

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 7, 2018

CLAIM NO. 201387791

HUSSEY COPPER, LTD.

PETITIONER

VS.

**APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE**

MELVIN STIVERS,  
COMMONWEALTH PAIN ASSOCIATES,  
SUHAIL HAQUE, M.D.,  
And HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**RECHTER, Member.** Hussey Copper, LTD (“Hussey”) appeals from the July 17, 2018 Opinion, Award and Order and the August 13, 2018 Order on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ Davis”). The ALJ

determined Melvin Stivers is permanently totally disabled, a finding which Hussey Copper contests on appeal. For the reasons set forth herein, we affirm.

Stivers worked as a general laborer at Hussey Copper, which required him to load and unload crates, copper coils, and other heavy materials from trucks. He also operated a forklift. Stivers injured his lumbar spine on January 25, 2012 while lifting copper coils. A second lumbar injury occurred on April 9, 2013, also while lifting. He filed a Form 101 alleging both injuries. In an Opinion rendered April 14, 2014, Hon. Scott Borders, Administrative Law Judge (“ALJ Borders”) determined Stivers suffered a lumbar injury superimposed on degenerative disc disease attributable to the April 9, 2013 accident. He also concluded Stivers lacks the physical capacity to return to his work at Hussey Copper. ALJ Borders awarded permanent partial disability benefits based upon a 6% impairment rating, enhanced by the three multiplier pursuant to KRS 342.730(1)(c)(1).

Following the April 14, 2014 Opinion, Stivers treated with Dr. Robert Blok, and received injections in his right sacroiliac (“SI”) joint. By December 23, 2014, however, Stivers’ pain had worsened and Dr. Blok recommended an SI joint arthrodesis. The surgical recommendation was submitted for pre-authorization, and Dr. Peter Kirsch conducted a utilization review. Dr. Kirsch recommended to deny the SI joint arthrodesis. Hussey Copper filed a medical fee dispute.

In an Interlocutory Opinion dated November 16, 2015, Hon. Robert Swisher, Chief Administrative Law Judge, relied upon Dr. Blok’s opinion to conclude Stivers’ ongoing low back pain since the work accident is attributable to SI joint dysfunction. As such, he concluded the proposed SI joint arthrodesis was

reasonable and necessary for the treatment of Stivers' April 9, 2013 work injury. The claim was abated pending the surgical procedure.

For unrelated reasons, Dr. Blok was unable to perform the surgical procedure and Stivers was transferred to Dr. Michael Casnellie. Dr. Casnellie performed a right SI joint arthrodesis on May 12, 2016. Stivers' right sided pain improved after the procedure and a period of physical therapy, though his left-sided pain did not relent. Dr. Casnellie performed a left SI joint arthrodesis on March 14, 2017. Stivers experienced some relief following the surgeries, although he continued to experience radiating pain from his hips. Dr. Casnellie opined Stivers' back pain was a continuation of the symptoms he had been experiencing since the work accident. A September 29, 2017 lumbar MRI revealed central disc herniation at L4-5. Dr. Casnellie referred Stivers to pain management. Stivers again visited Dr. Casnellie on May 14, 2018 with complaints of continued low back pain radiating into the legs and feet. Dr. Casnellie concluded these complaints are related to Stivers' work injuries, and recommended an epidural steroid injection and a referral to pain management.

Dr. Robert Jacob conducted an independent medical evaluation on October 18, 2017. Dr. Jacob placed Stivers at maximum medical improvement from the surgical procedures. He noted diminished sensation and numbness in Stivers' toes, but found no neurologic deficit or neuropathy. He diagnosed work-related lumbosacral strain with SI dysfunction. However, he found no evidence of a work-related injury to the hips, and emphasized that the SI joint is anatomically a component of the pelvis and lower extremities. Dr. Jacob also suspected symptom

magnification, noting a discordance between his physical examination and Stivers' claim he achieved only 20% relief from the two surgeries. He assigned a 3% pursuant rating to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition, and stated Stivers could return to his customary employment without restrictions.

Dr. Robert Byrd conducted an independent medical evaluation on January 26, 2018. Dr. Byrd had previously evaluated Stivers in 2014, during the original litigation of this claim, and assigned a 6% impairment rating. On physical evaluation, he noted back pain and mild loss of lumbar lordosis, but no radicular pain. He diagnosed a musculoligamentous injury to the lumbar spine which resulted in chronic pain. He acknowledged the SI dysfunction, but characterized it as a pre-existing condition which was brought into disabling reality by the work accident. Nonetheless, he opined the lumbar injury is most problematic. He again assigned a 6% impairment rating under the DRE Lumbar Category II, with an additional 1% impairment rating based on his level of pain. Dr. Byrd did not discuss permanent restrictions or future medical treatment recommendations.

Dr. Luca Conte conducted an independent vocational evaluation on March 22, 2018. Dr. Conte noted Stivers' chronic low back pain, and his need to use a cane when walking. In addition to his work at Hussey, Stivers was a missile technician in the U.S. Army, service station attendant, cashier, and farm manager. He has a high school diploma and is computer literate. Stivers demonstrated average academic abilities on testing. Dr. Conte noted Stivers' physical restrictions had not

changed since the original litigation of the claim. He concluded Stivers retains the physical and mental capacity to perform sedentary and light duty jobs.

Stivers testified he continues to have chronic low back pain and numbness in his toes. He can walk about 100 yards before he begins to experience pain. He also has trouble sitting for extended periods of time. For these reasons, Stivers testified it would be very difficult for him to return to work.

ALJ Davis concluded Stivers is permanently totally disabled by his work-related injury:

At the time of the April 29, 2014 Opinion Judge Borders found the Plaintiff to have a 6% impairment rating and to lack the capacity to return to the type of work done on the date of injury. That award was based on the low back injury only.

The medical evidence herein, as found by both Chief Judge Swisher and myself, strongly leans toward the work-relatedness of both SI joint fusions and conditions. Really, as far as the left SI joint fusion I don't see how a contrary finding could reasonably be made. As such, it stands to reason that the Plaintiff has work-related increase in impairment rating, and possibly occupational disability.

The only impairment rating for the SI joint fusion is from Dr. Jacob and I adopt the 6% he assigned.

It would be helpful, but it is not required, to have formal restrictions for the Plaintiff at this time. Dr. Jacob specifically said the Plaintiff could return to the type of work done on the date of injury. However, it is *res judicata* that he cannot. Dr. Byrd, even though he was asked, did not assign restrictions post-SI joint fusion. Dr. Casnellie never assigned restrictions. Therefore, there are no formal post-SI joint fusion restrictions from a medical provider in the record.

Plaintiffs are qualified to offer testimony as to their specific abilities. Said testimony can be relied upon, even in the absence of formal medical restrictions, by an ALJ to determine occupational disability, whether temporary or permanent. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). It is the ALJ's job to translate the lay and medical evidence into a finding of occupational disability. Ira Watson Dep't Store v. Hamilton, 34 S.W.3d 48 (Ky. 2001). The ALJ is only required to acknowledge the medical and vocational experts, not rely on them. Eaton Axle Corp. v. Nally, 608 S.W.2d 334 (Ky. 1985); Ira Watson Dep't Store v. Hamilton.

As such, I find the Plaintiff's statements and testimony that he has extreme and regular pain to be accurate and relevant. Due to this pain, he has difficulty concentrating. This would of course impede not only his ability to work but also his ability to learn new skills. The pain is such that he cannot realistically work a full day, anywhere. The pain is such that he would need to take frequent whole days off work, well in excess of what most employers, and probably all new employers, would accept. All of this pain, and therefore the effects of the pain, are work-related to his April 9, 2013 injury.

I am also required to assess all relevant factors of age, education, work history and restrictions when determining if a Plaintiff is permanently, totally disabled. While it is important to analyze all factor[s] I will emphasize I have already found the Plaintiff would have difficulty learning a new job. He would have difficulty working a full 8 hour day. He would have difficulty regularly attending work. In short, the factual findings I have made regarding his current abilities is sufficient to find him permanently, totally disabled. His age, 55; his educational background, high school; and his work history in no way overcome the obstacles of his physical condition. Osborne v. Johnson, 432 S.W.2d (Ky. 1968); Ira Watson Dep't Store v. Hamilton.

In making, this finding I acknowledge the report of Dr. Conte. Dr. Conte is very skilled and respected. However, his conclusion fails to take into account the relatively narrow window he had to evaluate the Plaintiff, as opposed to days and weeks of attempting to

work. It also fails to consider the validity of the Plaintiff's testimony.

Hussey petitioned for reconsideration, which was denied as a re-argument of the merits of the claim. On appeal, Hussey argues there is no evidence to support ALJ Davis' determination Stivers is permanently total disabled. It claims ALJ Davis' decision is supported only by Stivers' own testimony regarding his pain level, without any corroborating medical proof. Hussey also claims ALJ Davis erroneously concluded the restrictions assigned by Dr. Byrd are *res judicata* by virtue of ALJ Borders' decision.

Permanent total disability is 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). To determine whether a claimant is permanently totally disabled, the ALJ must engage in an individualized determination of what the worker is and is not able to do after recovering from the work injury. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000). This determination includes consideration of the worker's post-injury physical, emotional, intellectual and vocational status and how those factors interact. Id.

ALJ Davis considered the factors enunciated in Hamilton. He acknowledged Stivers' education and work history, in addition to Dr. Conte's report. However, ALJ Davis determined these factors were outweighed by Stivers' advanced age and chronic pain. He was convinced Stivers' chronic pain would impede his ability to complete a full work day reliably. As the fact-finder, the ALJ has the sole

authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993).

Hussey additionally asserts ALJ Davis erred in relying on Stivers' assessment of his own pain and limitations. As noted by ALJ Davis, the physicians offering opinions in this claim did not thoroughly address Stivers' physical restrictions. But, more importantly, the Court in Hamilton specifically addressed the concerns raised by Hussey:

Although the ALJ must necessarily consider the workers' medical condition when determining the extent of his occupational disability at a particular point in time, 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.

Hamilton, 34 S.W.3d at 52 (internal citations omitted).

It therefore was not error for ALJ Davis to consider Stivers' assessment of his pain, and its impact on his ability to reliably maintain a full-time job even if his education and skill set would otherwise permit light duty or sedentary work. A worker's ability to labor consistently is impacted by such factors "as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities." Hamilton, 34 S.W.3d at 51.

Finally, we disagree with Hussey's assertion that ALJ Davis concluded Stivers' restrictions were previously determined by ALJ Borders and therefore, *res judicata*. ALJ Davis correctly noted it is *res judicata* that Stivers is physically unable to

return to his pre-injury job. This fact is not determinative of whether Stivers is now permanently totally disabled, and ALJ Davis did not consider it in that manner. Rather, he considered this *res judicata* finding in the context of his assessment of Dr. Jacob's overall opinion. Additionally, the fact that Stivers' physical restrictions had not formally changed does not prohibit a finding that he is now permanently totally disabled, as Hussey asserts. Instead, ALJ Davis conducted the proper analysis of Stivers' current impairment rating and ability to labor.

Stivers successfully established the essential elements of his claim. The evidence does not compel a contrary finding. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence supports ALJ Davis' findings, and this Board is not authorized to reverse the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the July 17, 2018 Opinion, Award and Order and the August 13, 2018 Order on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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