

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
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OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000815-WC

NEIGHBORHOOD RESTAURANTS, INC./
EMPLOYEE RESOURCE GROUP

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-000710-WC
WORKERS' COMPENSATION NO. 08-83868

RICKY SLONE;
HONORABLE EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Neighborhood Restaurants, Inc./Employee Resource Group, appeals an award of workers' compensation benefits given to Appellee, Ricky Slone. Neighborhood Restaurants argues that the Administrative Law Judge ("ALJ") relied on contradictory medical opinions concerning the causation of Slone's left shoulder and cervical spine impairments, and thus the award of income benefits and medical expenses was clearly erroneous. Because the ALJ had the discretion to choose what evidence he found to be persuasive, we affirm the Court of Appeals.

Slone, a maintenance worker for Neighborhood Restaurants, suffered a work related injury on June 17, 2008. Subsequently, Slone filed an application for workers' compensation benefits, stating that he sustained injuries by falling "15 feet from a ladder onto [a] grease box and then onto [the] ground." He alleged the following injuries: "lungs, left ribs, fractured L1, L2, & L3, left shoulder, left arm, neck pain and chest pain."

Dr. Anbu Nadar and Dr. Thomas Jarboe examined Slone. Dr. Nadar assessed Slone with a 5% cervical spine impairment, 5% lumbar spine impairment, 2% left shoulder impairment, and a 3% impairment due to residual pain from multiple rib fractures, flail chest, and pneumothorax. Dr. Jarboe assessed Slone with a 5% impairment rating for the cervical spine condition and a 3% impairment rating for chronic chest wall pain caused by the rib fractures. But unlike Dr. Nadar, he did not assign a rating for a left shoulder impairment or lumbar spine impairment because he did not evaluate Slone's alleged neck, left shoulder, or lower back injuries. Instead Dr. Jarboe performed a pulmonary function examination to determine if Slone had a breathing impairment due to his injuries. Dr. Jarboe believed that the numbness and tingling in Slone's shoulder may have been related to his rib fractures.

After reviewing the record and the testimony of the two doctors, the ALJ found that Slone had a 15% permanent impairment to the body as a whole. In so finding, the ALJ stated that:

[t]he first is the issue of whether or not the plaintiff's complaints of pain in the cervical, left shoulder, and left arm areas are work-related . . . With respect to the permanent functional impairment ratings, the parties appear to be essentially in agreement that plaintiff's overall impairment is 8% to the body as a whole if the left shoulder and cervical areas are disregarded or 15% if the left arm, shoulder, and cervical areas are included . . .

The ALJ finds that plaintiff has a permanent impairment of 15% to the body as a whole, based on the opinion of Dr. Nadar, who assessed a 5% cervical spine impairment, 5% lumbar spine impairment, 2% left shoulder impairment, and a 3% impairment due to residual pain from the multiple rib fractures, flail chest, and pneumothorax. Dr. Nadar concluded that all of these conditions are the result of the work related incident which occurred on June 17, 2008. *Although the ALJ adopts Dr. Nadar's opinion of the allocation of permanent impairment under the AMA Guidelines, Fifth Edition, the ALJ finds the testimony of Dr. Jarboe, who evaluated the plaintiff at the request of the defendant-employer, to be most informative and persuasive.*

(Emphasis added).

Neighborhood Restaurants took issue with the language of the ALJ's opinion and award indicating that he adopted Dr. Nadar's impairment ratings, but found Dr. Jarboe's testimony to be most persuasive. Neighborhood Restaurants believed that Dr. Jarboe's evaluation which did not find that Slone suffered from a separate neck or shoulder injury, contradicted Dr. Nadar's impairment ratings, and thus the ALJ's findings were irreconcilable. Despite this argument, the ALJ denied Neighborhood Restaurants's petition for rehearing and the Workers' Compensation Board and Court of Appeals affirmed the opinion and award.

Neighborhood Restaurants now appeals to this Court making the same argument, that the ALJ could not adopt Dr. Nadar's impairment ratings and yet find Dr. Jarboe's evaluation to be "most informative and persuasive." Slone

had the burden of proving the elements of his claim for workers' compensation. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Because Slone prevailed on his claim, the only question on appeal is whether there was substantial evidence of record to support the ALJ's decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). The ALJ has the sole discretion to determine the quality, character, and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the adversary parties' total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977); *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000).

In this matter the ALJ did not abuse his discretion by assigning Slone the impairment ratings that Dr. Nadar chose. Dr. Nadar's allocation of permanent impairment to Slone was based upon the *AMA Guides* and there is substantial evidence in the record to support his opinion. While the ALJ did state that he found Dr. Jarboe's testimony to be most persuasive and informative, this does not change the fact that the ALJ expressly chose Dr. Nadar's impairment ratings as the appropriate ones to assign Slone. The ALJ was entitled to choose Dr. Nadar's impairment ratings over those of Dr. Jarboe. Accordingly, the ALJ did not err in awarding Slone medical expenses for the injuries to his cervical spine and left shoulder.

For the reasons set forth above, the opinion of the Court of Appeals is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur. Keller, J., not sitting.

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