, controls. 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 making similar arguments Quad now makes on appeal to this Board. Greg's Construction argued 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 statute does not preclude apportioning liability among employers where the evidence so permits. The 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 . . . .

The ALJ did not err by determining that the claimant sustained a work-related injury. 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. Greg's offered no rebuttal evidence.

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

As noted by the Court in Keeton, supra, KRS 342.7305 establishes a rebuttable presumption that hearing impairment is a compensable injury when the proof establishes: 1) audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure; and 2) the employee demonstrates repetitive exposure to hazardous noise in the workplace. The ALJ found the rebuttable presumption applicable because Bartolomeo made the two required showings, neither of which were rebutted by Quad.

In this instance, a university evaluator, Dr. Jones, evaluated Bartolomeo on September 25, 2020. Dr. Jones opined audiograms and other testing

establish hearing loss compatible with that caused by hazardous noise exposure in the workplace, and that Bartolomeo's hearing loss is related to repetitive exposure to hazardous noise over an extended period of time. In the attached letter, Dr. Jones opined the hearing tests and history are "most consistent with a (sic) occupational-related noise-induced sensorineural hearing loss." Bartolomeo testified he was exposed to loud noise at some of his prior jobs, including Quad. Likewise, Dr. Jones noted Bartolomeo worked in a printing factory as an electrician for the last seven years and was exposed to loud noise on a regular basis. Prior to that, Bartolomeo worked in various noisy jobs. This evidence is unrebutted.

Contrary to Quad's assertions, the rebuttable presumption created by KRS 342.7305(4) pertains only to the compensability of the hearing loss. The second clause in the statute, separated by a comma, conclusively establishes that the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits. Thus, having established his hearing loss is a compensable work injury, Bartolomeo only needed to prove he was injuriously exposed to hazardous noise at Quad. He testified he was exposed to loud noise at Quad and this testimony was not rebutted.

We acknowledge Bartolomeo underwent annual hearing tests from 2013 to 2018, and that Dr. Jones testified his hearing loss did not worsen during his employment with Quad. However, we are bound by the plain language of the statute and the holding in Keeton, supra. KRS 342.7305(4) expressly places exclusive liability on the employer with whom the employee was last injuriously exposed. Bartolomeo testified to hazardous noise exposure at Quad, and this

testimony was unrebutted. In Keeton, the Kentucky Supreme Court specifically stated, "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." Keeton, 385 S.W.3d at 425. Therefore, Keeton does not require Bartolomeo to prove his last employment caused a measurable hearing loss. Liability for any pre-existing hearing loss falls on Quad. Accordingly, the ALJ's award of medical benefits pursuant to KRS 342.7305 must be affirmed.

Finally, we do not agree that the analysis in Keeton is limited only to indemnity benefits for occupational hearing loss. We note Keeton was awarded indemnity and medical benefits for his noise-induced hearing loss. The Court in Keeton or in KRS 342.7305(4) makes no such distinction or limitation.

Accordingly, the February 19, 2021 Opinion, Award, and Order and the March 15, 2021 Order on Petition for Reconsideration by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON JO ALICE VAN NAGELL
HON BRIAN W DAVIDSON
300 EAST MAIN STREET, SUITE 400
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT: **LMS**

HON MCKINNEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE: **LMS**

HON STEPHANIE L KINNEY
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601