# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: August 5, 2014**

CLAIM NO. 201174652

FAMILY DOLLAR STORES, INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM RUDLOFF, ADMINISTRATIVE LAW JUDGE**

MADLYEN COOK
and HON. WILLIAM RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** Family Dollar Stores, Inc. ("Family Dollar") appeals from the January 15, 2014, Opinion, Order, and Award and the February 5, 2014, Opinion and Order on Petition for Reconsideration of Hon. William Rudloff, Administrative Law Judge ("ALJ"). The ALJ awarded Madlyen Cook ("Cook") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical

benefits. Family Dollar filed a petition for reconsideration which was denied by order dated February 5, 2014.

On appeal, Family Dollar challenges the decision on four grounds. First, it argues the medical evidence compels a finding Cook did not suffer an injury as defined by the Act. Second, it asserts the ALJ's determination Cook is permanently totally disabled is not supported by substantial evidence. Third, it contends the ALJ did not set forth sufficient findings of fact to support a determination of permanent total disability. Finally, Family Dollar maintains the ALJ relied upon a “factually incorrect impairment rating.”

The Form 101 alleges Cook injured her low back and left hip on August 13, 2011, in the following manner: "Mrs. Cook was on a ladder, stocking shelves. A customer asked her a question and as she turned around her left hip popped."

Significantly, the December 3, 2013, Benefit Review Conference ("BRC") order lists the following stipulation: "Plaintiff sustained a work-related injury or injuries on 8-13-2011." The BRC order lists the following contested issues: benefits per KRS 342.730; injury as

defined by the Act; medical benefits; and permanent total disability.

Family Dollar claims objective medical evidence does not establish Cook sustained an injury as defined by the Act; therefore, the claim should have been dismissed.

Significantly, Family Dollar stipulated Cook sustained a work-related injury on August 13, 2011. Pursuant to 803 KAR 25:010 Section 16(2), Family Dollar did not request relief from this stipulation; therefore, it is disingenuous for Family Dollar to now assert objective medical evidence does not support the finding Cook sustained an injury as defined by the Act.

Assuming, *arguendo*, Family Dollar had secured relief from this stipulation, the ALJ stated in the January 15, 2014, Opinion, Order, and Award that he relied upon the opinions of Dr. James Owen and Dr. Gregory Snider in determining Cook sustained a work-related injury as defined by the Act.

In his August 16, 2013, report, Dr. Owen diagnosed the following:

> 1. Chronic pain. I think it is probably of two origins, perhaps three. She clearly is tender in the area where one would suspect an abdominal wall hernia that has gone underneath the femoral ligament, which is typical for a female distribution. She clearly needs [sic]

> CT scan to rule that out. I did not see a definitive report from the contrast MRI on chart, but my suspicion is that it did not get high enough to involve the area of concern.
>
> 2. I do think she has SI joint vs. piriformis abnormality there. The piriformis has not been addressed to this point either, and she did have some tenderness and weakness to her piriformis testing.
>
> 3. I think she has degenerative disc disease with discogenic pain. All in all perhaps three different sources for the pain and thus the confusion and difficulty with treatment.

Dr. Owen checked "yes" to the following question: "Within reasonable medical probability, was plaintiff's injury the case of his/her complaints?" He opined Cook had no active impairment prior to the work-related injury. Regarding an impairment rating, Dr. Owen opined as follows:

> The impairment rating I think would be best served by using a DRE Category II. Within that categorization, for an ACL of 10/10, one would ascribe an 8% whole person impairment. One would also potentially rate this based upon the gait derangement. Although I do not have definitive evidence of advanced arthritic changes, she definitely requires use of a cane for ambulation and I think therefore would fall under Table 17-5 C: 15% whole person impairment. As is the admonition per the 5th Edition Guide to award the impairment rating that is of greatest benefit for the patient, a 15% whole person impairment would be appropriate

> considering the severity and longevity of her pain syndrome.

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). The above-cited evidence comprises substantial evidence in support of the ALJ's determination Cook sustained a work-related injury as defined by the Act. Consequently, that determination will not be disturbed.

Family Dollar's second argument on appeal is the ALJ's determination Cook is permanently totally disabled is not supported by substantial evidence.

In the January 15, 2014, Opinion, Order, and Award, the ALJ provided the following findings of fact in determining Cook is permanently totally disabled:

> In rendering a decision, KRS 342.285 grants the Administrative Law Judge 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). In this case, I make the factual determination that the plaintiff's sworn testimony was credible and convincing to the effect that she sustained significant physical injuries due to her work accident on August 13, 2011, which is covered in detail above, that she last worked on August 15, 2011, that she is not now employed,

that she has constant pain in her left low back, left hip and thigh and leg, that she takes prescription pain medication, including Lortab, Gabapentin, Naproxen and Flexeril, that she had no prior back injury or symptoms, that she has had medical treatment by a pain specialist and a rehabilitation specialist, that her housework is limited, that physical activity increases her pain, that her job with the defendant required her to unload trucks and stock shelves, that lifting was required by her job with the defendant and that she cannot do such lifting at the present time, and that she cannot physically perform her former jobs. I also make the factual determination that the medical evidence from Dr. Owen, which is covered in detail above, is very persuasive and compelling, i.e., that Mrs. Cook has diagnoses of chronic pain, SI joint vs. piriformis abnormalities, tenderness and weakness in her piriformis testing, and degenerative disc disease with discogenic pain, that within reasonable medical probability the plaintiff's injuries were the cause of her complaints, and further that using the AMA Guides, Fifth Edition, Mrs. Cook's permanent whole person impairment is 15% and also Dr. Owen's opinion that the plaintiff does not retain the physical capacity to return to the type of work which she performed at the time of her injuries and that she has physical restrictions as to lifting, handling or carrying objects more than 10 pounds and should avoid activities that require recurrent bending, squatting or stooping. I also find very compelling and persuasive Dr. Snider's medical opinion that Mrs. Cook has reached maximum medical improvement as of the time of Dr. Snider's

examination of her on December 11, 2013.

KRS 342.0011(11)(a) defines “temporary total disability” to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. Based on the plaintiff’s sworn testimony, as covered in detail above, and Dr. Snider’s opinion that she reached maximum medical improvement on December 11, 2013, the date of his examination, I make the determination that Mrs. Cook is entitled to recover from the defendant and its workers’ compensation insurer temporary total disability benefits for the period August 17, 2011 to and including December 10, 2013.

"'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

“the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the

> vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."
>
> Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).
>
> In the present case, I considered the severity of the plaintiff's August, 2011 work injuries, which are covered in detail above, and the medical evidence from Dr. Owen, which is covered in detail above, the plaintiff's age, which is now 43, her education, which was limited to the 9th grade with a GED, her complete lack of any specialized or vocational training or education, her sworn testimony regarding her very painful injuries, which is covered in detail above, as well as her physical limitations based upon her sworn testimony and the medial [sic] evidence from Dr. Owen, all of which is covered in detail above, and Dr. Snider's medical opinion that she has reached maximum medical improvement. Based upon all of those factors, I make the determination that the plaintiff Mrs. Cook cannot find work consistently under regular work circumstances and work dependably in the highly competitive employment market. I, therefore, make the factual determination that she is permanently and totally disabled, and that her permanent and total disability began on December 11, 2013, the date she reached maximum medical improvement.

In its petition for reconsideration, Family Dollar contended the ALJ did not provide sufficient

findings of fact to support a decision Cook is permanently totally disabled. However, it did not request additional findings of fact regarding this issue. Nevertheless, the ALJ provided additional findings of fact in the February 5, 2014, Opinion and Order on Petition for Reconsideration as follows:

> The defendant also argues that there was no basis for the award of permanent total disability benefits to the plaintiff. On the contrary, this aspect of the case was covered in detail on Pages 9-12 of the Opinion and Order dated January 15, 2014. I reviewed in detail the plaintiff's sworn testimony and the evidence from both Dr. Owen and Dr. Snider. I also relied upon the standards for permanent total disability set out in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky.2000). In addition, I relied upon the decision of the Kentucky Supreme Court in Hush v. Abrams, 584 S.W.2d 48 (Ky.1979), where the high court noted that it had in that case lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that is not in conflict with that lay testimony. The high court noted that the medical evidence clearly and unequivocally showed the actual body condition and that the lay testimony was competent on the question of the extent of disability which has resulted from the bodily condition. The high court held that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer a work-related trauma, having reached that conclusion the decision maker could then use the lay

testimony to determine the extent of the occupational disability. That is exactly what I did in the case at bar. I made that factual determination based upon Mrs. Cook's credible and convincing testimony that she had not had any prior back injury or back symptoms and that since her work-related injuries on August 13, 2011 she now has constant pain in her left low back, left hip, thigh and leg, and that any physical activity increases her pain. I make the factual determination that her testimony that she cannot physically perform her former jobs and is not now employed is credible and convincing.

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 evidence 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). It is well

> established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky.2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky.1976).

During her October 2, 2013, deposition, Cook testified she attended Rowan County High School through the ninth grade and then obtained a GED. Her previous employment includes manual labor working in tobacco; working for Hardees; keeping books for her mom's window cleaning business; keeping books for a home improvement business; working for Thorntons; assistant manager at Super America; a manager position at Dairy Mart; and cashier and manager at Shell.

Cook testified her symptoms are as follows:

> A: I have pain, my left thigh- I have pain in my left thigh, my left groin area, my left hip area, my lower left back area and it shoots up to almost- not quite the center of my back but it goes up to the tailbone area.
>
> Q: Okay.
>
> A: And every now and then, like right now, it goes, it shoots to the bottom of the foot-
>
> Q: Okay.
>
> A: - and sometimes in the toes. I'm sorry.

> Q: That's okay.
>
> A: My hip feels like there's a knife stuck in it, really. And my lower back is like- it's just [sic] very sharp pains in it. I'm sorry. I can't sit for very long. It hurts too bad.
>
> Q: That's okay.
>
> A: I have an indent in my hip from it but no one can tell me why. I was never there before.
>
> Q: And that's your left hip?
>
> A: Yes, sir. That's my left hip.
>
> Q: Okay.
>
> A: And my tailbone, it feels like somebody is just crushing it and if I try to wing my leg out it literally feels like it's going to pop out, pop off like you would pop a turkey leg off a turkey.

Regarding her current symptoms, Cook testified at the December 18, 2013, final hearing as follows:

> Q: Where do you experience pain or discomfort?
>
> A: In my lower left back, my left hip, my left thigh.
>
> Q: All right. Now, let's start with the low back first. Prior to your injury on August 13th, 2011, were you treating with anybody for any back pain?
>
> A: No, sir.
>
> Q: Were you taking any medications for any back pain before this injury?

A: Does it count my shoulders? I take Aleve.

Q: But not for the back?

A: Not for the back.

Q: Okay. Had you ever injured your low back in any way?

A: No, sir.

Q: All right. Now, let's talk about the pain that you experience today. Is the pain in the low back there all of the time or does it come and go?

A: It's constant pain. The levels change, but it's constant pain.

Q: All right. Now, when you say the levels change, is that the intensity of the pain, that it gets worse at times?

A: Yes, sir.

Q: All right. Let's take its best time, when it's as good as you're going to get, okay?

A: Yes, sir.

Q: Let's put that on a pain scale of zero to ten. When it's at its very best, even with medications, where would it be?

A: Four.

Q: What about when it's at its very worst on the pain scale?

A: It's a ten.

Q: How often in a weeks [sic] time, Ms. Cook, will you experience ten level pain or is it weekly?

A: It's daily.

Q: Daily.

Concerning her current hip pain, she testified:

Q: How often will you have pain or discomfort in the left hip?

A: It's a constant discomfort. It- it runs- depending on how back- how much I'm up or down and what I'm doing on how bad it is.

Q: Now you also said it comes down into the thigh.

A: In the thigh and in the groin area.

Q: Into the groin and the thigh?

A: It's down in here (INDICATING).

Q: You're-

A: It pretty much runs from my lower back all the way down into the hip joint here, under my buttocks and down this thigh in this leg and groin (INDICATING).

Q: Does it go past the knee at any time?

A: Occasionally it goes down the back of my leg into my left knee and these last couple of toes here (INDICATING). It's- sometimes it will hit that third one. Not very often, but every once in a while. But it's mostly when the pain gets really worse, it gets into the toes. It doesn't stay in the toes.

Regarding the medications she takes, Cook testified as follows:

A: I'm on Lortab 10.

> Q: How many times a day?
>
> A: Four times a day. I'm on- it's a generic of Neurontin-
>
> Q: Okay.
>
> A: -gabapentin, I'm on 900 milligrams, three times a day. I'm on Naproxen, 500 milligrams, twice a day. And then I was on Flexeril three times a day, but they changed that to a- it starts with a Z. I can't even say it. Zipan maybe? Something like that.
>
> Q: It's something that is-
>
> A: For the muscle spasms.
>
> Q: Okay.
>
> A: And I'm on that three times a day- four milligrams, three times a day.

Cook sees a pain physician every three months and she also sees a rehabilitation physician at the Lexington Clinic.

Cook testified that she can sit comfortably in a chair for thirty minutes to one hour. However, standing for too long causes her pain. Concerning her use of a cane when walking, she explained as follows:

> Q: Okay. So I noticed you walked in here this morning using a cane.
>
> A: Yes, sir.
>
> Q: And do you use a cane on a consistent basis?
>
> A: Yes, sir.

Q: And what leg are you- for lack of better terminology, what leg are you trying to support while using the cane?

A: My left.

Q: Okay. So do you use the cane everywhere you go or any time you're trying to walk, I should say?

A: Yes. The only time I don't use my cane is in my kitchen where I have counters.

Q: Okay.

A: I mean, as long as- I don't use it if I have some other way to support myself.

Q: Something you can put your weight on.

A: That's correct.

Her job at Family Dollar consisted of the following:

Q: All the merchandise is delivered by a vehicle that is owned by Family Dollar, correct?

A: It's- well, I don't know if it's always owned by Family Dollar. But a truck delivers the merchandise that's owned by Family Dollar. It comes off a conveyor belt roller, you take it off the roller, you put it on the u-boats- what I call the u-boat, it's called different things, a tray looking thing that's got little ends on it, you put the stock on it, stack it up there. You wheel that to the floor. It's got wheels on it. You go to the floor and then you put the stock away off of it.

> Q: So this requires lifting, to some degree?
>
> A: Yes, sir.
>
> Q: How often did a truck come to your Family Dollar store?
>
> A: Once a week.
>
> Q: Okay. Did you have things like cases of bleach?
>
> A: Yes, sir.
>
> Q: Cases of antifreeze?
>
> A: Yes, sir.
>
> Q: Cases of various canned good?
>
> A: Yes, sir.
>
> Q: Did you have to lift those things and move those around?
>
> A: Yes, sir.
>
> Q: Could you do that today?
>
> A: No, sir.
>
> Q: How come?
>
> A: I couldn't lift it. I couldn't hold it.

Cook testified there were not enough employees to permit her to delegate her lifting responsibilities.

Regarding her current ability to work, she testified as follows:

> Q: Could you- could [sic] go back and do the job that you were doing for Family Dollar store today?

> A: No, sir.
>
> Q: Any of these jobs that you had done before, Ms. Cook, could you go back and do those?
>
> A: Of course I couldn't.
>
> Q: Is there a job out there that you know of that you could do and do competitively?
>
> A: I don't believe so, sir.

In order to meet her burden of proving entitlement to permanent total disability benefits, Cook first had to prove an impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), and second, that she sustained a complete and permanent inability to perform any type of work as a result of the injury. *See* Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001). As long as that determination is supported by substantial evidence, the ALJ's finding on the issue of Cook's permanent total occupational disability cannot be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The above-cited testimony by Cook, relied upon and cited extensively by the ALJ in both the January 15, 2014, Opinion, Order, and Award and the February 5, 2014, Opinion and Order on Petition for Reconsideration,

comprises substantial evidence in support of the ALJ's determination Cook is permanently totally disabled. The ALJ is entitled to rely upon a claimant's self-assessment of his or her ability to labor in making a determination of permanent total disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Additionally, the ALJ relied upon Dr. Owen's 15% impairment rating, his opinion Cook does not retain the physical capacity to return to her former work at Family Dollar, and the restrictions he imposed in determining Cook is permanently totally disabled. Thus, the ALJ's determination will not be disturbed.

We find Family's Dollar's third argument the ALJ did not provide sufficient findings of fact to support a determination of permanent total disability to be without merit. While we acknowledge the ALJ could have provided a more in-depth analysis of how Cook’s age and education factored into his ultimate conclusion, a review of the January 15, 2014, Opinion, Order, and Award reveals an extensive discussion of the pertinent elements of Cook's testimony as well as Dr. Owen's opinions which factored into his decision. As recounted herein, the opinion contains three and a half pages of findings of fact pertaining to the issue of permanent total disability. Additionally, in the February 5, 2014, Opinion and Order on

Petition for Reconsideration, the ALJ provided additional findings of fact regarding Cook’s occupational disability. Thus, we conclude additional findings of fact are unnecessary. The ALJ's findings of fact concerning the issue of permanent total disability are sufficient.

Finally, we find no merit in the assertion the ALJ relied upon a factually incorrect impairment rating assessed by Dr. Owen. It contends Dr. Owen assessed a 15% whole person impairment rating for gait derangement, pursuant to Table 17-5, even though he admitted he had no definitive evidence of advanced arthritic change of the hip, knee, or ankle. Family Dollar argues definitive evidence of such a condition is required by the AMA Guides.

We conclude the ALJ properly relied upon Dr. Owen's impairment rating. Cook's testimony establishes she requires the use of a cane. Additionally, while Dr. Owen stated there is no "*definitive* evidence of advanced arthritic change," he did not opine that there is *no* evidence of advanced arthritic change. Thus, the ALJ could infer Dr. Owen believed advanced arthritic changes were present even enough he could not definitely document that fact. As stated in Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771, 774 (Ky. 2009), "physicians must use clinical judgment when assigning impairment ratings, and that 'clinical

judgment, combining both the "art" and "science" of medicine, constitutes the essence of medical practice.'" The Tokico Court continues:

> Diagnosing what causes impairment and assigning an impairment rating are different matters. Diagnostic criteria stated in the Guides clearly have relevance when judging the credibility of a diagnosis, but Chapter 342 does not require a diagnosis to conform to criteria listed in the Guides.

Id. at 774-775.

The applicable law affords Dr. Owen certain discretion and professional judgment when interpreting the Guides and assigning an appropriate impairment rating. The ALJ's reliance upon Dr. Owen's 15% impairment rating is appropriate and will not be disturbed.

Accordingly, as to all issues raised on appeal, the January 15, 2014, Opinion, Order, and Award and the February 5, 2014, Opinion and Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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