

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001263-WC

DAVID HASSIE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-96395

HIGHLEY MOTORS, INC.; HONORABLE  
HOWARD E. FRASIER, JR., ADMINISTRATIVE  
LAW JUDGE; AND WORKER'S COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: KELLER AND WINE, JUDGES; LAMBERT, SENIOR JUDGE.

WINE, JUDGE: David Hassie brings this petition for review from an opinion by the Workers' Compensation Board which affirmed the administrative law judge's (ALJ) award of benefits based upon a finding of permanent partial disability.

Hassie maintains that the evidence compels a finding that he is totally disabled. He

also argues that the ALJ failed to consider the combined effect of his physical and psychological impairments, or the combined effect of his work-related and non-work-related conditions. We agree with the Board that the ALJ's findings are supported by substantial evidence and that the ALJ properly considered all relevant factors. Hence, we affirm.

Hassie began his employment with Highley Motors in June of 2004. His job duties involved cleaning, detailing, and performing mechanical work on cars. In addition, he also delivered cars to auction. On December 10, 2004, while he was a passenger in a vehicle which he was delivering for Highley Motors, Massie was involved in a motor vehicle accident. He states that he injured his hip, leg, shoulders, left wrist, and collarbone. He was treated at the hospital and released with pain medication.

Thereafter, on December 27, 2004, Hassie returned to the hospital complaining of additional pain and numbness on his left side. Additional testing revealed that Hassie had suffered a cerebrovascular accident ("CVA"), more commonly known as a stroke. Since that time, Hassie developed depression which is related to the pain he suffers from his injuries and the CVA. Hassie has not returned to any type of work since the motor vehicle accident.

The medical evidence is fully summarized in the ALJ's and the Board's opinions. While Hassie initially asserted that the CVA was caused by the motor vehicle accident, the parties later stipulated that the stroke was not work-related. Nevertheless, Hassie maintains that the medical evidence conclusively

shows he suffered work-related injuries to his neck, left shoulder, and back. He also states that the pain from these injuries has caused significant psychological impairment which further limits his ability to work. The ALJ concluded that the majority of Hassie's disabling conditions were not caused by the work-related injury. Furthermore, while the ALJ agreed that Hassie is unable to return to his prior employment, the ALJ found that Hassie still retains the capacity to perform sedentary or light-duty employment.

In reaching this conclusion, the ALJ relied primarily on the report of an independent medical evaluator, Dr. Timothy C. Kriss. Dr. Kriss was of the opinion that Hassie's left shoulder impingement and neck pain were caused by pre-existing arthritis and other conditions which existed before the motor vehicle accident. Likewise, he did not believe that Hassie's low back pain was caused by the accident. Dr. Kriss also excluded most of Hassie's impairment caused by the CVA.

Based on Dr. Kriss's report, the ALJ found that Hassie has a 5% permanent impairment to his lumbar spine. The ALJ also relied on the report of Dr. Bobby Miller that Hassie has a 24% psychiatric impairment which is caused by his work-related injury. Under the combined value charts of the 5<sup>th</sup> Edition of the *AMA Guides*, the ALJ found that Hassie is entitled to permanent partial disability benefits based on a whole-body impairment rating of 28%. The Board affirmed the ALJ's opinion and award, and this petition for review followed.

Hassie first argues that the ALJ failed to consider the uncontradicted evidence of his herniated cervical disc and left shoulder impairment in determining his total impairment and ability to return to work. Since Hassie, the party with the burden of proof before the ALJ, was unsuccessful, the issue on appeal is whether the evidence compels a different conclusion. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). *See also, REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985). The ALJ has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Where the evidence is conflicting, the ALJ has the sole authority to 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. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). The function of this Court's review of the Board is to correct the Board only where the Court perceives that 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. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

We agree with the Board that the ALJ was well within his role as fact-finder by relying on the opinions of Dr. Kriss. Although Hassie points to contrary evidence supporting the conclusions of his experts, he cannot show that Dr. Kriss's

opinions are so fundamentally flawed as to be inherently unreliable. Therefore, the ALJ properly relied on Dr. Kriss's report that Hassie's cervical and shoulder conditions were not primarily caused by the motor vehicle accident and that he is not totally disabled.

Hassie also argues that the ALJ failed to consider the combined effect of the psychological and physical impairments when determining his entitlement to the multiplier in KRS 342.730(1)(c) 1 and 3. Under KRS 342.730(1)(c)1, if an employee does not retain the capacity to return to the type of work which he performed at the time of the injury, the benefits shall be multiplied three times the amount which would be otherwise payable. Similarly, KRS 342.730(1)(c)3 sets out additional benefit multipliers to be applied based on the employee's level of education and age.

In denying Hassie's petition for reconsideration, the ALJ stated that he had addressed the issue of the combined physical and psychological incapacities and found that Hassie did not lack the physical capacity to return to his former work based on his lumbar spine injury and the related psychological aspect of this injury. Although the ALJ conceded that Hassie had additional impairments which prevented him from returning to his former work, he stated that these conditions were not caused by his work-related injury and could not be considered in determining Hassie's ability to return to his former employment. Consequently, the ALJ found that the multipliers in KRS 342.730(1)(c) 1 and 3 are not applicable.

On appeal, the Board agreed that this legal conclusion was correct given the ALJ's factual findings. We agree.

Finally, Hassie argues that the ALJ failed to consider the combined effects of the work-related and non-work-related impairments in determining his ability to return to his former work. *See Jett v. Peabody Coal Co.*, 828 S.W.2d 646, 648 (Ky. 1992). As the Board noted, the ALJ determined that Hassie was not permanently totally disabled. As stated in the Board's opinion, "In so ruling, [the ALJ] noted Hassie's psychiatric impairment may be affecting his ability to obtain employment, but Hassie was not unable to perform sedentary or light duty as a result of any work injury. The ALJ clearly considered both the physical and psychiatric condition in making his determination."

The Board pointed out this determination was supported by the testimony of both Dr. Kriss and Dr. Miller. The Board also found that the conclusion was consistent with the rule set out in *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 859-60 (Ky. 2001), which states that "determining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy." *Id.* at 859-60. While the ALJ did not make an explicit finding, a reading of the entire opinion and award reveals that the ALJ considered Hassie's work-related and non-work-related conditions in determining the extent of his total

disability. Even after considering Hassie's total impairment, the ALJ nevertheless found that he retains some ability to work. Although there was other evidence which would support a different result, we cannot find this conclusion to be clearly erroneous.

Accordingly, the June 8, 2009, opinion by the Workers Compensation Board affirming the ALJ's opinion and award is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David A. Barber  
Paula G. Richardson  
Owingsville, Kentucky

BRIEF FOR APPELLEE:

Kamp T. Purdy  
Lexington, Kentucky