

OPINION ENTERED: JULY 12, 2012

CLAIM NO. 201100684

KES ACQUISITION CO.

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,  
ADMINISTRATIVE LAW JUDGE

DANNIE SHUMATE  
and HON. DOUGLAS W. GOTT,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AFFIRMING**

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

**SMITH, Member.** KES Acquisition Co. ("KES") appeals from the February 1, 2012 Opinion, Award and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"), awarding Dannie Allen Shumate ("Shumate") permanent partial disability ("PPD") benefits due to a work-related hearing loss. KES also appeals from the February 27, 2012 Order overruling its petition for reconsideration. On appeal, KES argues the ALJ erred in finding Shumate suffered an

injurious exposure while employed by KES. KES also argues the ALJ erred in finding the claim was not barred by the statute of limitations. We affirm.

Shumate filed a Form 103, Application for Resolution of Hearing Loss Claim on May 6, 2011, alleging that on December 18, 2010 he became disabled due to occupational hearing loss arising out of and in the course of his employment. Shumate alleged that he became aware of his hearing loss condition on May 4, 2011. He testified by deposition on September 6, 2011 and at the hearing held December 14, 2011.

Shumate testified he worked for KES or its predecessor, Kentucky Electric Steel for approximately 42 years, except for one year his employment was terminated when the company had closed due to bankruptcy. He was rehired in 2004 and passed mandatory hearing tests each year thereafter.

Shumate repaired equipment in different areas of the facility, usually working 12 hour shifts. He worked three to six hours a day near an electric arc furnace that was extremely loud. Shumate also worked around twenty loud vibrator motors used to break up dust in large collection bins in the dust collection center. Shumate stated he was also exposed to excessive noise around the caster. There, an 80 ton crane would bring in a ladle filled with molten steel. Shumate stated noise protection was needed

everywhere in the facility and he used earplugs the entire time he worked at KES.

KES filed the deposition of Donald Prater, its safety and environmental manager. He noted the melt shop would have noise up to 114 decibels when the arc furnace was running. However, he stated the arc furnace ran during the night shift from 6:00 p.m. to 6:00 a.m. before Shumate reported to work. He was not sure of Shumate's schedule, but thought his normal shift began at 7:00 a.m. Prater indicated KES had a hearing protection program that required hearing protection of at least 25 decibels of noise reduction. He was not aware if Shumate had ever been warned or disciplined for failing to wear hearing protection.

KES filed the deposition of Randall Beardsley, melt shop manager. To his knowledge, Shumate always wore hearing protection. Beardsley stated the arc furnace would still be running when Shumate reported for work, but only for about an hour. Beardsley stated Shumate worked mostly on equipment that was not in operation. He confirmed Shumate spent a significant amount of time in the "bag house" maintaining equipment. Beardsley indicated the caster would normally run until 9:00 a.m. Shumate normally arrived between 6:00 a.m. and 7:00 a.m. Beardsley also indicated Shumate used air powered tools which were loud.

Shumate filed the report of Dr. Robert Manning, an audiologist, who evaluated him in 2004 and previously assigned a 16% impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). In his 2011 evaluation, Dr. Manning assigned a 22% impairment rating pursuant to the AMA Guides.

Dr. Barbara Eisenmenger, an audiologist at the University of Louisville, performed a university evaluation in accordance with KRS 342.315 on July 25, 2011. Dr. Eisenmenger indicated Shumate had a greater hearing loss than would be expected for an individual of 67 years of age. Objective and behavioral measures were consistent and showed a pattern typical of that seen with long-term noise exposure. Based on the reported history of noise exposure, the apparent absence of other factors associated with hearing loss, and results of the hearing evaluation, she stated the primary cause of Shumate's hearing loss was long-term noise exposure. Dr. Eisenmenger indicated the audiogram and other testing established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. She stated, within reasonable medical probability, Shumate's hearing loss was related to repetitive exposure to hazardous noise over an extended

period of employment and assigned a 22% functional impairment rating pursuant to the AMA Guides.

Dr. Eisenmenger testified by deposition on December 1, 2011. When asked whether the earplugs Shumate used could be an effective type of noise suppression, Dr. Eisenmenger stated:

Making the assumption that they're the foam type earplugs, that they're inserted properly, and they're - he's in the right noise environment. I mean foam plugs will provide a certain amount of protection; maybe not as much as a custom-made earplug so but I have no idea what the noise exposure levels were.

Dr. Eisenmenger indicated that once noise exposure "is done" and a small range of time has passed, one should not see any additional hearing loss dating back to previous noise exposure. Dr. Eisenmenger testified protection is required where there is constant noise over 85 decibels. Any noise over 85 decibels is considered hazardous. With regard to the OSHA guidelines, Dr. Eisenmenger testified as follows:

Well, that - according to OSHA guidelines that is not, you know, once you hit 85 if it's over 85 you can have - you can be in an environment for eight hours up to 85. Add five dB, now you can only have four hours. Add five more, now you can only have two hours. So for a little over 85 then what that says is OSHA's guidelines, and that's

all I'm talking about here, says that you - the exposure has to be reduced by half for every five dB you increase.

Dr. Eisenmenger indicated that, while working near the arc furnace with 25 decibel rating protection, Shumate was exposed to noise slightly louder than what was allowable for eight hours.

A benefit review conference was conducted on September 6, 2011. The only issue listed in the BRC order and memorandum was "benefits per .730." At the hearing, the ALJ indicated the contested issues had been clarified prior to the hearing. The following exchange took place:

Judge Gott. . . The issues include whether there has been an injurious exposure, work-related causation, and then benefits under KRS 342.7305.

Additionally, the parties noted their stipulation that Mr. Shumate presented a hearing loss claim in 2004, for which he was assigned a 16 percent impairment for hearing loss at that time. And plaintiff's proof through University evaluation in this case is that he has current impairment of 22 percent and so there is - the defense also raises the issue of whether that 6 percent difference entitles plaintiff to benefits based on the 8 percent threshold of .7305.

Counsel, did I recite that generally accurately enough?

Mr. Smith: I believe so, your Honor.

Ms. Hoskins: Yes, your Honor.

The ALJ made the following findings relevant to this appeal:

6. As to the merits of the claim, the Defendant first argues that Shumate has not sustained his burden of proving injurious exposure. *Young v. Burgett*, 483 S.W.2d 450 (Ky. 1972). The ALJ relies on Shumate's testimony and the medical evidence from Dr. Eisengenger [sic], whose opinion is provided presumptive weight by KRS 342.315(2), to find that Shumate did suffer a work related injurious exposure.

7. The Defendant next argues limitations. That issue was not preserved on the BRC Order, or on the expansion of issues stated at page four of the hearing transcript. Regardless, the ALJ finds from the testimony of Shumate, and the medical evidence from Dr. Eisenmmenger [sic] and Dr. Manning, that Shumate timely filed his claim for additional impairment from work related hearing loss.

8. The ALJ relies on Dr. Eisenmenger and Dr. Manning to find that Shumate's present hearing loss is 22%, which is an increase from the 16% hearing loss he had in 2004. Therefore, he has proven 6% impairment related to his hearing loss claim of December 18, 2010.

KES filed a petition for reconsideration arguing the ALJ failed to make sufficient findings of fact to support his determination Shumate had an injurious exposure. KES also noted Shumate testified he had been subject to a

hearing protection program and had worn hearing protection at all required times since he was hired by KES in 2004. Finally, KES noted Dr. Eisenmenger stated she could not tell what the level of exposure was at KES and that an employee would need to be exposed to an average of 85 decibels over an eight hour day to be injuriously exposed.

The ALJ rendered his Order overruling the petition for reconsideration on February 27, 2012. The ALJ noted, with regard to the sufficiency of his findings, he had relied on the opinion of the university evaluator in making his finding. The ALJ further noted he was not required to comprehensively detail his reasoning in reaching a particular conclusion and the findings expressed in the opinion satisfied the requirements.

On appeal, KES argues the evidence fails to establish Shumate suffered an injurious exposure to loud noise while employed there. KES again notes Shumate wore hearing protection since he was hired in 2004. KES cites to the testimony of Mr. Prater that, when the required 25 decibel hearing protection is used, employees would be exposed to less than 90 decibels. He further testified the average exposure in an eight hour day would be much less. KES notes Dr. Eisenmenger indicated an employee would need to be exposed to an average of 85dB over an eight hour day to

be injuriously exposed. KES argues Shumate's hearing loss must be due to his prior employment. It contends Shumate's testimony was insufficient to establish an injurious exposure at KES.

KES argues the ALJ erred in finding the claim was not barred by the statute of limitations. KES notes it filed a special answer regarding the issue and the parties argued the issue before the ALJ<sup>1</sup>. Thus, it contends the issue was properly preserved for review. KES notes Shumate was hired by KES prior to settling his claim against Guardian Automotive and the last employer at which a claimant is injuriously exposed is solely liable for benefits in a hearing loss claim. KES argues that, if Shumate had an injurious exposure at KES, he had a claim against KES at the time the prior claim was settled. KES contends Shumate was aware of his occupational hearing loss at the time he settled the claim but failed to assert any claim against KES. KES argues Shumate was limited to pursuing a claim for hearing loss sustained in the two years prior to the filing of his claim against KES. KES argues Shumate failed to demonstrate how much of his hearing loss occurred in

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<sup>1</sup> Shumate's brief before the ALJ does not address the statute of limitations issue.

that time. KES requests that the Board reverse the ALJ's findings and direct that the claim be dismissed.

KRS 342.7305(4) provides 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 work place, there shall be a rebuttable presumption that the hearing impairment is an injury covered by this chapter, and the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits.

KRS 342.0011(4) defines injurious exposure as "exposure to an occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made."

It is well settled no minimum amount of time is required to constitute an injurious exposure. South East Coal Co. vs. Caudill, Ky., 465 S.W.2d 62 (1971). If the character of the exposure Shumate received while employed by KES is such that it would have caused an occupational hearing loss if continued for an indefinite time, then Shumate received an injurious exposure.

Here, Shumate testified he worked near the arc furnace as much as three to six hours during his shifts. Additionally, Shumate worked in other noisy areas of the

facility and worked with loud air powered tools and testified he frequently worked twelve hour shifts. Dr. Eisenmenger indicated Shumate had a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. Testimony from Mr. Prater established noise in the arc furnace area could reach 114 decibels. Testimony from Dr. Eisenmenger established that, even when hearing protection was properly used, noise in the arc furnace area could exceed 85 decibels. She noted any noise greater than 85 decibels is considered hazardous. We conclude there was sufficient evidence for the ALJ to find Shumate suffered an injurious exposure during his employment with KES.

Shumate's testimony and that of Dr. Eisenmenger is sufficient to establish repetitive exposure to hazardous noise in the workplace. Shumate made a sufficient showing to entitle him to the rebuttable presumption in KRS 342.7304(4) that the hearing impairment was an injury covered by the Act. Although KES presented rebuttal evidence in the form of lay testimony from Mr. Beardsley and Mr. Prater and through examination at the deposition of the university evaluator, the ALJ was free to assign whatever weight he deemed appropriate to the rebuttal evidence. Here, the ALJ was more persuaded by Shumate's testimony regarding his exposure to noise, and evidence from Drs.

Eisenmenger and Manning regarding increased impairment from that exposure, all of which constitute substantial evidence supporting the ALJ's decision. Dr. Eisenmenger testified hearing loss does not worsen after exposure ceases. Thus, Dr. Eisenmenger's opinion rules out prior exposure to noise as the cause of Shumate's increased hearing loss following settlement of his prior claim. There is no evidence in the record identifying any cause for the increase in hearing loss other than continued long term exposure to noise in the work place. Based upon the totality of the evidence, we cannot say the ALJ's finding is clearly erroneous.

The issue of the statute of limitations was not preserved as an issue before the ALJ, either in the BRC order or at the hearing. The administrative regulation pertaining to the benefit review conference, 803 KAR 25:010 section 13(14), plainly provides "Only contested issues shall be the subject of further proceedings." Thus, KES waived its argument concerning the statute of limitations. Therefore, since that issue was not preserved for a decision by the ALJ, it may not be considered on appeal.

Accordingly, the February 1, 2012 Opinion, Award and Order and the February 27, 2012 Order rendered by Hon. Douglas W. Gott, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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