RENDERED: JULY 8, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2015-CA-001258-WC

SOMERSET-BURNSIDE GARAGE DOOR
AND GLASS CO., INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-88659

LEE A. COOK; DR. AMR
EL-NAGGAR; HONORABLE OTTO
DANIEL WOLF, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Somerset-Burnside Garage Door & Glass Co., Inc. ("Somerset-Burnside") petitions this court for review of the July 24, 2015 opinion

of the Workers' Compensation Board ("Board") affirming the opinion, order, and award of an Administrative Law Judge ("ALJ") awarding Lee A. Cook permanent and total disability benefits. For the following reasons, we affirm.

Cook, age 31, resides in Somerset, Kentucky. He has a 10th grade education and no GED. Cook was employed with Somerset-Burnside from February 2003 until his injury date of April 14, 2011. Cook installed garage doors, mirrors, glass door fronts, and similar materials. The job required him to lift anywhere from 10 to over 100 pounds. On April 14, 2011, he suffered an injury to his low back when removing a large wood panel in the process of installing a garage door.

Cook was seen at the emergency room immediately following his injury. Subsequently, his family physician referred him to physical therapy, which he attended for three weeks without gaining any relief. Cook then underwent a lumbar MRI, and was referred to a neurosurgeon. The neurosurgeon examined Cook and recommended formal pain management. Cook's pain management specialist recommended lumbar epidural injections, which were denied by the workers' compensation insurance carrier, so Cook sought a second opinion from Dr. Amr El-Naggar, a neurosurgeon. Dr. El-Naggar recommended lumbar epidural steroid injections as well as a facet block. Those recommendations were again denied. An interlocutory opinion and order was entered by the ALJ in Cook's case on April 23, 2012. In that order, the ALJ found that Cook had sustained a work injury, and that he had not reached maximum medical

improvement ("MMI") and was entitled to temporary total disability ("TTD") benefits until he reached MMI.

In May 2012, another MRI of Cook's lower back led Dr. El-Naggar to recommend lumbar fusion surgery. The workers' compensation carrier sent Cook to Dr. John Guarnaschelli for a second opinion. Dr. Guarnaschelli agreed with Dr. El-Naggar's opinion, and Dr. El-Naggar performed the fusion on September 1, 2012. Following surgery, Dr. El-Naggar assigned permanent restrictions including no lifting, pushing, or pulling more than 10 pounds and directions to alternating sitting, standing or walking every hour. Dr. El-Naggar determined Cook to be at MMI on September 1, 2013.

The ALJ rendered an opinion and award on January 20, 2015, finding that Cook's lack of education and vocational skills, in addition to his work injuries made it unlikely that he retained the capacity to work. Accordingly, the ALJ found Cook to be permanently totally occupationally disabled. The ALJ noted in that opinion:

> 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[1] 342.125, should reopen this claim and obtain the appropriate relief.

[1] Kentucky Revised Statutes.

Somerset-Burnside filed a petition for reconsideration, which was denied, and the ALJ's opinion and award was ultimately affirmed by the Board on July 24, 2015. This appeal follows.

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *E.g., W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992); *Butler's Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004). *See also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (holding that if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that some substantial evidence supported the decision); *cf. Gray v. Trimmaster*, 173 S.W.3d 236, 241 (Ky. 2005) (If the ALJ finds against the party having the burden of proof, the appellant must "show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding[.]").

On appeal, Somerset-Burnside makes two arguments. First, Somerset-Burnside argues that the ALJ's finding of permanent total disability was influenced by a misinterpretation of KRS 342.125, or the failure to recognize that Somerset-Burnside would not have the opportunity to reopen Cook's case in the event that his present occupational capacity changes. Second, Somerset-Burnside

argues that consideration of the issue of disability in the context of Cook's present situation and capacity to work is inconsistent with the definition of permanent total disability contained in KRS 342.0011(11)(c).

Permanent total disability is defined 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). To determine whether an injured workers' occupational disability constitutes permanent total disability, we must consider certain factors: the worker's age, education level, vocational skills, post-injury medical restrictions, and the likelihood that the injured worker can resume some type of work under normal employment conditions. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). As the ALJ discussed at length, Cook was 27 years old, has a 10th grade education, an IQ of 70, and a learning disability. He has no vocational training or transferable skills beyond those required by his job at Somerset-Burnside. Furthermore, Dr. El-Naggar opined that Cook's physical condition renders him unable to work, even in a sedentary position.

We agree with the Board that

> 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 the 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 analysis focuses on whether, at the time of the opinion, the claimant is completely and permanently unable to perform any type of work. In Cook's case, Dr. El-Naggar opined that Cook was permanently unable to perform any type of work. Additional education or vocational training might expand the opportunities available to Cook,[2] and an unanticipated change in his physical condition could cause his physical restrictions to be modified. However, both of these possibilities, at present, are not expected. Thus, Cook's current condition renders him permanently unable to work, and a finding of permanent total disability was appropriate.

Somerset-Burnside's argument that the ALJ misinterpreted KRS 342.125 also fails. Somerset-Burnside claims that KRS 342.125(3) only allows for the reduction of a permanent total disability award "when an employee returns to work[.]" However, KRS 342.125(1) allows reopening of "any Award or Order," by any party, for certain reasons, including "change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order." KRS 342.125(3) only refers to the time for reopening a claim or award; it does not limit an employer's opportunity to reopen only to scenarios in which the employee returns to work. Hence, the ALJ, and the Board, both properly noted that

[2] Further vocational training or education might make a job in which Cook's restrictions are not an issue a possibility for Cook. For instance, further training or education might make a job in which Cook is required to do no heavy lifting, pulling or pushing, and in which he can alternate sitting, standing and walking every 10 minutes, a possibility.

Somerset-Burnside may reopen Cook's permanent total disability award in the event that his disability changes.

For the above reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Christion Hutson
Paducah, Kentucky

BRIEF FOR APPELLEE,
LEE COOK:

Mark D. Knight
Somerset, Kentucky