

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 24, 2015

CLAIM NO. 201188659

SOMERSET-BURNSIDE GARAGE DOOR
& GLASS CO., INC.

PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE**

LEE A. COOK
AMR EL-NAGGAR, M.D.
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**
* * * * *

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

STIVERS, Member. Somerset-Burnside Garage Door & Glass Co., Inc. ("Somerset-Burnside") appeals from the January 20, 2015, Opinion, Order, and Award and the February 27, 2015, Order ruling on its petition for reconsideration of Hon. Otto Daniel Wolf, IV, Administrative Law Judge ("ALJ"). The

ALJ awarded Lee A. Cook ("Cook") permanent total disability ("PTD") benefits and medical benefits.

The Form 101 alleges Cook sustained injuries while in the employ of Somerset-Burnside to his low back and left leg on April 14, 2011, in the following manner: "Plaintiff attempting to lift a panel weighing approximately 100 pounds. As he was pulling the panel out, he immediately felt severe pain and burning in the lower back and down the left leg." By order dated June 17, 2014, Cook was permitted to amend his claim to include a psychological injury. The Form 104, attached to the Form 101, indicates Cook worked for Somerset-Burnside from 2003-2011.

On appeal, Somerset-Burnside asserts the ALJ's finding of permanent total disability was erroneous as a matter of law for two reasons; 1) the "consideration of the issue of disability in the context of Cook's present situation was error;" and 2) "the finding of permanent total disability was based, in part, on erroneous assumptions regarding [Somerset-Burnside's] rights upon reopening."

The February 9, 2012, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; injury as defined by the ACT; and

TTD [handwritten: "PPD & PTD"]. Under "other" is as follows: "Δ filed MFD Dr. El-Naggar report MRI & pain management."

Cook's November 17, 2011, deposition was introduced. He testified he started working for Somerset-Burnside in February 2003 and stopped on the date of injury. Somerset-Burnside engages in replacing windows and garage doors and installing mirrors and glass. Regarding the lifting requirements of his job, he testified:

A: It varies, you know. You could be lifting 10 to 100, you know, just lifting all kinds of weights.

Q: And what would- give me an example. What would weigh 100 pounds?

A: You've got glass that- we had to install glass, you know, pretty much about that heavy. We'd do doors, garage doors, you know; for instance, 18 foot doors.

Cook had no problems performing his work before the April 14, 2011, incident.

He described his physical symptoms at the time of his deposition:

Q: What about your condition now Lee, tell me about- I don't mean this instance, I mean just generally now- do you still have the back pain?

A: Yes.

Q: How bad is it?

A: It's not better at all.

Q: If you put it on a scale like you did before of 1 to 10, where is it on an average day?

A: Still 10. I mean it's mainly a 10 all the time, yes.

Q: What about the pain in your leg and the tingling, is that still there?

A: Yes.

Q: Is it better or worse, or about the same?

A: About the same. It don't [sic] get no [sic] better, don't [sic] get no [sic] worse. It never changes.

Q: What about- how does it affect your ability to sit, stand and walk?

A: Just- it does. I mean it's painful. It's basically affected a lot of things, you know. I've got a newborn kid and my wife has to do it all, you know. It's hard on her, you know. It's hard on us both.

At that time he was not taking any medication.

Cook's goal was to return to work at Somerset-Burnside. As to his current ability to return to work, he testified as follows:

Q: Lee, in your present condition could you go back and do the work that you've done at the garage door company?

A: Ain't [sic] no way.

Q: Can you sit, stand or walk for eight hours without having to lay down?

A: No.

Cook quit high school after completing the eleventh grade and has not obtained a GED.

Cook received temporary total disability benefits from April 15, 2011, through July 14, 2011.

Cook also testified at the November 19, 2014, hearing. Concerning his pain and limitations, he testified:

A: Well, I'm still having the back pain in my low back, but it's not as severe as it was before. I would give it about a seven, as of right now- you know, dealing with the cold weather and all that stuff.

Q: So, if you had to tell me- if it wasn't cold weather, just on an average day for you where would your pain level be on a scale of one to ten?

A: It's- it's according. Some days it's a five and then it goes up to- like, an eight.

Q: So, it'll range...

A: It ranges, yes. It's according to how much I do during the day to what part or how much it's...

Q: And then you were talking about the left leg pain that's coming back. How would you describe the severity of that?

A: Well, it's like- it goes down my leg and into my foot. And it feels like-

you're pretty much stepping on needles is what it feels like. Like, if I sit up too long or stand up too long, you know, it worsens.

Q: Is the pain similar to what you had before the surgery?

A: Yes, sir.

...

Q: As far as how frequently you have pain...

A: Pretty much all the time.

Q: Are you ever pain free?

A: No, sir.

Q: And the pain that- you said low back. I mean, is it- can you give me, I guess, a location of the pain?

A: It's like right around my belt line right there- like, as your belt goes across. That's about where it's at.

Q: And the left leg pain- where is it?

A: All the way- I mean, it does down through the center of my leg down to my foot. And like I said, the foot is like- you know, pretty much like you're stepping on pins or something.

Q: And as far as your low back condition and your left leg, do you have problems in sitting, standing?

A: Yes, sir.

Q: And what problems- how long can you sit before you have to get up and move around?

A: Around thirty minutes- twenty or thirty minutes.

Q: And then what happens after twenty or thirty minutes?

A: Then my leg starts worsening, and my foot.

Q: What about your back?

A: And my back, yes- it hurts all the time, you know, my back does. Like I said, it just varies. Sometimes it's- you know, worse than others....

...

Q: And what about standing, how long can you stand before you have to...

A: Right around twenty minutes- maybe twenty-five minutes or something like that.

Q: Do you have any problems in walking?

A: Yes, sir.

Q: What problems do you have?

A: Just the pain worsening.

Q: And if you could alternate these positions, could you do that for eight hours, without having to lay down?

A: No, sir, there's no way.

Cook was taking anxiety medication at the time of the hearing, but was not taking pain medication.

Concerning his psychological condition and injury, Cook explained:

A: Well, sir, I worked for what, eight years, and I always provided for my family. I was there for my boy. I was able to do things with him that I cannot do with my daughter now- that's a three-year-old. And you know, it has caused trouble between me and my wife- not really, it's just that I get aggravated, you know, because I can't- I can't provide for my family and I was used to doing that. And it is just about to kill me. I just can't hardly take it. I've always- you know, all these other kids going out and doing things and I ain't [sic] got the money to do it, because we're living on my wife's money and that's it. And then we had to move in with my mother-in-law and stuff, and that's actually killed me the worst. We've just now finally gotten us a place on our own. It's just nothing to [sic] what we've had before. We just live in a mobile home.

...

Q: I know you've mentioned anger. You have some anger issues over this?

A: Yes, sir, honestly, I've got pretty bad anger issues. I mean, I just get aggravated at something, you know, when I can't do something. I just feel worthless. I mean, that's the honest truth, I feel worthless. I mean....

Dr. El-Naggar performed L5-S1 fusion surgery on September 1, 2012. In his December 8, 2011, deposition, Dr. El-Naggar testified Cook was not yet at maximum medical improvement ("MMI").

A medical record of Dr. El-Naggar dated January 31, 2013, indicates the following permanent restrictions: "Pt. has permanent restrictions not to lift/push/pull more than 10 lbs. and he should alternate sitting, standing, walking every 1 hour."

In his June 27, 2013, deposition, Dr. El-Naggar testified he expects Cook to reach MMI one year after his surgery which will be near September 1, 2013. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"), he would expect Cook to have a 22% whole person impairment rating. He attributes Cook's injuries and the resulting fusion surgery to the April 14, 2011, work injury. He confirmed the permanent restrictions he previously imposed.

In a report dated February 27, 2014, Dr. El-Naggar stated the 22% impairment rating, as expressed in the June 27, 2013, deposition, remains the same. He also stated his opinions regarding permanent restrictions for Cook have not changed.

The psychological report of Dr. Dennis Sprague was introduced by Cook. Dr. Sprague offered the following diagnoses:

Axis I: 323.83 Depressive disorder due to another medical condition with mixed features.

393.84 Anxiety disorder, due to
medical condition

Axis II: Social disability

Intellectual developmental disorder,
mild to moderate

Axis III: Medical Sequelae as Medically
Diagnosed

Axis IV: Psychosocial Stressors:
unemployment, physical health problems,
emotional factors, present life
circumstances

Axis V: 52 Highest Global Adaptive
Functioning past year

Dr. Sprague opined Cook's psychological
complaints are a direct result of his work-related injury
and assessed a 25% impairment rating pursuant to the 2nd
Edition of the American Medical Association, Guides to the
Evaluation of Permanent Impairment, ("AMA Guides, 2nd Ed.")

The April 23, 2014, psychological report of Dr.
Christy Hundley was introduced by Cook. Dr. Hundley set
forth the following diagnostic impressions:

309.28 Adjustment Disorder, with Mixed
Anxiety and Depressed Mood

V62.89 Borderline Intellectual
Functioning

315.1 Specific Learning Disorder, with
Impairment in Mathematics, Mild

In this report, Dr. Hundley opined as follows:

Mr. Cook did not express specific occupational interest during the evaluation, and would likely benefit from opportunity for exploring vocational interests. He appears exceedingly indecisive due to concerns about chronic back pain and needs for accommodations in the workplace.

The January 20, 2015, Opinion, Order, and Award, contains the following "Discussion and Determinations":

. . .

An injured worker's testimony concerning his condition is competent evidence and has probative value. *Caudill v. Maloney's Discount Stores, 560 S.W.2d 1, (Ky., 1977)*

An ALJ may believe part of the evidence and disbelieve other parts of the evidence whether it comes from the same witness or the same adversary part's total proof. *Caudill, Supra.*

Plaintiff was observed and heard during his November 19, 2014 final hearing. Plaintiff appeared depressed, and slow to answer questions. He appeared overwrought with his work-related injury problems. He was credible. He was forthright. There is no apparent reason to question his credibility, sincerity or forthrightness.

PHYSICAL INJURY

Plaintiff credibly testified that before his work injury he did not experience any low back problems or symptoms of an injury. There seems to be little dispute Plaintiff did sustain

some type of low back injury as a result of his April 14, 2011 work incident.

The question to be determined is the extent and duration of Plaintiff's occupational disability resulting from his work injury. Plaintiff's treating Orthopedic Surgeon Dr. El-Naggar assessed a 22% WPI and Defendant's Dr. Lester assessed a 20% WPI. Both were calculated under the Fifth Edition of the AMA Guidelines. Based upon the fact Dr. El-Naggar has been able to examine, monitor and treat Plaintiff, including his opportunity to actually see inside Plaintiff's lumbar spine, the proof provided through Dr. El-Naggar carries greater weight on the WPI issue, and, therefore, it is determined Plaintiff has sustained a 22% WPI as a result of his April 14, 2011 work incident.

The next question to be determined is whether Plaintiff sustained a psychological injury as a result of his work incident.

The general rule is that all of the injurious consequences flowing from a work-related injury, and that are not attributable to an unrelated cause, are compensable. *Beech Creek Coal Co. v. Cox*, 237 S.W.2d 56 (Ky., 1951). When there is substantial evidence indicating an injured worker's anxiety and/or depression are due to a work-related physical injury, it can be deemed the psychological injury is a direct result of the traumatic work incident, and is compensable. *Coleman v. Amalie Enterprises Inc.*, 58 S.W.3d 459 (Ky. 2001).

There is substantial persuasive proof indicating Plaintiff's alleged

psychological condition is a result of his April 14, 2011 work incident and is compensable.

Though Plaintiff's Dr. Sprague finds a work-incident psychological injury, and Defendant's Dr. Shraberg does not find a work-incident related psychological injury, the proof presented through Dr. Hundley's report, an evaluation done for the State Vocational Office, and not done at the request of either of the parties, indicates "Mr. Cook would likely benefit from outpatient counseling services for support related to his change in lifestyle following work-related injury." Dr. Hundley went on to note Plaintiff would benefit from ongoing medication management for treatment of his anxiety and depression. Dr. Hundley's unbiased input strongly suggests Plaintiff has a psychological component to his work injury. This is also the input of Plaintiff's Dr. Sprague.

A review of Dr. Shraberg's June 2014 evaluation report reveals a circuitous course of logic. Dr. Shraberg notes, "although this man has a situational depression associated with his present absence from the workforce," and "from the vantage point of his stressor, it is primarily situational," but, he then goes on to represent Plaintiff does not have a work-injury related psychological problem, which is it? This never ending circle of logic is akin to the riddle "which came first the chicken or the egg?" Dr. Shraberg indicates Plaintiff does have situational depression due to his absence from the workforce, but it cannot be denied Plaintiff's absence from the workforce is a consequence of his April 14, 2011

work injury. Is Plaintiff supposed to perform the difficult task of returning to the workforce and thus eliminate his stressor, or is he to let go of the stressor and then return to the workforce? The stressors Plaintiff has and his absence from the workforce are due to his April 14, 2011 work incident.

The input of Drs. Hundley and Sprague indicate Plaintiff has sustained a psychological injury as a result of his April 2014 work incident.

Having determined Plaintiff has sustained a psychological work-injury, it is next appropriate to ascertain what is Plaintiff's psychological WPI. Only two WPI ratings have been provided - Plaintiff's Dr. Sprague's 25% and Defendant's Dr. Shraberg's 0%. Having found Plaintiff does have a psychological component to his work injury, it would seem obvious that 0% does not accurately reflect Plaintiff's psychological impairment. The only percentage given, that could be considered as accurately reflecting Plaintiff's psychological impairment, is Dr. Sprague's 25%.

It is determined Plaintiff has a 25% WPI pursuant to the psychological component of his work injury.

Plaintiff claims to be permanently totally occupationally disabled as a result of his April 2011 work injury.

"Permanent total disability" is defined in KRS 342.0011 (11) as being 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.

As used in the definition of "permanent total disability," the word "work" is defined in KRS 342.0011 (34) as meaning, "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

To determine whether an injured worker's occupational disability fits within the above statutory definitions it is necessary to do an analysis as set forth in *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky., 2000). Under *Watson* the injured worker's status must be considered using several certain factors - the workers age, education level, vocational skills, post-injury medical restrictions, and the likelihood the injured worker can resume some type of "work" under normal employment conditions. The following analysis is set forth.

AGE: At the time of his injury Plaintiff was 27 years old. This age suggests Plaintiff is not permanently totally occupationally disabled.

EDUCATION LEVEL: Plaintiff's formal education level is that he withdrew from the 10th grade [sic] at Pulaski Central High School. He explained he withdrew, "I couldn't do it... I guess it was too hard." He reported receiving mostly D's and F's during the years he was in school. He was required to repeat the fourth grade. The results of several of the evaluations done in the course of this litigation indicated Plaintiff has an IQ of 70, and fell into the borderline range of intellectual functioning. The measurements indicated Plaintiff had a learning disability in the areas of mathematical computation and reading.

Plaintiff's level of education, both formal and measured, strongly suggests he is permanently totally occupationally disabled.

VOCATIONAL SKILLS: It appears the only vocational skill Plaintiff has is manual labor, which, at least to this point of his life, is limited to the repair and installation of garage doors and windows. It is unlikely he will be able to use this skill due to the physical consequences of his work injury.

Defendant's Dr. Conte, Vocational Consultant, indicated Plaintiff has the skill of driving, the skill of performing mechanical and manual tasks, the skill of being a cashier, the skill of being a security guard, etc. Assuming these are realistic skills for Plaintiff to learn, he presently, but for driving, has none of these skills. Plaintiff's present lack of transferable skills suggest Plaintiff is permanently totally occupationally disabled.

POST-INJURY MEDICAL RESTRICTIONS: Plaintiff has substantial post-injury medical restrictions. As previously noted, in his initial IME evaluation report, Defendant's Dr. Lester, indicated he would recommend permanent restrictions after reviewing the FCE, but in his December 30, 2013 follow up letter he forgot to do so. A review of the FCE report indicates Plaintiff should be limited in floor to waist lifting, restricted in hand grip, limiting provisions should be made for sitting and standing postures, restrictions should be made for ambulation, and certain types of standing positions. These are

substantial restrictions for a heavy manual duty laborer.

Even if Dr. Lester's anticipated restrictions were not considered, the restrictions imposed by Plaintiff's treating neurosurgeon, Dr. El-Naggar are significant. On June 24, 2012 Dr. El-Naggar gave the ultimate restriction, "he cannot work. He cannot go back to work, because even sedentary work can cause him to have back pain. People who have discogenic back pain, they have the worst pain when they sit because sitting puts pressure on the disc almost about four times more than standing or walking. So sedentary work is out. Standing in one position causes back pain, bending over causes pain so..." (Depo. p. 24-25).

Similarly, as to Plaintiff's psychological injury, Dr. Sprague indicated Plaintiff could not return to work from a psychological perspective and should have ongoing psychological counseling. Plaintiff's medical records suggest he is permanently totally occupationally disabled.

LIKELIHOOD OF RESUMING SOME TYPE OF WORK: At this time it is unlikely Plaintiff retains the capacity to "work." He has a pitifully poor level of education, and demonstrated in standardized test results a poor capacity to likely increase his level of education. His present vocational skill of heavy manual labor is substantially compromised as a result of his work injuries. If he learns the skill or skills mentioned by Dr. Conte, Plaintiff's chances of being able to "work" would increase, but he does not presently have those skills. The physical restrictions set by Dr. El-

Naggar substantially compromise Plaintiff's capacity to "work."

Based upon the findings of the *Watson* analysis, it is determined Plaintiff is permanently totally occupationally disabled.

It may have been noted that the determination of Plaintiff's occupational disability is made in the context of Plaintiff's present situation. In the event Plaintiff is able to learn occupational skills, and/or raise the level of his education, and/or lessen his work-injury related restrictions, or in any way lessen his present level of occupational disability, then Defendant, pursuant to KRS 342.125, should reopen this claim and obtain the appropriate relief.

Somerset-Burnside filed a petition for reconsideration asserting several errors including those it now asserts on appeal. Except for amending the award to delete erroneous language concerning the award of PTD benefits, the petition of reconsideration was denied by order dated February 27, 2015.

Somerset-Burnside's first argument on appeal is the ALJ erred by considering the issue of disability in the context of Cook's present condition. We disagree.

The Workers' Compensation Act defines permanent total disability as "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." KRS 342.0011(11)(c). The factors that an ALJ must consider in determining whether an individual claimant is permanently and totally occupationally disabled are set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). They include the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact; a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions; whether the individual will be able to work dependably; and whether the worker's physical restrictions will interfere with vocational capabilities. Id. "An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury." McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001).

In the January 20, 2015, decision, the ALJ amply discussed the evidence which persuaded him Cook is permanently totally disabled. The January 20, 2015, Opinion, Order, and Award contains a thorough discussion of the pertinent factors relevant to an analysis of permanent

total disability including age, education level, vocational skills, post-injury medical restrictions, and the likelihood of Cook resuming some type of work. The ALJ's analysis spans approximately five pages and is thorough and consistent with the law.

Significantly, Somerset-Burnside does not argue substantial evidence does not support the ALJ's determination of permanent total disability. Rather, Somerset-Burnside argues the ALJ's analysis improperly focused on Cook's "present situation." Regarding the ALJ's statement the determination of Cook's occupational disability is made in the context of "Plaintiff's present situation," we note that an analysis of permanent total disability is ultimately an analysis of a claimant's present condition. Specifically, it is an analysis as to whether the claimant *presently* has a permanent disability rating and a complete and permanent inability to perform any type of work as a result of an injury according to the factors enunciated in the relevant case law. KRS 342.0011(a)(c); See Ira A. Watson Department Store v. Hamilton, supra. The ALJ's analysis is in perfect harmony with the law.

Somerset-Burnside also argues the ALJ's finding of permanent total disability is based upon a

misinterpretation of its rights on reopening. It argues as follows:

After confirming the determination of Cook's occupational disability was made 'in the context of Plaintiff's present situation,' the ALJ identified the following as opportunities for the employer to "reopen this claim and obtain the appropriate relief:"

1. Cook is able to learn occupational skills; and/or
2. Cook raises the level of his education; and/or
3. Cook lessens his work-injury related restrictions;
4. Or in any way lessens his present level of occupational disability.

None of the opportunities cited to reduce a permanent total disability award are provided by KRS 342.125(3).

The above-cited language regarding reopening is included in the January 20, 2015, Opinion, Order, and Award. However, this is of no consequence in light of the ALJ's comprehensive analysis regarding Cook's occupational status and entitlement to PTD benefits. The ALJ carried out a thorough analysis pursuant to Ira A. Watson Department Store, supra. Any language, even if partially or completely erroneous regarding Somerset-Burnside's right to reopen at a later date is superfluous.

Accordingly, the January 20, 2015, Opinion, Order, and Award and the February 27, 2015, Order ruling on Somerset-Burnside's petition for reconsideration are **AFFIRMED.**

ALL CONCUR.

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