

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 8, 2021

CLAIM NO. 201995494

WILLIAM HUMBERTO HUERTA

PETITIONER

VS.

APPEAL FROM HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE

THE BANNISTER CO., LLC and
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING & REMANDING

* * * * *

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

BORDERS, Member. William Humberto Huerta (“Huerta”) appeals from the May 20, 2021 Opinion, Award, and Order and the June 14, 2021 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge (“ALJ”). On appeal, Huerta argues the ALJ erred in finding on reconsideration impairment for tinnitus was not to be included in the award for permanent partial disability. For the reasons set forth herein, we reverse and remand.

Huerta filed his Form 101 Application for Resolution of a Claim – Injury on October 15, 2020. He alleged injuries to his face and head, including facial and orbital bones; TMJ and ear (tinnitus); right upper extremity/shoulder; and back when he fell approximately eight feet from a ladder resulting in permanent impairment.

Huerta testified by deposition on January 19, 2021 and at the hearing held March 24, 2021. He was working on a ladder on January 29, 2019 when he fell and landed on the concrete below. He was taken to Baptist Health LaGrange and he was then he transferred to the University of Louisville Hospital. Huerta testified he has had noise in his right ear since the accident. He denied any prior work injuries. Huerta stated he had never received treatment for any problems with his hearing or injuries to his ears prior to the work injury.

A January 29, 2019 note from Baptist Health La Grange indicates Huerta was treated in the emergency department after falling from an eight-foot ladder onto concrete. A CT scan of Huerta's face and head showed a displaced fracture of the lateral and anterior walls of the right maxillary sinus and inferior orbital rim; minimally displaced lateral wall of the right orbit; two non-displaced fractures of the right zygoma, and blood in the maxillary sinus. Huerta was diagnosed with a closed orbital and a right-side zygomatic fractures. Huerta was transferred to University of Louisville hospital.

Huerta presented to University of Louisville Physicians Ear, Nose & Throat on November 15, 2019. He complained of constant high-pitched bilateral

tinnitus. There was no reported ear fullness, dizziness, or vertigo. Huerta was diagnosed with tinnitus of both ears and noise-induced hearing loss.

Dr. Jules Barefoot evaluated Huerta on September 24, 2020. Dr. Barefoot diagnosed multiple facial fractures, displacement of the TMJ disc, and ongoing tinnitus secondary to a closed head injury and facial fractures. He also diagnosed arthrocentesis and brisement of the right TMJ and right infraorbital nerve injury secondary to facial fractures. Dr. Barefoot noted a CT scan of the face demonstrated depressed lateral and anterior wall maxillary sinus fractures with an inferior orbital rim fracture, displaced right orbital lateral wall fracture, and non-displaced fracture of the right zygoma. He related these diagnoses to the January 29, 2019 work-related injury and assessed a combined 23% whole person impairment rating for Huerta's right upper extremity, tinnitus, and loss of facial sensation pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"). He assessed a 5% impairment rating for persistent tinnitus pursuant to page 246, section 11.2a of the AMA Guides. Dr. Barefoot stated Huerta had no active, symptomatic, impairment ratable condition prior to January 29, 2019. Dr. Barefoot specifically stated Huerta did not have tinnitus prior to the work injury.

Dr. Jerry Lin treated Huerta on November 15, 2019. Huerta presented with bilateral tinnitus. Dr. Lin noted a positive history for noise exposure. He diagnosed tinnitus of both ears and noise induced hearing loss. Dr. Lin discussed the pathophysiology of tinnitus and its relationship to occupational hearing loss with Huerta. He also discussed possible tinnitus management strategies.

Dr. Thomas Loeb performed an IME on February 2, 2021. Based on the medical records, Dr. Loeb stated Huerta's prior exposure to loud noise on a chronic basis caused the occupational hearing loss and tinnitus. Thus, he believed that there was no evidence Huerta sustained any hearing damage or that any TMJ damage occurred due to the January 2019 work incident. Dr. Loeb did not believe Huerta required any additional medical treatment.

The ALJ's findings relevant to this appeal are set forth *verbatim* as follows:

Plaintiff has alleged injury to his ear in the form of tinnitus. There is no evidence indicating any complaints, symptoms, or treatment associated with tinnitus prior to the work injury. Further, there is no evidence that contradicts Plaintiff's testimony that he experiences symptoms in his ears since the January 2019 work incident. Medical records from the University of Louisville College of Dentistry beginning in March 2019 evidence that Plaintiff was suffering from right TMJ. He had consistent treatment with this facility. On September 27, 2019 Plaintiff reported suffering from persistent right ear tinnitus with no specific aggravating factors. On October 22, 2019, Plaintiff underwent arthrocentesis of the right TMJ and Brisement.

Further, records from November 2019 from U of L Physicians Ear, Nose, and Throat indicate that Plaintiff's chief complaint was bilateral tinnitus, which was described as high-pitched and constant. The record provides two distinct diagnoses of tinnitus in both ears as well as noise-induced hearing loss. Dr. Lin's record indicates that the pathophysiology of tinnitus and its relationship with occupational hearing loss were discussed with Plaintiff although no express statements as to the medical cause of the tinnitus were noted.

Dr. Barefoot notes in his report that Plaintiff reported ongoing, persistent tinnitus of his right ear with evaluation by ENT. Following review of records and examination, Dr. Barefoot diagnosed ongoing tinnitus

secondary to a closed head injury/facial fractures due to a workplace fall on January 29, 2019.

Dr. Loeb opined in his report that Plaintiff had occupational hearing loss from noise exposure, but he found no indication in the records that Plaintiff's occupational hearing loss was caused or exacerbated by the work injury in question. He reiterated in his report that there was no evidence that Plaintiff sustained any hearing damage as a result of his work injury of January 2019.

Having reviewed the medical evidence and testimony in this matter, the ALJ finds the medical testimony from Dr. Barefoot to be more credible and persuasive than the opinions of Dr. Loeb. The records of Plaintiff's treating physicians from University of Louisville College of Dentistry and U of L Physicians-Ear, Nose, and Throat indicate that Plaintiff suffered from right ear tinnitus following the January 2019 work incident. Accordingly, the ALJ relies upon the testimony from Dr. Barefoot in finding that Plaintiff sustained a work-related injury to his ear in the form of tinnitus on January 29, 2019.

The Bannister Co., LLC ("Bannister") filed a Petition for Reconsideration arguing based upon the plain statutory language of KRS 342.7305, impairment for tinnitus cannot be considered when determining the work-related whole person impairment. Bannister further argued that income benefits for occupational hearing loss rated at less than 8% to the whole person shall not be payable pursuant to the statute.

The ALJ provided the following findings on reconsideration, *verbatim*:

This matter is before the Administrative Law Judge (ALJ) on a May 28, 2021 Petition for Reconsideration by Defendant asserting patent error in the May 20, 2021 Opinion, Award, and Order. Defendant asserts patent error in inclusion of 5% impairment for Plaintiff's diagnosis of tinnitus under the Kentucky Workers' Compensation Act (hereinafter "the Act").

Plaintiff has responded Defendant's Petition asserting that Plaintiff's tinnitus secondary to his closed head injury does not fall within the statutory provision pertaining to occupational hearing loss. Therefore, Defendant's Petition should be overruled.

KRS 342.281 provides that an ALJ is limited on review on petition for reconsideration to correction of errors patently appearing on the face of the award, order, or decision. Upon reconsideration, the ALJ agrees that patent error appears on the face of the Opinion, Award, and Order with respect to impairment rating utilized to award PPD benefits.

Specifically, the Kentucky Workers' Compensation Act provides that for "all claims of occupational hearing loss caused by either a single incident of trauma or by repetitive exposure to hazardous noise over an extended period of employment, the extent of binaural hearing impairment shall be determined under the 'Guides to the Evaluation of Permanent Impairment.'" KRS 342.7305(1).

Further, this provision states that "[i]ncome benefits payable for occupational hearing loss shall be as provided in KRS 342.730, except income benefits shall not be payable where the binaural hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%). No impairment percentage for tinnitus shall be considered in determining impairment to the whole person." KRS 342.7305(2).

Pursuant to applicable statutory provisions, the 5% impairment assessed by Dr. Barefoot for Plaintiff's tinnitus from a single incident of trauma was erroneously included as part of the combined whole person impairment in the Opinion, Award, and Order. Accordingly, Defendant's Petition is **SUSTAINED**.

On appeal, Huerta argues KRS 342.7305 pertains to claims for occupational hearing loss, which he has not alleged. Huerta notes he filed a Form 101 for physical injuries sustained when he fell. Huerta asserts the diagnosis of

tinnitus in both ears was a separate diagnosis from noise-induced hearing loss. The AMA Guides defines tinnitus as:

A sensation of noise (such as ringing or roaring) in the ear. Tinnitus may be audible or inaudible. Audible tinnitus is usually associated with a muscular tic or vascular bruit. Inaudible tinnitus can be heard only by the person affected and may be associated with an obstruction of the external auditory canal or a disturbance of the auditory nerve and/or the central nervous system.

Huerta notes the definition of tinnitus does not indicate tinnitus is a form of hearing loss. Dr. Barefoot diagnosed ongoing tinnitus secondary to closed head injury and facial fractures. Huerta argues his tinnitus does not fall under KRS 342.7305. He argues the ALJ did not err in initially including the impairment for tinnitus in the award. Huerta contends the reversal of the original award including the impairment for tinnitus is in error pursuant to Bowerman v. Black Equip. Co., 297 S.W.3d 858 (Ky. App. 2009).

We agree that Huerta's claim was neither filed as a occupational hearing loss claim, nor did it proceed as an occupational hearing loss claim. There was no referral for evaluation as mandated in KRS 342.7305(3) and 803 KAR 25:010 section 11(1). However, Bannister and the ALJ equated any claim that includes an allegation of tinnitus with an occupational hearing loss claim.

KRS 342.7305 provides:

Compensability of occupational hearing loss --
Authority for administrative regulations -- Rebuttable
presumption as to employer liability.

(1) In all claims for occupational hearing loss caused by either a single incident of trauma or by repetitive exposure to hazardous noise over an extended period of

employment, the extent of binaural hearing impairment shall be determined under the "Guides to the Evaluation of Permanent Impairment."

(2) Income benefits payable for occupational hearing loss shall be as provided in KRS 342.730, except income benefits shall not be payable where the binaural hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%). No impairment percentage for tinnitus shall be considered in determining impairment to the whole person.

By its clear language, KRS 342.7305 is applicable only to occupational hearing loss claims. In addition to the definition of tinnitus in the AMA Guides set forth above, we note Stedman's Medical Dictionary, 28th Edition, defines tinnitus as follows:

Perception of a sound in the absence of an environmental acoustic stimulus. The sound can be a pure tone or noise including (ringing, whistling, hissing, roaring, or booming) in the ears. Tinnitus is usually associated with a loss of hearing. The site of origin of the sound percept may be in the central auditory pathways even if the initial lesion is in the end organ of the auditory system.

Neither the definition in the AMA Guides nor that in Stedman's categorizes tinnitus as a form of hearing loss. No medical opinion of record states tinnitus is a form of hearing loss. The ALJ specifically stated she found Dr. Barefoot's opinion more credible than that of Dr. Loeb, who felt the tinnitus resulted from hearing loss. Because the ALJ rejected occupational hearing loss as the cause of the tinnitus, KRS 342.7305, which governs occupational hearing loss, is inapplicable. The restriction in KRS 342.7305 against the inclusion of tinnitus refers to the determination of the level of hearing impairment in occupational hearing loss

claims. Tinnitus is not to be used to reach the 8% threshold for compensability of occupational hearing loss or the ultimate impairment rating for hearing loss.

In his impairment assessment, Dr. Barefoot did not determine impairment from hearing loss. Rather, he determined impairment from a physical trauma. Dr. Barefoot diagnosed ongoing tinnitus secondary to a closed head injury and facial fractures due to a workplace fall. The ALJ relied upon the testimony from Dr. Barefoot in finding Huerta sustained a work-related injury to his ear in the form of tinnitus on January 29, 2019. There was no finding that Huerta had occupational hearing loss as a result of the accident. The ALJ accepted Dr. Barefoot's opinion that physical trauma caused the tinnitus. Under the facts of this claim, and given the ALJ's finding the tinnitus resulted from physical trauma rather than hearing loss, the exclusion in KRS 342.7305 does not apply. Substantial evidence in the original decision supported the ALJ's finding that Huerta was entitled to the impairment rating assessed for tinnitus. The ALJ erroneously reversed that decision on reconsideration based upon the inapplicable provisions of KRS 342.7305.

Accordingly, the June 14, 2021 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge, is hereby **REVERSED**. This claim is **REMANDED** for entry of an amended Opinion, Order, and Award reinstating the impairment rating related to Huerta's tinnitus.

ALL CONCUR.

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