

OPINION ENTERED: November 2, 2012

CLAIM NO. 200974344

TAUBENSEE STEEL AND WIRE CO.

PETITIONER

VS.

APPEAL FROM HON. THOMAS POLITES,
ADMINISTRATIVE LAW JUDGE

TIMOTHY W. SAUM
and HON. THOMAS POLITES,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Taubensee Steel and Wire Company ("Taubensee") appeals from the June 19, 2012, opinion and award of Hon. Richard M. Joiner, Administrative Law Judge ("ALJ Joiner") and the July 31, 2012, order of Hon. Thomas Polites, Administrative Law Judge ("ALJ Polites") ruling on its petition for reconsideration.

The Form 101 alleges Timothy Saum ("Saum"), while working for Taubensee, was injured on October 27, 2009, in the following manner: "Adding barrels of borax to a 5000 Gallon cleaning tank when the strap holding the barrel of borax broke and fell into the cleaning tank splashing plaintiff [sic] with 212 degree water burning him." Saum alleges sustaining "burns on left arm, shoulder and neck" and "PTSD." As the issue on appeal concerns Saum's claim for post-traumatic stress disorder ("PTSD"), this opinion will focus exclusively on that claim.

In the June 19, 2012, opinion and award, ALJ Joiner made the following findings of fact regarding Saum's claim for PTSD:

Mr. Saum saw Dr. Andrew Cooley for CFA evaluation on June 19, 2011 and his report dated September 6, 2011 has been submitted. The examination and testing took five hours with another one and one-half hours spent reviewing medical records, reviewing test data, and preparing his report.

A psychiatric examination of three components was performed. The first component was Mr. Saum's history of his work accident and how it has affected him mentally. The second component was a two part mental examination with the first part being a face-to-face mental status examination, and the second part being administration and interpretation of standardized mental test instruments. The third component consisted of reviewing available medical records,

analyzing data, and reducing the findings to 13 pages.

Mr. Saum denied ever having any sort of nervous depression, emotional, psychiatric, or mental problems but does believe the accident has affected him. He says it started shortly after he left his previous employer. His hands would shake, he would become short of breath, and it lasted for a few minutes and then he would have heart palpitations. These problems occurred the last few times he worked as an electrician after the accident. Mr. Saum reports difficulty falling asleep and staying asleep. He reports decreased energy, has subjective problems with concentration, has had weight loss, has had some problems with psychomotor agitation, and obsessively checks things to make sure they are done properly.

Because the accident clearly meets threshold for Criteria A of PTSD, Dr. Cooley examined Mr. Saum directly in regard to that. He was clearly exposed to an event that involved an actual threat of death, or serious injury or threat to his physical integrity. He reports the accident happened so fast that he does not remember having intense fear or feeling helpless.

For Criteria B, Mr. Saum reports recurrent or intrusive distressing thoughts or recollections about the accident, has had recurrent bad dreams about it, reports flashbacks of the accident, reports being emotionally upset when reminded about the accident, and has intense physical reactions when reminded of the accident.

For Criteria C, Mr. Saum reports persistently making efforts to avoid thoughts or feelings about the accident,

makes efforts to avoid activities, situations, or places that remind him of the accident, cannot recall important aspects of the accident, has marked loss of interest in free time activities, feels detached or cut off from other people around him, feels his ability to experience the whole range of human emotions is impaired, and feels his future hopes and plans have been changed because of the accident.

In regard to Criteria D he has difficulty falling asleep and staying asleep, has continuous irritability or outbursts of anger, has persistent difficulty concentrating, and is overly alert and is startled more easily and is jumpier since the accident.

All in all, Dr. Cooley reports Mr. Saum is clearly consistent for post-traumatic stress disorder.

Mr. Saum appeared for the mental status examination as a normal statured, nourished, Caucasian male dressed appropriately. Speech was normal and cooperation with Dr. Cooley was good. Motor inspection revealed some mild psychomotor agitation or fidgeting but it did stop. His mood was serious and somber. His intellectual skills were in the average range. Content of thought was significant for the re-experiencing avoidance and autonomic arousal symptoms as noted in his past psychiatric history.

A psychological consultation was requested by Dr. Cooley on September 6, 2011 and testing was performed on that date. All tests were administered and/or supervised by Dr. Martine Turns, Psy.D.

In Mr. Saum's effort and validity test which is a cognitive measure of effort and validity, he showed adequate effort. On the predicted versus measured ability test Mr. Saum scored 91 which is in the average range. It is anticipated that further cognitive measures would be in this range. On the attention and concentration test for measure of simple auditory verbal attention he had a T-score of 37 which is below average but in the acceptable range. On more complicated measure of verbal auditory attention he had a T-score of 51 which is in the average range. Overall this is an individual who has intact ability for both simple and complex auditory attention and both simple and complex visual attention.

On memory assessment testing, Mr. Saum's scores show that he is an individual who has the ability to acquire new information via serial auditory list learning.

For personality measures, the SCID-II PQ was administered. For paranoid, schizotypal, schizoid personality disorders, histrionic, narcissistic, and borderline personality disorders, and avoidant, dependent, and obsessive-compulsive disorders, Mr. Saum was sub-threshold for all of these disorders.

On the positive symptom total, he had a raw score of 58 which is an invalid profile secondary to over-reporting of symptoms over the last one week.

The SIMS test was administered and he scored a total of 9 which is in acceptable range. Overall, this pattern is consistent with honest symptom reporting and shows no evidence of malingering.

Diagnoses were: Axis I Post traumatic stress disorder, Axis II None, Axis III Status post injury in question with resulting burns and left hand dysfunction, and Axis IV Psychosocial stressors of litigation stress and new occupation, marital discord.

In Dr. Cooley's opinion Mr. Saum has a 10% whole body psychiatric impairment as the result of his post traumatic stress disorder which is a result of the accident in question.

An examination was done by Dr. Douglas Ruth and his report was sent to Dr. Cooley for review. Dr. Cooley's report dated February 27, 2012 states that he knows and respects Dr. Ruth but their opinions differ regarding Mr. Saum.

Dr. Ruth believed that Mr. Saum provided a false and misleading medical history because he did not report his visit to Dr. Sanapati for problems with his left upper arm extremity. He also reported there was a discrepancy in the reporting of Mr. Saum's weight to different examiners. Dr. Cooley did not use neurovegetative signs and symptoms of depression which require an assessment of weight and appetite so he did not record it. He further states that post-traumatic stress disorder is not a criterion. Dr. Ruth noted that Mr. Saum did not describe "intense fear, helplessness, or horror" as one of the criteria. Mr. Saum did not describe that emotion and characterization. Several things need to be considered before reducing facts. In post-traumatic stress disorder it is well known that individuals may have amnesia of certain specific aspects of the trauma. Mr. Saum should not be diagnostically punished because he met that criterion. Dr. Ruth disagrees with Dr. Cooley

regarding PTSD and believes that Mr. Saum exaggerated his symptoms. Dr. Cooley disagrees. Dr. Cooley states that to Mr. Saum's credit he did not present in his office in a theatrical, dramatic, and stilted manner. He did not have any problems on any sort of malingering measure. A 10% psychiatric impairment does not make him a psychiatric cripple. Mr. Saum is back at another job and doing it successfully.

Dr. Ruth opines Mr. Saum to have a Class 1 psychiatric impairment rating. Dr. Cooley disagrees. Class 1 is 0% to 5% impairment in the old *Guidelines* and is considered a normal range. Any evidence of further impairment as described by Mr. Saum would be Class 2.

In conclusion, Dr. Cooley states if falling fifteen feet from a crane and being splashed with 212 degree water that is contaminated with borax would not satisfy a criteria A1 for PTSD, he really does not know what would. Simply because Mr. Saum may have misreported his weight, minimized symptoms with Dr. Ruth and not reported previous upper extremity pain are from a psychiatric standpoint distinctions without differences. Dr. Cooley believes that Mr. Saum is worthy of a very mild 10% impairment and his conclusions have not changed.

Mr. Saum saw Dr. Douglas Ruth for a psychiatric evaluation on January 18, 2012. He performed this examination at the request of counsel for the Defendant, Hon. Donald Walton, III.

Dr. Ruth's objective findings revealed that Mr. Saum provided false and misleading medical history. Dr. Ruth states that Mr. Saum did not provide a

history of pre-existing symptoms which he now attributes to the work injury. Several symptoms he reports followed the injury including insomnia, numbness, tingling, pain, and "jerking" in the left upper extremity were documented in medical records while he was in treatment with Dr. Mahendra Sanapati. He was also examined by Dr. Warren Bilkey on April 19, 2011 with the same symptoms. Apparently Mr. Saum did not tell Dr. Bilkey of those symptoms because his report indicates a negative history for illnesses related to the neck and left upper extremity. Also there is reported insomnia and sensory symptoms that are documented that predate the work injury.

Dr. J. Criss Yelton examined Mr. Saum on June 29, 2010 with complaints of left upper extremity pain and numbness but he reported their onset as 3 to 4 months earlier. He also reported to Dr. Cooley during a psychiatric examination on June 19, 2011 that his principle problem was that of tingling, numbness, sharp pain, and dropping things involving his left upper extremity. He failed to make Dr. Cooley aware of his pre-existing symptoms leaving him to form an erroneous opinion that they were caused by the work injury.

Dr. Ruth also states that Mr. Saum reported a weight loss of 20 pounds since his injury. His weight was not documented by Dr. Cooley and when he was weighed in the emergency room he weighed 160 pounds. Then when he saw Dr. Bilkey he weighed him at 164 pounds. When he saw Dr. Ruth he weighed about 150 pound but the loss would have begun sometime after April 2011 and would be unrelated to the work incident.

Mr. Saum has a number of psychiatric symptoms that are compatible to posttraumatic stress disorder but objective findings do not support that impression. Posttraumatic stress disorder is caused by an incident that causes intense emotional trauma at the time of the occurrence. His history does not include that he experienced an intense emotional reaction to the work accident. He also described his activities immediately after the accident and his behaviors did not suggest that the incident was particularly frightening.

Dr. Ruth states that the psychiatric diagnosis is most likely malingering consisting of an effort at falsely attributing symptoms to the work injury. The objective findings do not support that Mr. Saum suffers *bonda* [sic] *fide* psychiatric symptoms as a result of the work accident. Dr. Ruth states that he did not find any observations suggesting a psychiatric condition arising as a result of the incident. The only references to such a complaint are found in the psychiatric IME by Dr. Cooley.

Dr. Ruth states there are no objective findings to indicate that Mr. Saum suffers from a permanent psychiatric impairment and he has not been treated for psychiatric complaints. If he does suffer from any psychiatric symptoms due to the work injury they could improve with treatment.

According to the Fifth Edition of the *AMA Guides*, Table 14-1 on Page 363 in Chapter 14, Mr. Saum would have a Class 1 psychiatric impairment rating, and according to the Second Edition of the *Guides*, Table 1 on Page 220 in Chapter 12, he would have a Class 1 or 0%

psychiatric impairment rating. Mr. Saum would not have work restrictions.

The results of the Zung Anxiety Rating Scale revealed that Mr. Saum has mild anxiety. The Zung Depression Rating Scale revealed mild depression.

On the Axis II checklist Mr. Saum endorsed a number of personality trait characteristics that included impulsivity, tending to carry a grudge, feeling hurt if he does not receive the attention of others, feeling misunderstood by others, emotional emptiness, feeling interpersonally dependent, and stubbornness preferring solitude and avoiding socialization.

The MMPI-2-RF Validity Scales demonstrated that Mr. Saum was able to read, understand, and concentrate sufficiently. They were also compatible with some over reporting of symptoms. The salient scales reflected his complaints of depression, anxiety, lack of confidence, feelings of helplessness, and irritability. Other scales revealed that he prefers solitude and does not feel that he shares much in common with others. He indicated a history of engaging in aggressive behavior and endorsed physical complaints, primarily neurological symptoms.

ALJ Joiner's conclusions of law regarding Saum's PTSD claim are as follows:

For the psychological injury, the impairment is either 0% under the report of Dr. Ruth, or 10% under the report of Dr. Cooley....I also find the report of Dr. Cooley to be well-reasoned and accept it as an accurate assessment of the psychiatric or psychological impairment in this case.

...

With respect to the psychological claim, I resolve the causation issue in favor of the plaintiff in reliance on the report of Dr. Cooley as expressed above.

Taubensee filed a petition for reconsideration asserting, in part, ALJ Joiner erred by relying on Dr. Cooley's 10% psychiatric impairment rating when he opined Saum was not at maximum medical improvement ("MMI"). In response to this specific argument, ALJ Polites stated as follows in the July 31, 2012, order ruling on the petition for reconsideration:

The defendant employer has requested reconsideration on the grounds that the ALJ's reliance on the 10% impairment rating of Dr. Andrew Cooley was inappropriate due to the fact that Dr. Cooley also found that Plaintiff was not at MMI on the date of his examination and on the date he assessed the rating. However, the ALJ has the authority to pick and choose which evidence is more credible. *Magic Coal Co. v. Fox*, 19 S.W. 3d 88 (Ky. 2000); *Whitaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999). This authority allows the ALJ to choose to rely on Dr. Cooley's impairment rating yet disregard his opinion on MMI, and rely on the opinion of Dr. Ruth as to MMI yet disregard his opinion on impairment. The Worker's Compensation Board has specifically authorized such an approach in *Nurse Staffing vs. Roberta Rogers*, Claim No. 09-94579, and *Tokico (USA), Inc. vs. Jerry Poynter*, Claim No. 06-88984. In addition, Dr. Cooley's subsequent

report dated February 27, 2012 could reasonably be interpreted as a reaffirmation of his 10% rating after taking into consideration the entirety of the findings of Dr. Ruth, including his opinion on MMI, whose report he reviewed. Based on the above, the ALJ believes his reliance on Dr. Cooley's impairment rating was appropriate and hereby overrules the Petition for Reconsideration filed by the Defendant Employer in all respects.

On appeal, Taubensee makes the same argument it made in its petition for reconsideration. Taubensee asserts as follows:

The Administrative Law Judge was presented with two competing medical opinions regarding the Claimant's emotional injury claim. Dr. Cooley felt that he had legitimate PTSD which was completely untreated and from which, therefore, he had not reached MMI. Dr. Ruth felt that he was malingering (for which no treatment is needed) and he was at MMI with a 0% rating. It is an abuse of discretion, however, for the Judge to 'pick and choose' elements of these two opinions to arrive at a hybrid conclusion of both PTSD and MMI- as Dr. Cooley tells us, this is something that no respectable psychiatrist would conclude.

At the time of Dr. Cooley's September 6, 2011, psychiatric examination resulting in an assessment of a 10% impairment rating, Dr. Cooley opined Saum had not yet reached maximum medical improvement ("MMI"). Dr. Cooley's

February 27, 2012, supplemental report confirming his previous opinions and critiquing Dr. Douglas Ruth's January 23, 2010, psychiatric evaluation report does not contain an opinion regarding MMI.

Dr. Ruth's report indicates Saum was examined on January 18, 2012. While Dr. Ruth does not specifically use the phrase MMI, he stated the following: "The findings do not indicate that Mr. Saum requires psychiatric treatment for any complaint attributable to the 10/27/09 work incident." A definition of MMI, within the context of temporary total disability ("TTD") benefits, is contained in Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327, 329 (Ky. App. 2000) in which the Kentucky Court of Appeals stated as follows:

TTD is payable: until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market.

Thus, Dr. Ruth's opinion Saum requires no psychiatric treatment for the alleged October 27, 2009, psychological injury is sufficient to support the conclusion Dr. Ruth believed Saum attained MMI regarding his PTSD claim.

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Additionally, if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

As is his prerogative, the ALJ chose to rely upon Dr. Cooley's impairment rating and Dr. Ruth's opinion concerning MMI. Within the discretion afforded him under the law, the ALJ is entitled to pick and choose from the evidence in this manner. As stated by ALJ Polites in the July 31, 2012, order "this authority allows the ALJ to choose to rely on Dr. Cooley's impairment rating yet disregard his opinion on MMI, and rely on the opinion of

Dr. Ruth as to MMI yet disregard his opinion on impairment." ALJ Polites' recitation of the ALJ's authority is correct. ALJ Joiner's findings shall remain undisturbed.

Accordingly, the June 19, 2012, opinion and award of ALJ Joiner and the July 31, 2012, order of ALJ Polites ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON DONALD C WALTON III
9300 SHELBYVILLE RD STE 700
LOUISVILLE KY 40222

COUNSEL FOR RESPONDENT:

HON DANIEL CASLIN
P O BOX 1793
OWENSBORO KY 42302

ADMINISTRATIVE LAW JUDGE:

HON THOMAS G POLITES
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR
LEXINGTON KY 40511