OPINION ENTERED: JUNE 22, 2012

CLAIM NO. 201001375

BIZZACK, INC. PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

CORNELIUS HALL
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

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

SMITH, Member. Bizzack Inc. ("Bizzack") appeals from the January 3, 2012 Opinion, Award and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge, ("ALJ") awarding Cornelius W. Hall ("Hall") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits. Bizzack also appeals from the ALJ's order on reconsideration rendered January 19, 2012. On appeal, Bizzack argues it was an error of law and

an abuse of discretion for the ALJ to find Hall had met his burden of proof regarding the existence of the compensable injury. Bizzack also argues the ALJ erred in relying on the impairment rating assessed by Dr. Nadar. We affirm.

Hall, now age 59, filed a Form 101 on November 10, 2010, alleging that on February 15, 2010 he sustained a work injury as "I was operating a different bulldozer that I normally operate on solid rock and my arm became numb." He alleged injury to his neck and right arm. Hall is married with no children and resides in Tomahawk, Kentucky. Hall's education is limited to the completion of the eighth grade, but he has a miner's card and a Foreman's license, and he has been a dozer operator since 1976. He has worked for Bizzack since 2000.

Hall described his injury as follows:

> Q. Can you describe what happened?
>
> A. Okay. On the -- on that Monday I got on my 8R, was going to go cut some drill benches off. Well, I didn't make it around through there until it broke down. Okay. They sent -- they took it out and brought it in the next day, an old tractor. It was an 8N. And it -- the undercarriage and everything was wore out on it. And it rode as rough as rough can be.
>
> And I was going out through there to clean the bench off. And I heared [sic] one of the drill men say, it's about to turn over. And I told him, I'd be right

> there to smooth it up for him. And I went out there to smooth it up. And I hauled a Volvo driver. I needed a good load of fine dirt to put on that drill bench. It was on solid rock. And Cliff Hughes was the dirt boss. He hollered and said, no, you ain't going to do that. You're going to smooth it up with what's there. So that's what I've done. I went out and tried to smooth it up is -- the best I could. And it was so rough. And that's when my arm started hurting and my neck. (Errors in original)

Hall testified the injury occurred at approximately 9:00 a.m. and he continued working until his shift ended. He sought medical treatment with Dr. John Triplett later that month and continued working until June.

Hall submitted medical records from Dr. Phillip Tibbs and his physician's assistant, Randall Kindler, PA-C, who examined him on August 13, 2010 on referral from Dr. Triplett. Dr. Tibbs noted Hall to be a 57-year-old male who reported a work injury operating a dozer on February 15, 2010. Hall reported cervical pain radiating to his right upper extremity with numbness. He also noted Hall had undergone cortisone injections and had taken Medrol without much success.

Dr. Tibbs opined that Hall appeared to have a C7 radiculopathy. He noted that a June 5, 2010 MRI showed a right C6-7 herniation. He recommended physical therapy with

traction, prescribed Baclofen and noted "he may end up needing surgical intervention." The report indicated Hall should remain off work noting: "We do believe it is within reasonable medical probability that he suffered the work injury, and final determination is pending."

Hall submitted the medical report of Dr. Anbu Nadar who examined him on November 9, 2010. Hall provided a history that, as he was operating a dozer on the job, it hit a hard object. Hall reported it "jarred him and jerked his neck and since then, he had been having pain in his neck and right shoulder." Dr. Nadar noted Hall continued working but his pain got progressively worse. Hall had initially seen Dr. Triplett, his family physician, who treated him conservatively. Later he was referred for an MRI which showed a moderate disc bulge, high-grade, and C6-7 with foraminal compromise on the right and less so on the left. Hall stopped working as of June 2, 2010 because of increased symptoms and an ongoing persistent headache with neck pain going down his right arm.

Upon examination, Dr. Nadar's impression was cervical strain with radiculopathy, as well as right shoulder strain with rotator cuff tendinitis.

Dr. Nadar's recommendations included:

> 1. The claimant has reached maximum medical improvement secondary to the present conservative treatment. He will continue to need ongoing symptomatic treatment from time to time and also, if his radicular symptoms progress, he may be a candidate for diskectomy and fusion.
>
> 2. He has limitation in work activities that require heavy lifting, pushing, pulling, overhead activity, and I would recommend he not do any heavy lifting of more than 15 pounds using his right hand on an occasional basis and on a frequent basis, 5 pounds.

Dr. Nadar assessed a 15% whole person impairment under DRE cervical category III with an additional 1% impairment to the right shoulder, all pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Bizzack submitted the treatment notes of Dr. Bill Webb. We are unable to decipher much of those records as they were completed in mostly illegible longhand.

Hall filed the report of Dr. Sujata Gutti, a neurologist who evaluated Hall on August 2, 2011. Hall gave a history that he initially had back and right upper extremity pain, but, in the last six months, he reported he “has been developing symptoms on his left upper extremity too.” Hall complained of intermittent tingling and numbness in the right hand and fingers. Dr. Gutti

diagnosed cervical disc disease and C6 radiculopathy. He stated the symptoms were currently more on the left side and neural imaging studies revealed obvious moderate to severe neural foraminal stenosis bilaterally, which Dr. Gutti stated would explain Hall's bilateral upper extremity symptomatology. Dr. Gutti assigned a 15% impairment rating pursuant to the AMA Guides.

Bizzack filed records from Our Lady of the Way Hospital dated July 25, 2010, documenting treatment for a fall onto the right side and face. Hall denied neck pain. Bizzack also filed records from St. Joseph Hospital dated December 12, 2010, that indicated in part: "REPORTS CHRONIC PAIN TO NECK FROM C3 – C7 HERNIATION X15 YRS."

Bizzack filed reports and the deposition of Dr. David Jenkinson, an orthopedic surgeon who evaluated Hall on September 10, 2010. Dr. Jenkinson determined Hall's MRI did not show a disc herniation. In his opinion, the MRI appeared to be "more like a chronic degenerative osteophyte formation." He found no objective abnormality and concluded Hall had degenerative changes in his neck, which are symptoms that can only be related to the incident in question by history. Dr. Jenkinson believed the history he received to be suspect. There was no evidence to support a diagnosis of cervical radiculopathy, and no indication of

any comorbidity or significant prior injury. Determining Hall had reached maximum medical improvement, he assessed a 0% permanent impairment pursuant to the AMA Guides.

The parties submitted testimony from co-workers, Robert Cline ("Cline") and Johnny Wright ("Wright"). Cline was Hall's supervisor and he testified Hall did not report a work injury until February 25, 2010. He also noted Hall was an "outstanding" employee and "one of the best finish dozer men we had ever had." Wright, a fellow worker, had no specific knowledge of the injury incident but also confirmed Hall's expertise operating a dozer.

The ALJ made the following findings relevant to this appeal:

> The ALJ relies on the Hall testimony; Johnny Wright's testimony; the testimony of Robert Cline affirming Hall's credibility by noting that he was one of the best operators the defendant ever had; and the report of Dr. Tibbs to find that all has sustained his burden of proving a work-related injury.
>
> However, Hall has not proven that his dramatic change of radiating arm complaints from the right side to left around February of 2011 are [sic] related to the work injury. The only medical evidence submitted by Hall tending to prove that the left-sided complaints is [sic] related to the February 15, 2010 incident came from his evaluator, Dr. Gutti, but the ALJ did not find Dr. Gutti's evidence

> credible on this issue. The ALJ is not willing to accept Hall's alleged radiculopathy as a component of his impairment rating (as assigned by Dr. Nadar) because Hall testified that those complaints had resolved on the right side; and he did not prove work relatedness on the left side.
>
> As to impairment, Dr. Jenkinson's opinion of no impairment was not accepted. Neither was Dr. Nadar's 16% rating, because it was based on right-sided radiculopathy that Hall said he no longer had, as noted above. Therefore, the ALJ finds that Dr. Nadar's alternative DRE cervical category II rating of 8% is the most accurate evidence from the record on Hall's impairment. (p. 19)
>
> . . . .
>
> In this case, the ALJ finds that Hall is not totally disabled. Hall's testimony considered in totality, the restrictions assigned by Dr. Nadar, and the description of a heavy equipment operator's work by Colin Faulkner persuade the ALJ that while Hall may not be able to return to his former job, he is capable of "work" as defined by the statute.

Accordingly, the ALJ awarded PPD benefits based upon an 8% functional impairment rating enhanced by the three multiplier, with additional enhancement based upon Hall's age and education. The ALJ also awarded TTD benefits from August 13, 2010 through November 17, 2010.

Bizzack filed a petition for reconsideration seeking correction of the educational enhancement multiplier and

arguing the ALJ had an incorrect understanding of the evidence from St. Joseph Hospital in Martin. Bizzack noted the record contained six pages and included the statement that Hall reported chronic pain to the neck from C3–C7 herniation for 15 years. Bizzack also pointed to a reference to Hall passing out at his son’s house. Bizzack argued the medical records were significant as they described a 15 year history of cervical pain which Hall denied in his sworn testimony and which he did not report to his treating physicians or medical experts. Bizzack again argued the opinions of Dr. Stevens and Dr. Nadar could not constitute substantial evidence on the issues of causation and extent and duration because of the failure of Hall to report his hospitalization on December 12, 2010 and his 15 year history of cervical pain. Bizzack argued because Dr. Nadar was provided with substantially incomplete and inaccurate medical history, his conclusions regarding causation and permanent functional impairment could not constitute substantial evidence.

Bizzack further argued Dr. Tibbs’ opinion on causation was based upon an incomplete medical history and his opinion was speculative. Bizzack also took issue with the ALJ's reliance upon the testimony of Cline and Wright in finding Hall was credible.

In his January 19, 2012 order ruling on the petition for reconsideration, the ALJ corrected his calculation regarding the multiplier related to Hall's education. The ALJ then provided as follows:

> The ALJ additionally sustains the Defendant's Petition to the extent that the ALJ erred in not elaborating on his statement of partial reliance on the deposition testimony of Johnny Wright for the finding of work relatedness. That testimony was largely hearsay, and such was not considered. The ALJ considered Wright's description of the dozer work done on a rock wall, and its consistency with the work Hall described when he was injured. It was not determinative in the finding of work-relatedness.
>
> The ALJ additionally sustains the Petition to the extent that the Defendant has pointed the ALJ to medical records from St. Joseph Hospital in Martin that he did not properly appreciate when originally reviewing the evidence. Further background on this point is as follows: The Defendant filed medical records from three providers in a single pleading dated March 22, 2011 (but believed to have been served on April 22, 2011 based on DWC stamp filing date of April 25, 2011). The records were not tabbed. The first records were stated to reflect a “hospitalization of December 12, 2010,” but the pleading does not specify the name of the hospital. However, the first page of the attached records was a consistent report of a December 12, 2010 admission at St. Joseph Hospital at Martin; no further records from St. Joseph immediately followed. The pleading

> states that the second set of records were from Dr. Bill Webb, and Dr. Webb's notes begin with second page of records attached to the pleading, which is why the ALJ stated in his summary of the evidence, at page four, that only one page of records from St. Joseph had been filed. The records from St. Joseph Hospital that contain the documentation that the defendant relied on in support of its causation argument were mingled with the third set of records attached to the pleading that also happened to be from a hospital, in this case Our Lady of the Way Hospital. Some of the St. Joseph records were copied on both sides of the page and upside down, contrary to the practice regulations.
>
> The ALJ has now fully considered these records in the context of the arguments presented by the Defendant, and does not change his findings. The ALJ continues to find persuasive Dr. Tibbs' opinion that Hall's injury was work related. His opinion is firmly stated, and the "final determination is pending" language of the August 16, 2010 note does not detract from that opinion. The ALJ finds that Dr. Tibbs was adequately informed of Hall's history to state his opinion. *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004).

On appeal, Bizzack argues the ALJ erred as a matter of law and abused his discretion in finding Hall met his burden of proof regarding the existence of a compensable injury. Bizzack notes a claimant's own testimony is not sufficient for a finding of work-relatedness unless the cause of the injury would be obvious to a layman. Bizzack

notes Hall originally complained of right arm symptoms which resolved and which appeared in his left arm when he turned his head approximately one year later. Bizzack notes Dr. Nadar and Dr. Jenkinson agreed this was not physiologically possible. Thus, Bizzack argues that, if the doctors cannot explain the nature of Hall's symptoms, then clearly Hall cannot be relied upon to explain the cause of his symptoms.

Bizzack also believes the ALJ erred in relying upon Mr. Cline’s opinion regarding Hall's past integrity and technical skill with a bulldozer. Bizzack argues Dr. Tibbs did not have any of Hall's medical records at the time of his treatment consultation. Dr. Tibbs was not told Hall had fallen from his roof two weeks before the examination and did not have the history of chronic neck pain for the last 15 years that Hall gave to physicians at St. Joseph Hospital in Martin. Therefore, Bizzack argues Dr. Tibbs cannot provide a substantive opinion on causation with such an incomplete and inaccurate medical history. Bizzack contends Dr. Tibbs’ opinion regarding causation was not a final determination of causation. Bizzack notes Dr. Tibbs opined the potential work injury was a right arm radiculopathy which Hall testified disappeared in February 2011, about six months after Dr. Tibbs’ examination.

Bizzack argues the ALJ erred in relying on Dr. Nadar's 8% impairment rating. Bizzack contends his opinions were distorted by the same inaccurate and incomplete medical history provided to Dr. Tibbs. Bizzack contends Hall misled Dr. Nadar by indicating he had begun treatment soon after the alleged injury of February 25, 2010. Bizzack notes Hall refused medical treatment after reporting the alleged injury and did not treat with a physician until he was seen by Dr. Triplett on May 28, 2010. Bizzack notes Dr. Nadar testified he did not know the exact date Hall sought treatment, but knew he had seen a doctor soon after the injury. Bizzack notes Dr. Nadar's examination was conducted before Hall's symptoms disappeared from his right arm and appeared in his left arm, which Dr. Nadar found to be unbelievable. Bizzack contends Dr. Nadar's original 16% impairment was for a right-sided radiculopathy which the ALJ found to have resolved. Bizzack contends Dr. Nadar also assigned an 8% rating but did not specify whether it was for a right or left sided radiculopathy. Bizzack argues that, regardless of which side the 8% rating was assigned to, it was an abuse of discretion and an error of law to rely upon it for an award benefits.

It is well established a claimant in a workers' compensation claim bears the burden of proving each of the

essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Hall, the party with the burden of proof as it applies to whether the injury generated a PPD, was successful before the ALJ, the issue is whether there was substantial evidence to support the ALJ's determination. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ, as fact-finder, may reject any testimony and 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. Magic

Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We find no error in the ALJ's determination Hall sustained a work-related injury and therefore affirm. The ALJ indicated he relied on Hall's testimony and the report of Dr. Tibbs in finding Hall sustained his burden of proving a work-related injury. The ALJ was well within his role as fact-finder in choosing to rely on Hall's testimony as to the occurrence of the incident on February 15, 2010. Hall's account of the condition on the ledge and the effect of driving a dozer on rock was confirmed by testimony of Wright and David Wilson, who was director of safety at Bizzack at the time of Hall's injury. Wilson stated he had no reason not to believe Hall. As noted by the ALJ, Mr. Cline affirmed Hall's credibility. On reconsideration, the ALJ indicated Wright's testimony was considered with regard to his description of the dozer work done on a rock wall and its consistency with work Hall described. The ALJ clarified he did not use the testimony to determine whether

the condition was work-related. The ALJ was free to use the lay testimony in weighing Hall's credibility.

We find no error in the ALJ's reliance on the opinion of Dr. Tibbs regarding work-relatedness of Hall's condition. We believe Bizzack misread the report from Dr. Tibbs. A close reading of the record indicates it was Randall A. Kindler, PA–C who completed that portion. He indicated Hall may need surgery and should remain off work. He stated "We do believe it is within reasonable medical probability that he suffered a work injury, and final determination is pending." A reasonable understanding of the PA–C's statement is that, after discussion with Dr. Tibbs, a final determination would be made regarding surgery. Dr. Tibbs' statement says nothing about the assessment of a work-related injury remaining in a pending state.

Although Bizzack argues Dr. Tibbs and Dr. Nadar had an inaccurate history, the ALJ specifically determined Dr. Tibbs was adequately informed, pursuant to Cepero, *supra,* of Hall's history sufficient to form an opinion regarding work-relatedness. While Bizzack places great emphasis on the notation of a 15 year history of neck pain in the St. Joseph Hospital record, it submitted no evidence indicating Hall underwent treatment for a cervical condition prior to

the alleged work injury. Bizzack points to no other evidence indicating Hall had a prior injury or that the condition was active prior to the work-related injury. Similarly, although Hall was seen at Our Lady of the Way Hospital after a fall, there was no indication of cervical complaints related to that accident and the accident occurred after MRIs had been completed showing a herniated disc following the work injury. Bizzack argues, in essence, Hall had a pre-existing active condition. However, the evidence falls far short of compelling such a finding.

Authority to select an impairment rating assigned by an expert medical witness rests with the ALJ. *See* KRS 342.0011(35) and (36) and Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001). When medical experts offer differing impairment ratings, an ALJ is free to pick and choose amongst them. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Contrary to Bizzack's assertions, Dr. Nadar did not assess his rating for radiculopathy. He clearly assigned the rating for a cervical injury. He initially assigned a rating based upon placement in DRE cervical category III. Dr. Nadar testified Hall had objective findings at the time of his examination which would warrant placement in DRE

cervical category III and if the radicular symptoms resolved, he would place Hall in DRE cervical category II with an 8% impairment.

The ALJ chose to believe Hall's right sided radiculopathy resolved, which precisely fits with Dr. Nadar's testimony regarding DRE category II and an 8% impairment rating. Dr. Nadar referenced Table 15-5 of the AMA Guides which allows placement in category II when the individual has clinically significant radiculopathy and an imaging study demonstrating a herniated disk at the level and on the side that would be expected based on the radiculopathy, but has improved following non-operative treatment. Dr. Nadar indicated Hall had a herniated disk with the neurocompromise. It was the ALJ's prerogative to select Dr. Nadar's impairment rating as being more representative of Hall's impairment caused by the injury. Dr. Nadar's opinion is substantial evidence regarding Hall's impairment and the ALJ's finding cannot be reversed on appeal.

Finally we note Hall requests sanctions in the form of costs and attorney fees in the conclusion of his brief to the Board. While Bizzack has not been successful before this Board, we believe the questions raised in its appeal were based upon reasonable grounds. Additionally, although

we were not persuaded by Bizzack's arguments, we do not believe those arguments were so lacking in merit as to be considered completely absent a good faith basis. We therefore decline to impose sanctions. *See* Roberts v. Estep, Ky., 845 S.W.2d 544 (1993).

Accordingly, the January 3, 2012 Opinion, Award and Order and the January 19, 2012 order on reconsideration rendered by Hon. Douglas W. Gott, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON. THOMAS DONKIN
333 WEST VINE ST. STE 1100
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON JARROD BENTLEY
PO BOX 1330
PRESTONSBURG, KY 41653

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W. GOTT
400 EAST MAIN STREET, STE 300
BOWLING GREEN, KY 42101