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NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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ACTION.**

Supreme Court of Kentucky

2013-SC-000255-WC

KELLY PASS

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-001456-WC
WORKERS' COMPENSATION NO. 08-71970

PASCHALL TRUCK LINES;
HONORABLE ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Kelly Pass, argues in this workers' compensation appeal that the Court of Appeals erred by holding that her claim for a work-related physical injury is barred by *res judicata* and that the Administrative Law Judge ("ALJ") erred by not granting her permanent total disability benefits for a work-related psychological injury. For the reasons set forth below, we affirm the Court of Appeals.

Pass was involved in a work-related truck accident on October 29, 2008. On that day, the truck which Pass and her husband drove for Appellee, Paschall Truck Lines, broke down in West Virginia. As Pass was sitting in the sleeper berth of the truck calling for assistance, she felt a strong impact which

caused her to lose consciousness. The impact of the collision threw Pass into the passenger foot well of the cabin. After regaining consciousness, she escaped the truck which had caught fire. The truck subsequently exploded. Immediately after the accident, Pass was treated at a local hospital for blunt force trauma to the upper body secondary to a fall.

Pass asserts she sustained injuries to the right side of her body, head, neck, back, bilateral upper extremities, and right lower extremity. She filed a workers' compensation claim for these alleged physical injuries in November 2009. She later amended her claim to allege psychological injuries caused by the same accident. Pass has not returned to work since the accident.

Pass was treated by several physicians for her physical injuries after the truck accident: Dr. David Pocos; Dr. Bo H. Yoo; Dr. Steven Cremer; and Dr. Adam J. Hedaya. She did not initially allege that she suffered from any psychological impairment to these doctors. Pass was also examined by Dr. William Gavigan at the request of Paschall. Dr. Gavigan found that all of Pass's symptoms were related to an accident¹ she was involved in prior to her work-related accident. Dr. Henry Tutt also evaluated Pass on behalf of Paschall and found no evidence that Pass sustained a harmful change from the accident. Pass did not complain of any psychological condition to Dr. Gavigan or Dr. Tutt.

¹ In 1995, Pass was run over by her former husband causing multiple cervical injuries.

In regard to her alleged psychological condition, Pass was treated by Dr. Susan Dorski, beginning in December 2008. Dr. Dorski diagnosed Pass with post-traumatic stress disorder ("PTSD") as a result of the work-related truck accident. Pass was subsequently treated at the Cleveland Clinic, where she was again diagnosed with PTSD, as well as a reflex sympathetic nerve disorder² attributable to the accident. Dr. Dorski believed that Pass would never be able to drive a tractor trailer truck again for emotional and physical reasons. But Dr. Dorski believed that if Pass underwent the treatment recommended by the Cleveland Clinic, she could be able to manage her symptoms and find suitable employment in a different field.

Pass was also evaluated by Dr. David Shraberg, board-certified in neurology and psychiatry, at the request of Paschall. He diagnosed Pass with acute stress reaction with elements of chronic PTSD and phobic avoidance, narcotic dependency, dependent personality with avoidant traits and symptom magnification, pre-existent chronic cervical spondylosis and cervicalgia, temporarily exacerbated by soft tissue injuries caused by the work-related accident (from which she had recovered with baseline non-disabling chronic cervicalgia), and stressors of occupational uncertainty and litigation. Dr. Shraberg believed Pass had a Class II Impairment, based on the 5th Edition of the *AMA Guides* and assigned her a 3 to 5% impairment. He did not believe that Pass was capable of driving a tractor trailer truck again, but believed she could work in an office.

² Reflex sympathetic nerve disorder is a chronic degenerative disease.

After a hearing, the ALJ rendered an opinion and order on March 22, 2011, dismissing Pass's claims. The ALJ found that Pass did not give due and timely notice of her alleged psychological injuries, and that she did not present sufficient evidence of work-related physical injuries. A petition for reconsideration was denied. Pass appealed the ALJ's decision to the Workers' Compensation Board ("Board") who affirmed the dismissal of Pass's physical injury claim. However, the Board reversed and remanded the matter to the ALJ for further fact finding and conclusions of law regarding Pass's alleged psychological injuries. Pass attempted to appeal the dismissal of her physical injury claim to the Court of Appeals, but the appeal was untimely filed and rejected as defective.

On remand, the ALJ reweighed the evidence and entered an award in Pass's favor for psychological impairment, based upon the 3% permanent partial impairment rating, as assessed by Dr. Shraberg. The Board and Court of Appeals affirmed. In affirming, the Court of Appeals found that Pass's argument regarding her physical injury claim was barred by *res judicata* because it had already been dismissed by the first ALJ's opinion which was not properly appealed. Pass now appeals arguing that the Court of Appeals misapplied the doctrine of *res judicata* and that the ALJ erred by giving her an award of permanent partial disability benefits instead of permanent total disability benefits for her psychological injuries.

I. PASS'S PHYSICAL INJURY CLAIM IS BARRED BY RES JUDICATA

Pass first argues that the Court of Appeals erred by holding that her physical injury claim was barred by *res judicata*. *Res judicata* is defined as “an issue that has been definitively settled by judicial decision.” *Blacks Law Dictionary* 1312 (7th Ed. 1999). She contends that the Board’s first opinion in this matter did not definitively decide her physical injury claim because it was not a final and appealable order. She bases that argument on the fact the Board’s order remanded the matter to the ALJ for further proceedings on her psychological injury claim. Pass believes that the Court of Appeals should have relied on *King Coal Company v. King*, 940 S.W.2d 510, 511 (Ky. App. 1997), which states that an “[o]rder of the Board is appealable only if it terminates the action itself, acts to decide the matter litigated by the parties, or operates to determine some rights in such a manner as to divest the Board of power. An action which is remanded only for further findings of fact and not to make a disposition that would terminate the action . . . is not a final and appealable order within the meaning of CR 54.01.” (Citations omitted). Thus, Pass contends that the issue of whether she should receive compensation for her physical injury claim is still ripe for review because she did not need to appeal that issue at that time.

Applying *King*, as Pass requests, would not change the outcome in this matter. The Board’s opinion affirming the denial of benefits for Pass’s alleged physical injuries determined her rights on that issue “in such a matter as to

divest the Board of power.” *King*, 940 S.W.2d at 511. As this Court stated in *Whittaker v. Morgan*, 52 S.W.3d 567, 569-570 (Ky. 2001):

[i]n *Williamson v. Com.*, Ky., 767 S.W.2d 323, 325 (1989), we explained that a party who is aggrieved by an adverse appellate determination must appeal at the time the decision is rendered because an objection on remand is futile, and an appeal from the implementation of the appellate decision on remand amounts to an attempt to relitigate a previously-decided issue. *See also, Inman v. Inman*, Ky., 648 S.W.2d 847, 849 (1982). In view of the fact that the Board decided the legal question that was raised by the Special Fund and rejected its argument, the questions subject to appeal following the remand would have been limited to whether the ALJ properly construed and applied the order of remand. Had the Special Fund failed to appeal the adverse determination by the Board, that determination would have become the law of the case and, therefore, would have precluded a subsequent appeal of the issue. For that reason, the Board’s decision was ripe for appeal.

In this matter, the Board affirmed the ALJ’s opinion which dismissed Pass’s claim for alleged physical injuries. Thus, Pass needed to appeal that ruling to the Court of Appeals at that time to preserve her right to contest the issue. Pass apparently understood this, but filed her appeal in an untimely manner. Accordingly, the Court of Appeals was correct in applying *res judicata* to Pass’s argument regarding her physical injury claim. There is no error here.

II. SUBSTANTIAL EVIDENCE SUPPORTED THE AWARD OF PERMANENT PARTIAL DISABILITY BENEFITS FOR PASS’S PSYCHOLOGICAL INJURY

Pass’s other argument is that the ALJ erred by awarding her permanent partial disability benefits for her psychological injuries instead of permanent total disability benefits. Pass contends that the record compels a finding that PTSD has rendered her totally disabled based on the opinion of Dr. Dorski. Pass notes that Dr. Dorski does not believe she can return to her prior job as a

truck driver due to emotional and physical reasons. Instead of relying on Dr. Dorski, the ALJ found Dr. Shraberg's impairment rating more persuasive.

The ALJ, as fact finder, has "the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from the evidence." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Here the ALJ did not abuse his discretion by adopting Dr. Shraberg's impairment rating. The ALJ noted that Dr. Dorski believed that Pass had a psychological condition and accordingly had to deal with certain limitations in her daily life. But, the ALJ did not believe that these limitations rendered Pass permanently and totally disabled. Indeed, Dr. Dorski stated that by following the treatment recommended by Cleveland Clinic, Pass could manage her symptoms and return to gainful employment. Dr. Shraberg also acknowledged that Pass was not capable of driving a tractor trailer truck again,³ but that she could work in a different environment. Dr. Shraberg's rating was based upon the AMA *Guides* and is supported by substantial evidence. Additionally, Pass may receive benefits for her psychological injury even though there was no finding of a permanent physical injury. Workers' compensation may be awarded for a permanent psychological injury because Pass suffered a temporary physical injury due to the work-related truck accident. *See Wal-Mart Stores, Inc. v. Smith*, 277 S.W.3d 610, 621 (Ky. App. 2008) ("Because the PTSD directly resulted from a physically traumatic event (the explosion), Smith sustained an 'injury' under KRS 342.0011(1)"). There is no error here.

³ The ALJ awarded Pass the triple multiplier pursuant to KRS 342.730(1)(c)1.

CONCLUSION

For the reasons set forth above, we affirm the decision of the Court of Appeals.

Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur.

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