

OPINION ENTERED: July 5, 2012

CLAIM NO. 201101165

KES ACQUISITION COMPANY

PETITIONER

VS.

**APPEAL FROM HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE**

DANNY J. WOLFE
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AFFIRMING IN PART
AND REMANDING**

* * * * *

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

ALVEY, Chairman. KES Acquisitions Company (KES) seeks review of the opinion, order, and award rendered March 22, 2012 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") awarding Danny Wolfe ("Wolfe") permanent partial disability ("PPD") benefits and medical benefits for an occupational hearing loss. KES also appeals from

the April 19, 2012 order denying its petition for reconsideration.

On appeal, KES argues the ALJ erred by concluding Wolfe sustained injurious exposure to loud noise while employed by KES. KES also argues the ALJ failed to offer sufficient reasoning to support his conclusions regarding injury and causation. Finally, KES argues the ALJ erred in concluding Wolfe gave due and timely notice of the work-related hearing loss. We affirm in part and remand.

Wolfe filed the Form 103, Application for Resolution of Hearing Loss Claim, on August 25, 2011 alleging he became disabled due to occupational hearing loss arising out of and in the course of his employment with KES on March 31, 2010. Wolfe alleged his hearing loss was due to exposure to loud noise as an oiler. Wolfe continues to work for KES. In support of his claim, Wolfe attached an audiological report prepared by Tony Waybright, audiologist, on March 31, 2010, who works with Dr. Baker of Southern ENT Associates. In the report, Mr. Waybright noted Wolfe reported forty years of occupational noise exposure and complained of difficulty understanding speech, especially in noisy environments. A hearing test performed on March 31, 2010 demonstrated normal type A tympanograms of both ears, suggesting normal middle ear compliance with

normal ear canal volumes, bilaterally. However, the audiometric testing revealed "a mild to profound sensorineural hearing loss, consistent with his history of noise exposure." Mr. Waybright assessed the following hearing loss percentages:

Percentage of hearing loss:
Right ear: 31.9%
Left ear: 24.4%
Binaural: 25.6%
Whole Body: 9%

He opined the hearing loss was consistent with Wolfe's symptoms and caused difficulty in speech understanding, especially in noisy environments. He recommended hearing conservation, annual audiograms and binaural hearing aid fitting.

A university evaluation was performed by Drs. Jones and Shinn on November 4, 2011, pursuant to KRS 342.315(2) and 803 KAR 25:010(11). Dr. Jones noted Wolfe had worked in a steel mill for forty-one years. Wolfe reported hearing loss for approximately twenty years, had never been in the military and had no family history of hearing loss, other than his father, who had also worked in the steel mill and developed sensorineural hearing loss. Wolfe reported wearing hearing aids for approximately a year. The examination revealed normal external canals and normal TMs, and the audiogram revealed "a sloping symmetric

bilateral high frequency sensorineural hearing loss consistent with noise exposure." Dr. Jones further noted:

I do believe within a reasonable degree of medical certainty that Mr. Wolfe suffers from an occupational related noise induced sensorineural hearing loss. Using 5th Edition AMA guidelines he has a 26.3% hearing impairment, which translates to a 9% impairment of the whole person."

Dr. Jones opined the testing established a pattern of hearing loss compatible with that caused by hazardous noise exposure and noted Wolfe's hearing loss is related to repetitive exposure to hazardous noise over an extended period of time. Dr. Jones recommended use of hearing protection.

Wolfe submitted a letter dated April 19, 2010, from his counsel, Kenneth Smith of Kirk Law Firm to KES, addressed to "To Whom it May Concern." The letter stated "This letter hereby notifies you that your employee, Danny Joe Wolfe, has been diagnosed with occupational hearing loss." Wolfe also submitted an affidavit dated January 25, 2012 by his counsel stating on April 19, 2010, he prepared and mailed to KES the aforementioned letter, which at no point had been returned.

Wolfe testified by deposition on January 5, 2012 and again at the hearing on January 24, 2012. Wolfe, a

resident of Rush, Kentucky, was born on October 11, 1949. He completed high school and has no vocational or specialized training. Wolfe testified he began working at Kentucky Electric Steel, a steel mill, in December 1969 where he worked in a variety of positions within the plant including work as a laborer in the finishing department, as a tondish repairman in the melt shop, as a helper in the furnace area, as a janitor in the shipping department, and as an overhead crane operator until the steel mill shut down in 2001 or 2002. Wolfe testified he was rehired by KES in 2005. Between the time the plant shut down and being rehired in 2005, Wolfe worked one day at a landfill and briefly at Wal-Mart.

Since 2005, Wolfe has continued to work in the maintenance department as an oiler where he checks the oil levels of machinery and is responsible for greasing all machinery. This requires him to go to the finishing department, rolling mill and overhead cranes. Wolfe testified the machines are normally not running when he is greasing them. Wolfe denied having prior ear injuries.

When asked if he is normally exposed to loud noise as an oiler, Wolfe testified at the deposition as follows:

A: Yes, at times, sir.

Q: What kind of loud noises are you normally exposed to?

A: Well, down there in finishing you've got the hot metal that rolls - that goes down the roll line onto what's called a cooling bed. And then they - you've got different operators from different parts there that, you know, shift it over where it goes through the sheerer and all this stuff down where it's stacked at.

Q: But this stuff is normally not running when you're working on it; is that correct?

A: No, sir. See I work weekends and-

Q: Weekends when they're -

A: Uh-huh (affirmative response.)

Q: - not operating; correct?

A: Right.

Q: Okay.

A: But then there's - there's like on a Monday they are running, you know, the rolling mill and everything.

Q: But are you normally around them when they're running or -

A: Parts of it.

Q: Okay.

A: See, I've still got - got all my oil levels to check and different units and all this stuff.

At the hearing, Wolfe further testified about his exposure to loud noises as follows:

Q: Okay - are you exposed to loud noises in maintenance and as an oiler?

A: Every once in a while.

Q: Okay - what do you mean by "every once in a while?" Are you exposed to loud noise everyday?

A: No, ma'am.

Q: Are you exposed to loud noise every week?

A: On certain days we are.

Q: Okay - what are you doing specifically on those days?

A: Well, I - - I have my - - I have oil levels to check in different machinery. I have hydraulic fluid to check in different units and if I don't do my job they have a breakdown they're going to say, you know, you let this lapse or whatever and . . .

Q: Okay - when you are checking the oil levels or the levels in this machinery. . .

A: Well, it's like. . .

Q: Are those machines running?

A: Part of them sometimes, yes, ma'am.

Q: Are there machines around them that are running?

A: Yes, there's - - like up in the Rolling Mill you've got all this

equipment that has to be checked and like I said you have to keep the oil levels and hydraulic fluid and stuff like that put in these units. All right - this one unit that I have to keep a check on it's inside this room which outside here you've got the steel going through the different mills and stuff.

Q: Is that loud?

A: Well, at times it is. That's like last week they was making this 12-inch wide by one inch thick or three-quarters inch and this stuff is - - you can imagine.

Q: Okay - what are some other noisy parts of your job?

A: Well, it's like down there in Finishing after the steel goes through the mills to whatever width or - - it goes down there and it runs - - it comes off the Rolling Mill like - - or the Roll Line this this - - all right? And, then you got - - I've got units down there I have to check. But, they're not going to shut down production, you know, and say Danny Wolfe has got to check this out or that out. You still have to - - you got things you have to check on.

Q: Okay - as you're going from place to place to check this equipment is there noise going on around you?

A: Yes, ma'am. And, then, like the weekends that's when maintenance has to do all the repairs. And, of course, I - - I help the maintenance people at times with these things, you know, if they're down now.

Q: Okay.

. . . .

Q: So, how often do you have to go to the different parts of the plant and check the levels?

A: It's supposed to be done every day.

Q: All right.

A: Or every day that I'm out there.

Wolfe admitted during the times described above, he wears ear protection.

Wolfe also testified he was exposed to loud noises at the plant prior to 2005, including when he worked around the furnaces, overhead cranes, and melt shop. Wolfe testified since 2005, he has attempted to wear hearing protection at all times while at work. Prior to 2005, the plant had hearing protection available to employees which he occasionally utilized.

Wolfe testified he currently has difficulty hearing and understanding people when they talk. He first began to notice he had hearing difficulty approximately twenty years ago which he had never discussed with a physician. Wolfe had a hearing test administered by Mr. Waybright at Dr. Baker's office in March 2010, and he had another performed at the University of Kentucky Clinic in November 2010. Wolfe testified KES performed annual

hearing tests, but he was not provided with the results. Wolfe does not remember if the plant conducted annual hearing tests prior to 2005.

Wolfe testified he obtained hearing aids on his own and has worn them for approximately two years. However, Wolfe testified he was not told he had a work-related hearing loss until he saw Dr. Baker in March 2010. After he received the hearing aids, he sought counsel to assist with recouping their cost.

KES submitted the deposition of Dr. Jones dated January 20, 2011. Dr. Jones explained hearing loss is most commonly the result of age or noise exposure, but can be caused by several other factors including disease, medication, head injury, congenital abnormalities and genes. Dr. Jones testified he did not perform any testing to rule out disease, congenital abnormality or genetic causes for hearing loss. Likewise, he did not see any sound studies or testing performed at KES and he was unaware of the hearing protection offered to the employees. However, Dr. Jones testified as follows:

Those would all be nice things to learn but in practicality we rarely, in fact, I have never had all that information. What we do is we take a history and put it together with the physical findings including the audiogram and then come up with the most likely explanation for

the scenario, so I don't think you need to have those sorts of data that you described to make a reasonable medical judgment as to what the cause of a hearing loss is.

In this instance, Wolfe's audiogram was consistent with the noise pattern set forth in his history.

David Hylton ("Hylton"), manager of the rolling mill at KES, testified by deposition on January 5, 2012. Hylton has worked at the plant since 1996, and he has been employed by KES since 2004 as the rolling mill manager. He explained the rolling mill and finishing department are in the same building, but are separated by approximately 250 feet of roll line. The finishing department can be one of the noisiest parts of the steel mill, especially the cooling beds, stacker and the shuffle bars. Hylton testified Wolfe might have briefly been exposed to the noise of the stacker in the finishing department.

Hylton testified KES has a hearing protection program in place which requires employees to wear hearing protection any time the mill is in operation. KES makes hearing protection available to its employees in the form of ear plugs, and on request, ear muffs. Employees are trained annually on the use of hearing protection through safety meetings. Hylton testified Wolfe is a laborer/oiler/greaser for the rolling mill maintenance department

who he supervises. Wolfe primarily lubricates the roll lines and the mill equipment, and assists the maintenance men. Hylton has never warned or cited Wolfe for not wearing hearing protection. He also testified Wolfe primarily works during the weekends when the mill is shut down and he has never noticed him to have hearing problems.

Donny Prater ("Prater"), the safety environmental security manager at KES testified by deposition on January 5, 2012 and also at the hearing on January 24, 2012. Prater has been employed by KES since May 2004. Prater also handles radiation safety and insurance. Prater testified he manages the KES hearing protection program, which he rewrote and republished in July 2004. The program requires employees to wear protection with at least a twenty-five noise reduction rating ("NRR") in operating areas, including the mill and melt shop, or when operating any loud machinery. Prater explained a twenty-five NRR means the hearing protection would reduce exposure to noise by twenty-five decibels over an eight hour time weighted average. For example, if an employee was wearing twenty-five NRR hearing protection while exposed to 115 decibels, the exposure level would be reduced to ninety decibels. Prater testified the loudest areas of the steel mill are

the finishing department stacker and the electric arch furnace, which measure at 114 decibels.

Prater testified OSHA standards require action to be taken by employers to reduce noise exposure if the noise level is measured at eighty-five decibels or above over an average eight hour work day. Employees can be exposed to ninety decibels pursuant to OSHA standards. Prater also testified the twenty-five NRR hearing protection keeps the noise level under the average of ninety decibels over the work day in all the areas in the steel mill plant.

Prater testified Wolfe is a greaser with the maintenance department and stated he could potentially be exposed to loud noise in the entire rolling mill since he greases equipment while they are in operation. He testified Wolfe could be exposed to everything from the rolls in the mills to the stacker in the finishing department. To his knowledge, Wolfe has never been warned or cited for not wearing hearing protection.

Prater testified at the hearing concerning the April 19, 2010 notice letter submitted by Wolfe. Prater handles workers' compensation for KES and would be the person who would have received the notice letter. Prater testified neither he nor any other employee at KES had received the letter. The letter could have ended up in

Wolfe's personnel file without him first seeing it. However, he checked Wolfe's file and had not found it. Prater admitted the letter listed the correct address of KES. Prater first learned of Wolfe's hearing loss claim when he received notice of the claim filing from the Department of Workers' Claims.

Prater also testified all KES employees undergo annual hearing tests. Prater receives the annual hearing tests results and keeps track of them. Prater testified as a practice, he does not mail the hearing test results to employees. When asked if any of Wolfe's prior hearing tests results indicated any type of hearing loss, Prater testified as follows:

It's a broad question. What I do, I take the hearing tests and I track them on a spreadsheet and see if there is a fifteen (15%) percent shift to make an OSHA reportable and I haven't seen an OSHA reportable for him. There is definite hearing loss, though, as far as being normal and - - the normal range versus the middle range versus the (inaudible) range which is very common.

In the opinion, order, and award rendered March 22, 2012, the ALJ stated as follows in awarding PPD benefits and medical benefits for Wolfe's hearing loss claim:

The first issues for determination are whether or not the Plaintiff suffered injurious exposure to loud noise while employed for the Defendant Employer, KES Acquisition and whether he was exposed to these industrial noises within the statutory time period of two years as mandated by KRS 342.185.

KRS 342.7305 (4) states, "when audiogram's or other testing revealed 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 shall be exclusively liable for benefits."

The Defendant Employer argues the Plaintiff was not exposed to industrial noise at such a level as to be considered an injurious exposure since returning to work for KES Acquisitions in 2004. They[sic] argue that upon his return to work in 2004, the Plaintiff was provided and wore hearing protection and was not exposed to industrial noise at such a level as would cause him to incur hearing loss worse than what was already in existence prior to 2004. They[sic] argue that he performed his job primarily on the weekends and when the machinery was not running and that, coupled with his hearing protection, prevented him from being exposed to loud industrial noise.

The Plaintiff testified while he was not exposed to loud industrial noise on a continuous daily basis, there were times that he was exposed to

industrial noise while in the steel mill. He testified that steel mill is inherently a noisy environment, an opinion that was agreed to by Mr. Prater.

In addition, the Defendant Employer argued that Mr. Wolfe's work was performed when the plant was shut down. However, Mr. Wolfe testified he was frequently exposed to noise from the stacker, as well as other loud noises in the steel mill and while the machine he was working on may have been shut down there were other machines operating in the steel mill that were extremely noisy. In addition, there were occasions in order to communicate that he had to remove his hearing protection.

Therefore, in this specific instance, after a careful review [sic] the evidence, the Administrative Law Judge finds Mr. Wolfe's testimony to be credible and believes that[sic] met his burden of proving he was exposed to the hazards of industrial noise while employed by Kentucky Electric Steel. Therefore, the Administrative Law Judge finds Mr. Wolfe was last injuriously exposed to hazardous noise while employed by the Defendant Employer. In addition, the Administrative Law Judge finds that Mr. Wolfe was exposed to the hazards of industrial noise on March 31, 2010 and in fact continues to be exposed to it as he is currently working for KES Acquisitions.

The next issues for determination are whether or not Mr. Wolfe's hearing loss condition is causally related to his employment [sic] KES Acquisitions and constitutes an injury as defined by the Act. In this instance, Dr. Jones and the audiologist, Dr. Waybright have

both performed audiograms that revealed a pattern of hearing loss compatible with that caused by hazardous noise exposure. In addition, Mr. Wolfe has demonstrated that he was repetitively exposed to hazardous noise in the workplace, at the steel mill, thereby creating a rebuttable presumption that the hearing impairment is an injury covered by this chapter.

The Administrative Law Judge further finds that the opinion of Dr. Jones, finding Mr. Wolfe suffers from noise induced hearing loss as a result of his employment for the Defendant Employer, is entitled to presumptive the[sic] weight pursuant to KRS 342.315. While the Defendant Employer argues that Dr. Jones opinion is not credible as he did not have a factual basis for determining that Mr. Wolfe's hearing loss was work-related. A review of Dr. Jones deposition reflects that he based his opinions on the history given him by Mr. Wolfe and compared that to the audiogram testing in reaching his determination. Dr. Jones testified that this is the proper methodology for determining whether or not an employee suffered noise induced hearing loss. In addition, the Administrative Law Judge believes that the testimony of Mr. Wolfe regarding the history he gave Mr. Jones was accurate in regards to his exposure level.

The Defendant Employer has argued that Mr. Wolfe was not repetitively exposed to hazardous noise in the workplace and therefore the rebuttable presumption is not applicable. However, as previously indicated, the Administrative Law Judge believes that Mr. Wolfe was repetitively exposed to hazardous noise in the workplace, which

led to his noise induced hearing loss as evidenced by audiogram testing performed by Dr. Jones.

Therefore, the Administrative Law Judge finds Mr. Wolfe has met his burden of proving that he suffered an injury as defined by the Act and that his noise induced hearing loss is causally related to his exposure to industrial noise while employed as a steelworker at KES Acquisitions.

The next issue for determination is whether or not Mr. Wolfe gave notice of his hearing loss claim. KRS 342.185 (1) states, "no proceeding under this chapter for compensation for an injury or death shall be maintained unless notice of the accident shall been given to the Employer as soon as practicable after the happening thereof."

The Defendant Employer argued they[sic] did not receive actual notice that Mr. Wolfe was pursuing a hearing loss claim until they[sic] received notification from the department of Worker's Claims of his intent to do so. Mr. Wolfe argues and the Employer acknowledged that Mr. Wolfe underwent a hearing test once per year. In addition, the Plaintiff submitted an affidavit and letter indicating that written notice was sent to the Employer on April 19, 2010.

In this instance, the Administrative Law Judge finds that the Defendant Employer had notice that Mr. Wolfe was suffering from noise induced hearing loss as a result of his exposure to occupational noise while employed at the steel mill. The Administrative Law Judge believes that this notice came as a result of the hearing tests performed on Mr. Wolfe on

an annual basis by the Employer. In addition, even if the Employer did not receive specific notice of his intent to pursue a claim until August 31, 2011, they[sic] were not prejudiced in any way. Mr. Wolfe has continued to be employed by them[sic] and has continued to be exposed to the effects of industrial noise.

The next issue for determination is the appropriate average weekly wage. A review of the evidence submitted in the record does not indicate the submission of any wage records. In his Form 101, the Plaintiff submitted that his average weekly wage was \$600.00 and filed an earnings statement attached to the Form 101. This evidence is uncontradicted. Therefore, the Administrative Law Judge finds that Mr. Wolfe's average weekly wage was \$600.00.

The next issue for determination is whether or not Mr. Wolfe has met the threshold level to be entitled to permanent partial disability benefits as a result of his work related hearing loss. KRS 342.7305 (2) states, "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 8%. No impairment percentage for tinnitus should be considered in determining impairment to the whole person."

In this instance, Dr. Jones and Dr. Waybright have both assessed Mr. Wolfe a 9% functional impairment rating for his noise induced hearing loss pursuant to the Fifth Edition of the AMA Guides. This impairment is in

excess of the minimum of 8% required by the statute and therefore Mr. Wolfe has met the threshold level entitling him to partial disability benefits based on a 9% functional impairment rating.

The next issue for determination is whether or not Mr. Wolfe suffers from any pre-existing active impairment/disability. In order for Plaintiff to be determined to be suffering from a pre-existing impairment, a functional impairment rating must be assessed, reflecting that the Plaintiff suffered from a functional impairment rating for the same body part claiming to be injured immediately before the occurrence of the work-related injury. In this instance, there is simply no evidence in the record reflecting that Mr. Wolfe suffered from any pre-existing active noise induced hearing loss for which a functional impairment rating has been assessed. Therefore, the Administrative Law Judge finds that Mr. Wolfe did not suffer from a pre-existing active impairment as a result of noise induced hearing loss.

The next issue for determination is entitlement to medical benefits. Having found the Mr. Wolfe retains a permanent partial disability, for which he is to be awarded the permanent partial disability benefits, the Administrative Law Judge likewise finds that he should be entitled to all reasonable, necessary, and related medical expenses for treatment of his work related hearing loss pursuant to KRS 342.020. See *FEI Installation vs. Williams*, 214 SW 3d 313 (KY 2007).

The last issue for determination is what level of benefits.[sic] Mr. Wolfe is entitled to pursuant to KRS

342.730. Both Dr. Jones and Dr. Waybright assessed Mr. Wolfe a 9% functional impairment rating.[sic] As a result of his work-related, noise induced hearing loss. Therefore, the Administrative Law Judge finds that Mr. Wolfe retains a 9% functional impairment rating, pursuant to the Fifth Edition of the AMA Guides, as a result of his work related hearing loss. Pursuant to KRS 342.730 (1) (b) the functional impairment rating is multiplied by a factor of .85, yielding a 7.65% permanent partial disability award.

In addition, Mr. Wolfe has continued working for the Defendant Employer, earning equal or greater wages, there has been no testimony submitted, reflecting that he does not retain the physical capacity to continue working at the type of work he was performing at the time of his injury, therefore he is not entitled to application of any statutory multipliers.

Based upon the average weekly wage of \$600.00 per week Mr. Wolfe is entitled to permanent partial disability benefits calculated at a rate of \$400.00 per week. Multiplying that amount by the 7.65% permanent partial disability yields a weekly benefit of \$30.60.

The ALJ denied KES's petition for reconsideration on April 19, 2012. KES argues on appeal the ALJ erred in finding Wolfe suffered an injurious exposure to loud noise while in its employ. KES notes Wolfe was rehired in 2005 after Kentucky Electric Steel shut down the plant in

approximately 2001. Since 2005, Wolfe has been subject to a hearing protection program and is required to wear hearing protection in loud areas of the plant, therefore preventing him from injurious exposure to loud noise. KES also notes Prater's testimony establishes KES employees who wear hearing protection would be exposed to less than ninety decibels. KES cites to Dr. Jones' deposition testimony that an employee would need to be exposed to an average of eighty-five decibels over an eight hour day in order to be injuriously exposed.

Regarding lack of causation, KES points to Wolfe's testimony of having difficulty hearing for the past twenty years, exposure to loud noise "at times" while employed by KES, and again notes the hearing protection program.

KES also argues the ALJ erred in finding Wolfe gave due and timely notice of the work-related hearing loss. KES argues although it conducted annual hearing tests on its employees, "there is no evidence that any of these hearing tests indicated a hearing loss, nor is there any indication that any such hearing loss was determined to be due to occupational causes." As a result, KES did not have actual knowledge of the work-related hearing loss claim prior to the filing of the claim by Wolfe. KES

argues it was prejudiced by the lack of due and timely notice. It argues if such notice had been provided, it could have taken steps to ensure Wolfe received no further injurious exposure.

Since Wolfe was successful before the ALJ, the question on appeal is whether there was substantial evidence to support the ALJ's decision, including that pertaining to hearing loss and notice. 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 the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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, 16 (Ky. 1977). Although a party may note evidence supporting

a different outcome than reached by the ALJ, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Upon consideration of the ALJ's analysis, we are satisfied the ALJ made adequate findings of facts sufficient to apprise the parties of the basis for his decision. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Noise induced hearing loss is a form of cumulative trauma injury as defined by KRS 342.0011(1). Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003); Quebecor Book Co. v. Mikletich, 322 S.W.3d 38 (Ky. 2010). The general rule in cumulative trauma claims is the last employer with whom the employee suffers a harmful change bears liability for the entirety of the injury. Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001); Alcan Foil

Products v. Huff, 2 S.W.3d 96 (Ky. 1999); Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). It is the date of manifestation of disability, the date the employee discovers an injury has been sustained and learns from a physician that it is work-related, that fixes respective rights and obligations of the parties, including liability for the whole of the employee's disability up to and including that date. Brummitt v. Southeastern Rehabilitation Industries, 156 S.W.3d 276 (Ky. 2005).

KRS 342.7305 specifically addresses occupational hearing loss due to hazardous noise and provides as follows:

(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.

(3) The executive director shall provide by administrative regulation for prompt referral of hearing loss claims for evaluation, for all medical reimbursement, and for prompt authorization of hearing enhancement devices.

(4) 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 shall be exclusively liable for benefits. (Emphasis added)

We find no merit in KES's argument the ALJ erred in finding Wolfe suffered no injurious exposure to loud noise while employed there. In the case *sub judice*, the ALJ found Wolfe's testimony credible. Wolfe testified he has worked for the steel mill acquired by KES in 2004 or 2005, for over forty years beginning in 1969. Wolfe testified prior to KES's ownership, he had worked in a variety of positions which exposed him to loud noise. Wolfe also testified when he was rehired as an oiler in 2005, he would "at times" or on certain days be exposed to loud noise in the finishing department, in the rolling mill, and when checking the machinery oil levels on a daily

basis. Wolfe testified prior to 2005 he occasionally wore hearing protection, but he has worn it at all times since then. It is also noted Hylton testified Wolfe might have briefly been exposed to noise from the stacker in the finishing department. Prater testified Wolfe potentially could be exposed to loud noise in the entire rolling mill since he goes throughout the mill while it is operating and greases equipment. Therefore, he could be exposed to everything from the rolls in the mills to the stacker in the finishing department.

An audiologist and university evaluator assessed a 9% impairment for a work-related hearing loss, in spite of Wolfe's alleged constant use of hearing protection. Tony Waybright, audiologist, prepared an audiological report on March 31, 2010 and concluded the audiometric testing revealed "a mild to profound sensorineural hearing loss, consistent with his history of noise exposure." Mr. Waybright noted Wolfe reported forty years of occupational noise exposure and complained of difficulty understanding speech, especially in noise. He then assessed hearing loss in 31.9% of the right ear, 24.4% of the left ear, 25.6% binaural and 9% whole body. He opined the hearing loss was consistent with Wolfe's symptoms and caused difficulty in speech understanding, especially in noise. A university

evaluation was also performed by Drs. Jones and Shinn on November 4, 2011, pursuant to KRS 342.315(2). Dr. Jones noted Wolfe had worked in a steel mill for forty-one years and has had hearing loss for approximately twenty years. The audiogram revealed "a sloping symmetric bilateral high frequency sensorineural hearing loss consistent with noise exposure." Dr. Jones further opined Wolfe suffered from an occupational related noise induced sensorineural hearing loss and assessed a 9% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment 5th Edition. He also opined the testing established a pattern of hearing loss compatible with that caused by hazardous noise exposure and noted Wolfe's hearing loss is related to repetitive exposure to hazardous noise over an extended period of time. KES did not submit any medical evidence in support of its arguments regarding causation, extent and duration. Therefore, we believe substantial evidence supports the ALJ's finding Wolfe was last injuriously exposed to hazardous noise while employed by KES on March 31, 2010.

We next turn to the ALJ's finding Wolfe provided due and timely notice of his work-related hearing loss. As noted above, hearing loss is a cumulative trauma injury within the context of the definition of injury pursuant to

KRS 342.011(1). Cumulative or gradual trauma injuries must be distinguished from acute trauma injuries where a single traumatic event causes the injury. The Supreme Court in Hill v. Sextet Min. Corp., 65 S.W.3d 503, 507 (Ky. 2001) noted:

Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion.

In Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to cumulative trauma injuries holding the date of injury is "when the disabling reality of the injuries becomes manifest." In Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999), the Supreme Court of Kentucky defined "a manifestation of disability" in a cumulative trauma or gradual injury claim as follows:

In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

Id. at 490.

In other words, a cumulative trauma or gradual injury manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma or gradual injury. See American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness. In this instance, Wolfe's work-related hearing loss was not diagnosed until March 31, 2010 by Mr. Waybright.

We find substantial evidence exists in the record to support the ALJ's finding of due and timely notice of Wolfe's work-related hearing loss. Although Wolfe testified he first noticed hearing difficulty approximately twenty years ago, he had never discussed it with his family physician in the past nor had he been told his hearing problem was work-related until seeing Mr. Waybright at Dr. Baker's office on March 31, 2010. Despite receiving hearing aids approximately two years prior to seeing Mr. Waybright, he was not apprised at that time by any professional that his hearing was work-related.

Wolfe testified KES performed annual hearing tests, but he was not provided with the results. He does not remember if the plant conducted annual hearing tests prior to 2005. Prater confirmed all KES employees undergo annual hearing tests. He received the results and kept track of them. As a practice, he does not mail the hearing test results to employees. When asked if any of Wolfe's prior hearing tests results indicated any type of hearing loss, Prater testified "there is definite hearing loss, though, as far as being normal and -- the normal range versus the middle range versus the (inaudible) range which is very common." Finally, Wolfe submitted a letter dated April 19, 2010, addressed to KES from Wolfe's counsel notifying it Wolfe had been diagnosed with occupational hearing loss, as well as the affidavit, which Prater testified neither he nor any other KES employee had received. He further testified the letter was not in Wolfe's personnel file. The ALJ subsequently found Wolfe provided due and timely notice by relying on the annual hearing tests performed by KES.

We find the ALJ made the reasonable inference from the evidence KES received due and timely notice of Wolfe's work-related hearing loss. KES conducted annual hearing tests, and did not convey such results to its

employees. Prater admitted the results showed "definite hearing loss." It is also noted Wolfe submitted evidence showing notice of the occupational hearing loss was mailed to KES on April 19, 2010, less than one month following the audiological exam by Mr. Waybright. Therefore, we do not believe the ALJ erred in finding Wolfe provided due and timely notice of his occupational hearing loss.

That said, KRS 342.285(2)(c) provides the Board may determine on appeal whether an order, decision, or award is in conformity to the provisions of KRS Chapter 342, and KRS 342.285(3) provides, in relevant part, the Board may, "in its discretion," remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These provisions permit the Board to *sua sponte* reach issues even if unpreserved in order to properly apply the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

KRS 342.730(1)(c)2 provides:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reasons, with or without cause, payment of weekly

benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

In the case *sub judice*, the ALJ awarded PPD benefits based upon a 9% impairment rating and found Wolfe's average weekly wage was \$600.00. The ALJ also determined Wolfe is not entitled to the application of any statutory multiplier since Wolfe has continued working for KES, earning equal or greater wages, and found no evidence reflecting he does not retain the physical capacity to continue working at the type of work he was performing at the time of his injury. However, since Wolfe continued to work for KES earning equal or greater wages as acknowledged by the ALJ in the March 22, 2012 order, KRS 342.730(1)(c)2 is applicable subject to the conditions set forth in Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009); Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010). Therefore, the ALJ's failure to provide for enhancement of the award by the two multiplier in the opinion, order, and award is in error. While we acknowledge Wolfe has not yet met the requirements as set forth in Chrysalis House, Inc., *supra* and Hogston, *supra*, at some point during the 425 weeks Wolfe receives income benefits, his employment may cease due to reasons which relate to the disabling injury, entitling him

to have his income benefits enhanced by the two multiplier upon a properly filed motion to reopen. Chrysalis House, Inc., supra and Hogston, supra.

This is consistent with KRS 342.730(1)(c)4 which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2" i.e., the two multiplier. Wolfe is entitled to have the two multiplier language included in his award, contingent upon during any period Wolfe's employment at such a wage ceases for a reason that relates to the disabling injury. The ALJ's failure to include this language in his final award is an error of law. On remand, the ALJ must include this language in the award.

Accordingly, the ALJ's opinion, order, and award rendered March 22, 2012, and order on reconsideration entered April 19, 2012 are hereby **AFFIRMED IN PART**. However, this claim is **REMANDED** for entry of an amended opinion, order, and award in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON BONNIE HOSKINS
P O BOX 24564
LEXINGTON, KY 40524

COUNSEL FOR RESPONDENT:

HON KENNETH SMITH III
P O BOX 321
CATLETTSBURG, KY 41129

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042