OPINION ENTERED: July 13, 2012

CLAIM NO. 200988425 & 200799372

AFFILIATED COMPUTER SERVICES, INC. PETITIONER

VS. **APPEAL FROM HON. HOWARD E. FRASIER, JR., ADMINISTRATIVE LAW JUDGE**

SHEILA BALL
and HON. HOWARD E. FRASIER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. Affiliated Computer Services, Inc. ("Affiliated") appeals from the February 28, 2011, opinion, award, and order by Hon. Howard Frasier, Administrative Law Judge ("ALJ Frasier") and the March 29, 2011, order ruling on its petition for reconsideration which was overruled in part and granted in part.

Affiliated makes three arguments on appeal. Affiliated's first argument is that ALJ Frasier erred in finding Sheila Ball ("Ball") sustained a cervical spine injury on November 3, 2006. Second, the ALJ erred by awarding benefits for a cervical spine injury in 2009 that was never asserted by Ball. Third, the ALJ's award of benefits for a cervical spine injury in 2009 violates the United States and Kentucky Constitutions.

Due to the issues on appeal, an overview of the extensive procedural history is necessary. On June 12, 2008, a Form 110-I, Agreement as to Compensation and Order Approving Settlement for Claim No. 2007-99372 was approved by Hon. Donna H. Terry, Administrative Law Judge ("ALJ Terry"). The settlement agreement reflects Ball injured her "right shoulder/neck" on November 3, 2006, in the following manner: "Sorting mail and injured her right thumb/shoulder/neck." The diagnoses noted on the settlement agreement are as follows: "S/P Rt arthroscopic rotator cuff repair, subacromial decompression & distal clavicle excision."

On March 24, 2010, Ball filed a Motion to Reopen Claim No. 2007-99372 and attached an Affidavit in which Ball alleged a worsening of condition. Ball's Affidavit asserts as follows:

> 1. That she suffered an injury claim which resulted in a settlement. The claim was settled on June 12, 2008. The date of her injury was November 3, 2006. She sustained an injury to the right shoulder and neck. She came under the care of Dr. William Lester and Dr. Glen McClung who assigned an impairment rating to her of 2%.
>
> 2. That the right shoulder has continued to deteriorate. She has had to have arthroscopic surgery, rotator cuff repair, subacromial decompression and distal clavicle excision of the right shoulder. She believes now her impairment rating has significantly increased. She believes that her occupational disability has worsened.

On May 5, 2010, Affiliated filed a Notice of Claim Denial in Claim No. 2007-99372 denying Ball's Motion to Reopen for the following reasons:

> Explain: Plaintiff has not presented any evidence of permanent injury or permanent disability to the neck as a result of the 11/3, 2006 injury and has not filed reliable medical evidence to substantiate an increase of impairment for her right shoulder.

The Form 101 for Claim No. 2009-88425 alleges Ball sustained an injury to her left shoulder on April 30 [sic], 2009, while working for Affiliated.[1] The injury to

[1] Ball clarified in her February 1, 2010, deposition that the injury date is in fact April 28, 2009.

Ball's left shoulder occurred in the following manner: "Picked up heavy box and felt sharp pain in shoulder."

By order dated May 13, 2010, Ball's Motion to Reopen Claim No. 2007-99372 was consolidated with Claim No. 2009-88425.

The August 5, 2010, Benefit Review Conference order lists the following contested issues: extent and duration; multipliers; whether there has been a worsening of impairment and condition; PTD; injury as defined by the Act (cervical spine); TTD (overpayment and underpayment).

In Ball's brief to ALJ Frasier, she argued, in part, as follows:

> The Plaintiff suffered work-related injuries while working for the Defendant/Employer in 2006 and in 2009. Due to those injuries, she has problems with both shoulders as well as her neck. Prior to becoming employed by the Defendant/Employer in 2000, she had suffered work-related bilateral carpal tunnel syndrome and cubital tunnel syndrome which required surgery. [sic] and had surgery. While the carpal tunnel and cubital tunnel injuries were while she was employed by a different employer and not a part of this claim, the Plaintiff mentions them, as they are relevant to the issue of whether she is permanently totally disabled based upon *Kern's Bakery v. Tackett*, 964 S.W.2d 815 (Ky. App. 1998), wherein it was ruled that the ALJ is not precluded from considering prior work-related injuries when considering whether a claimant is totally and

> permanently disabled, even if no formal claim for prior work-related injuries were filed.
>
> ....
>
> While the Plaintiff is fairly young and has a 12th grade education, all the jobs she has held have been physically demanding. She suffered work-related carpal tunnel and cubital tunnel syndrome, had surgery and was able to return to work, albeit for a different employer. Now as a result of injuries she sustained with the Defendant/Employer, she has had surgery to both of her shoulders and also suffered an injury to her cervical spine.

In its brief to the ALJ, Affiliated made the following argument regarding Ball's cervical spine injury:

> This issue has been addressed in the previous argument to some degree; but the employer submits that the claimant has failed to establish any work-related injury to her cervical spine. She presumably alleged such an injury following her 2006 injury as same is listed in the Settlement Agreement. This, however, does not establish liability on the part of the employer for any neck injury. KRS 342.125(7) notes that where a Settlement Agreement becomes an award by approval of the ALJ, 'no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against interests [sic] of any party. The parties may raise any issue upon reopening and review of this type of award which could have been

> considered upon an original application for benefits.' This issue was raised in the Employer's Claim Denial filed in response to the claimant's reopening. The claimant, however, produced no evidence of any harmful change to the human organism as a result of any cervical spine injury in 2006 and she has never alleged any injury to her neck as a result of the 2009 injury. Dr. Daniel Primm addressed the issue at the time of his deposition and stated that the claimant had no injury to her cervical spine as any changes the claimant may have on her MRI scan are due to the natural aging process. (Primm, 16). This is uncontroverted evidence. Therefore, any claim for benefits, income or medical, related to the cervical spine must be denied.

Affiliated filed a petition for reconsideration asserting, in relevant part, as follows:

> 2. There is an error appearing on the face of the Opinion in that the ALJ awarded benefits for a claim that was not asserted. The claimant never offered any testimony or allegation that she sustained an injury to her cervical spine as a result of the April, 2009 incident. Her Application for Benefits listed only an injury to the left shoulder occurring in April, 2009. In her Brief [sic] to the ALJ she consistently submitted that the injury to her cervical spine occurred in 2006; not in 2009. In the Opinion, the ALJ could not cite to any specific injury to the cervical spine noting alternative theories of what may have occurred. Without a specific allegation of injury to the cervical spine in April of 2009, the employer was not presented an opportunity to defend such an allegation; and with an

> allegation of a previous injury to this same body part in 2006 that was the subject of a reopening being litigated at the same time, coupled with prior issues involving bilateral cubital tunnel and carpal tunnel with apparent surgeries, a finding that the claimant sustained a work-related injury to her cervical spine as a result of the April, 2009 incident is erroneous and prejudicial.
>
> Alternatively, the employer would request specific findings of fact as to the occurrence of any April, 2009 injury to the cervical spine including how the injury occurred, when and if the claimant gave notice of an alleged 2009 cervical spine injury, identification of the harmful change, and all other necessary elements of a claim.
>
> 3. There is an error patently appearing of [sic] the fact [sic] of the Opinion in that the ALJ did not make any specific findings as requested by the employer regarding the occurrence of an injury to the cervical spine as a result of the 2006 claim which was before the ALJ on reopening. As noted by the employer in its Brief [sic], as the 2006 claim was resolved through settlement, all issues remained subject to determination. The employer argued that the claimant did not establish the occurrence of an injury to the cervical spine as a result of the 2006 incident and requested a finding on the issue. The Opinion does not address this issue.

In the March 28, 2011, order ruling on the petition for reconsideration, ALJ Frasier determined, in relevant part, as follows:

> (5) The undersigned finds that while the Plaintiff may not have amended her claim to reflect a specific cervical spine injury, he addressed his justification of an award of cervical spine impairment in footnote 1 on page 21 of the Opinion and Award, and the Defendant has not identified any patent error in this finding.
>
> (6) The Defendant's second objection to the Opinion and Award is OVERRULED;
>
> (7) The Defendant's request for specific findings of whether a cervical spine injury occurred on April [sic] 3, 2006, is well taken, and the undersigned finds that the Plaintiff's testimony and the medical evidence supported the existence of a cervical spine injury on April [sic] 3, 2006, but no impairment; and, as the undersigned found in the Opinion and Award, the injury of April 30 [sic], 2009, also resulted in a cervical spine injury that was largely masked by the shoulder condition and did result in a 5% impairment.

Affiliated's first argument on appeal is that the ALJ erred by determining Ball sustained an injury to her cervical spine as a result of the November 3, 2006, work incident. Affiliated argues as follows:

> As has been noted above, the claimant and this employer settled a claim in 2008 that arose from a November 3, 2006 injury. The Settlement Agreement noted that the claimant was sorting mail and injured her right thumb/shoulder/neck. The body part identified was right shoulder/neck. The impairment ratings

upon which the settlement was based related to the right shoulder only.

...

In this case, the claimant tendered a Motion to Reopen her 2006 injury claim on or about March 23, 2010. In her Affidavit in support of her Motion to Reopen she stated that her 'right shoulder has continued to deteriorate'. She made no reference to her cervical spine or neck. She further supported her Motion to Reopen with an Affidavit from Dr. Robert Johnson. Dr. Johnson stated in his Affidavit that he 'believes that the Plaintiff's medical condition relative to her right shoulder has worsened since the claim that she settled on June 12, 2008.' He made no reference to the cervical spine and the 2006 injury.

The employer filed a Claim Denial regarding the 2006 reopening wherein it was noted that the 'Plaintiff has not presented any evidence of permanent injury or permanent disability to the neck as a result of the 11/3/2006 injury and has not filed reliable medical evidence to substantiate an increase in impairment for her right shoulder.' When this case was submitted for decision to the ALJ, the employer argued in its Brief [sic] that the claimant had failed to produce any evidence that she sustained an injury to her cervical spine on November 3, 2006. It supported its argument with the testimony of Dr. Daniel Primm. Other evidence in the record that supports the argument of the employer included the initial treatment records of Dr. Glen McClung beginning February 28, 2007 in which he noted pain in the right shoulder without 'any specific injury'. On June 21, 2007 Dr. McClung

> noted the claimant was protracting her scapula and was having some neck pain from this. On September 18, 2007 Dr. McClung recorded that the claimant's biggest complaint was pain on the neck but his [sic] 'has gotten better since she has worn the scapular brace.' When Dr. McClung saw the claimant on March 13, 2008 he noted that she was having pain in her periscapular area. He stated that this was a postural problem.'[sic] Dr. McClung did not see the claimant again until June, 2009;[sic] after the injury to her left shoulder. At no time did not [sic] Dr. McClung reference or diagnosis [sic] any harmful change to the cervical spine arising out of the November 3, 2006 work injury.
>
> A review of the record reveals no medical opinion that the claimant sustained an injury to her cervical spine in 2006. The ALJ did not address any injury to the cervical spine in his original Opinion and Award. It was not until this employer filed a Petition for Reconsideration requesting a specific finding on this issue that he addressed the question. After noting that the 'request for specific findings of whether a cervical spine injury occurred on April [sic] 3, is well taken,' that ALJ found that 'the Plaintiff's testimony and the medical evidence supported the existence of a cervical spine injury on April [sic] 3, 2006, but no impairment.' He made no reference to the testimony of the Plaintiff upon which he was relying; nor did he make any reference to the 'medical evidence' upon which he was relying.

The June 12, 2008, Form 110-I, Agreement as to Compensation and Order Approving Settlement for Claim No.

2007-99372 indicates "right shoulder/neck" as the body parts affected by the November 3, 2006, work injury. Ball seemingly did not allege a worsening of impairment to her cervical spine in her March 24, 2010, motion to reopen, as there is no direct argument in Ball's motion asserting as much. In fact, in Ball's Affidavit, she states "the right shoulder has continued to deteriorate." Nonetheless, Affiliated and Ball are both entitled to a definitive finding from the ALJ regarding the specific nature of the injuries Ball sustained on November 3, 2006, for any future motions to reopen. Affiliated requested such a finding throughout this litigation. See Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008).

In Affiliated's April 13, 2010, response to Ball's motion to reopen and in Affiliated's brief to the ALJ, it argues there is no evidence in the record supporting an injury to Ball's neck on November 3, 2006. In the February 28, 2011, opinion and award, this Board is unable to locate a clear finding by ALJ Frasier as to the nature of Ball’s cervical spine injury due to the November 3, 2006, work injury. Since the February 28, 2011, opinion, award, and order was silent on the issue of whether Ball sustained a cervical spine injury on November 3, 2006, Affiliated requested additional findings in its

February 9, 2012, petition for reconsideration. In the March 28, 2011, order ruling on the petition for reconsideration, ALJ Frasier noted Affiliated's request for additional findings on this issue "is well taken" and indicated Ball's testimony and "the medical evidence" support the existence of a cervical spine injury on November 3, 2006, but with no impairment.

We find ALJ Frasier's findings of fact on this issue, made only in the February 9, 2012, petition for reconsideration, to be insufficient as a matter of law, and we remand for additional findings. While the ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result, the ALJ is required to adequately lay out the basic facts drawn from the evidence upon which his ultimate conclusions were based so that all parties are reasonably apprised of the basis for the decision. Big Sandy Community Action Program vs. Chafins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). The ALJ has not done so in this case, and this Board is simply unable and unwilling to guess what specific evidence the ALJ has relied upon in concluding Ball sustained an injury to her cervical spine on November 3, 2006. A mere reference to

"Plaintiff's testimony" and "the medical evidence" is inadequate.

Affiliated's second argument on appeal is the ALJ erred by awarding benefits for a 2009 cervical spine injury that was never alleged by Ball. Affiliated asserts as follows:

> When the claimant filed her Application she referenced a left shoulder injury occurring on April 30 [sic], 2009; although the parties later agreed the correct date of injury was April 28, 2009. She made no reference to a neck injury. She saw Dr. Robert Johnson on February 1, 2010 at the request of her attorney. Dr. Johnson prepared a Form 107 and on the basis of his conclusions, the claimant tendered a Motion to Reopen her 2006 claim on or about March 23, 2010. Her Affidavit filed in support of her Motion to Reopen references that her date of injury was November 3, 2006 when she sustained an injury to her right shoulder and neck. She then stated that 'the right shoulder has continued to deteriorate.' She makes no reference to any change in her neck. She further supported her Motion to Reopen with an Affidavit from Dr. Johnson. Dr. Johnson states in his Affidavit that 'the Plaintiff's medical condition relative to her right shoulder has worsened since the claim' was settled. He noted that she would now have a right shoulder impairment of 7%. He makes no reference to the neck in this Affidavit.
>
> The point of this recitation is that the claimant had access to the opinions and conclusions of Dr. Johnson in

sufficient time to rely upon same to seek a reopening of her 2006 claim. Yet, she never amended the original Application [sic] to assert that she also sustained an injury to her neck as a result of the 2009 injury. While it is [sic] has repeatedly been held that an employee is not required to 'self-diagnose' an injury, in this case, there was a doctor that diagnosed what the ALJ thought was an injury and the claimant did not pursue a claim for that injury. The claimant did not argue that she was entitled to any benefits regarding an injury to her neck in 2009 in her brief to the ALJ. She stated in the first sentence of her brief that she 'filed a Form 101 for a left shoulder injury' and she also 'filed a Motion to Reopen her previous right shoulder claim' with both claims being consolidated. While she asserted later in her brief that she had problems with both shoulders as well as her neck due to those injuries, it must be remembered that the claimant had asserted an injury to her neck as a result of the 2006 injury so this statement cannot serve as any type of argument that she was claiming an injury to her cervical spine as a result of the 2009 injury. This position is supported by the statement in her brief that 'Dr. Johnson is the only physician who has examined and rated both the 2006 right shoulder and neck injury and the 2009 left shoulder injury.' (Plaintiff's brief, 3) The claimant's argument continues that Dr. Johnson assessed a 12% rating for the <u>2006 injury</u> noting that 7% was for the right shoulder and 5% was for the neck. (Plaintiff's brief, 3; Emphasis added). While the Plaintiff's brief is not 'evidence' these assertions clearly support the position of the employer that the issue of an injury to the

cervical spine as a result of the 2009 injury was never asserted by the claimant.

The fact that a 2009 injury to the cervical spine was never asserted is further supported by the statements of the ALJ himself when he found that such an injury had occurred. On page twenty-one (21) of the Opinion and Award, the ALJ notes that while he was not persuaded by the opinions of Dr. Johnson for the conditions other than the cervical spine, he noted that Dr. Johnson had 'identified a number of work-related conditions for which treatment is still appropriate including bilateral scapular protraction, cervical spine symptoms shown by physical exam findings of guarding and spasm, (footnote reference omitted) and left and right shoulder conditions for which prior surgery was performed.' The former ALJ, however, did not stop there. He went on to note in the text of his footnote that he found 'a permanent harmful change to the cervical spine based on the opinions of both Dr. Johnson and Dr. McClung. While no condition justifies any surgery to the cervical spine, sufficient objective findings support a cervical DRE category II as opined by Dr. Johnson. **Even though the Plaintiff did not specifically allege an injury to the cervical spine**, she did have surgeries to both shoulders, and both Dr. Johnson and Dr. McClung note involvement in the nearby structure of the cervical spine. Whether or not her left shoulder symptoms masked any cervical spine symptoms, or the more recent surgery and aggravation of more recent work activities intensified symptoms in the cervical spine, the most credible evidence, and even some statements by Dr. Primm of 'possible'

> cervical spine symptoms, supports the existence of a cervical spine injury related to the events of April 30 [sic], 2009.' (Opinion, 21; Emphasis added). In the Order on this Petitioner's Petition for Reconsideration the ALJ reiterated that the claimant had not alleged an injury to her cervical spine stating, 'The undersigned finds that **while the Plaintiff may not have amended her claim to reflect a specific cervical spine injury**, he addressed his justification of an award of cervical spine impairment in footnote 1 on page 21 of the Opinion and Award, and the Defendant has not identified any patent error in this finding.' (Order on Reconsideration, 2; Emphasis added).

In the February 28, 2011, opinion, award, and order, ALJ Frasier stated as follows regarding a cervical spine injury sustained in April, 2009 (Claim No. 2009-88425):

> The opinion of Dr. Johnson based on his one-time examination of the Plaintiff does not appear to be consistent with the opinion of her treating surgeon who performed both surgeries, provided her original 2% rating for her right shoulder impairment, and more recently opined 0% impairment with no restrictions for her left shoulder. On the other hand, both Dr. Johnson and Dr. McClung have identified continued complaints to the cervical spine which Dr. Johnson has opined justifies a 5% impairment under DRE cervical category II. Further, even though the undersigned is not persuaded with the 7% impairment of Dr. Johnson in his affidavit or his opinion on impairment for the conditions other than the

> cervical spine, Dr. Johnson has identified a number of work-related conditions for which treatment is still appropriate including the bilateral scapular protraction, cervical spine symptoms shown by physical exam findings of guarding and spasm [footnote omitted], and left and right shoulder conditions for which prior surgery was performed.
>
> The undersigned finds that the Plaintiff has not met her burden of proof for a worsening of impairment to her right shoulder in regard to her April [sic] 3, 2006, injury, and only a 5% impairment to the cervical spine in regard to her more recent cervical spine and left shoulder injuries. Further, the undersigned is simply not persuaded by Dr. Johnson in his February 1, 2010, opinion in regard to the other impairment ratings listed at page 15 of his report. Despite his earlier statement that the *AMA Guides* do not recognize a scapular deformity, he goes ahead and provides an impairment rating. While Dr. McClung did prescribe a brace for this condition, and the Plaintiff is entitled to reasonable and necessary treatment for this condition, the undersigned is not convinced under the opinions of Dr. McClung and Dr. Primm that any impairment rating is appropriate for this condition. The remaining impairment ratings by Dr. Johnson, other than for the neck, appear to relate to the left shoulder condition for which both Dr. McClung and Dr. Primm have given more credible opinions of 0% impairment at this time.

While this Board acknowledges Ball's December 3, 2009, Form 101 does not allege an injury to her cervical spine, we believe this issue was tried by implied consent.

On the issue of implied consent, we turn first to Kentucky Rules of Civil Procedure, Rule 15.02, which states as follows:

> RULE 15.02. . AMENDMENTS TO CONFORM TO THE EVIDENCE.
>
> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Regarding implied consent, in Kroger Co. v. Jones, 125 S.W.3d 241 (Ky. 2004), the Kentucky Supreme Court instructed as follows:

In *Nucor Corp. v. General Electric Co.,* Ky., 812 S.W.2d 136, 145–46 (1991), the Court determined that CR 15.02 is a tool for deciding cases on their merits rather than on the basis of gamesmanship. Quoting from Bertelsman and Philipps, *Kentucky Practice,* 4th Ed., Civil Rule 15.02, the Court explained that one of the reasons for the rule is to take cognizance of issues that were actually tried. As a result, if issues that are not raised in the pleadings are tried with the express or implied consent of the parties, they are treated as if they had been raised. **A party's failure to object to the introduction of evidence on an unpleaded issue implies consent to the trial of the issue.** Rejecting the view that there could be no implied consent, the Court took the view that the theory of implied consent rested on an absence of actual prejudice, i.e., on the ability to present a defense. We are convinced that the principles that were expressed in *Nucor* apply equally to workers' compensation proceedings.

Here, both parties introduced evidence with respect to the left arm injury. The employer contested notice of the left arm injury at the prehearing conference, but it did not raise the claimant's failure to plead the injury until the hearing, after the proof was closed. Under the circumstances, it was reasonable for the ALJ to conclude that the employer was not prejudiced and that the claimant had not waived her right to claim an injury to her left arm. In so concluding and awarding benefits based upon both injuries, the ALJ effectively amended the claim for the right arm, *sua sponte,* and joined the claim for the left arm. We are persuaded that the ALJ's actions were

> authorized under the circumstances and that the award was proper.

Id. at 246 (emphasis added).

Here, Affiliated was put on notice Ball was alleging a cervical spine injury occurred on April 28, 2009, as early as February 25, 2010, when Ball filed the February 1, 2010, Form 107-I report of Dr. Robert Johnson regarding the April 28, 2009, injury. In that report, regarding Ball's cervical spine, Dr. Johnson provided the following diagnosis: "A specific injury to the neck with guarding and spasm." Dr. Johnson assessed a 5% impairment rating for an "injury with muscle guarding of the neck" pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Johnson opined as follows:

> To be clear, my rating is confined to the left shoulder and associated neck problem. These are of recent onset attributable to the work injury of April 30 [sic], 2009."

Affiliated filed no objection in response to Dr. Johnson's February 1, 2010, report.

Additionally, Sheila Ball was deposed on February 1, 2010. In her deposition, Ball specifically testified to pain she was experiencing in her neck after the April 28, 2009, injury. She testified as follows:

> Q: Where were you having pain?
>
> A: In my shoulder, and all the way up into the neck area.
>
> Q: Okay. So your left shoulder. Was it on the top, up to the neck, or--?
>
> A: It was here (indicating). But the pain goes all the way up into back in here (indicating), and down.
>
> Q: The back of your neck?
>
> A: Uh-huh (affirmative response).

Affiliated made no objection at Ball's deposition or afterwards to her testimony.

On July 19, 2010, Ball filed an MRI report concerning her cervical spine dated May 7, 2010, which sets forth the following impression:

> At C4/5 there is moderate central narrowing of the canal due to posterior longitudinal ligament thickening & endplate spur. There is no narrowing of the foramina.
>
> At C5/6 there is moderate to severe central narrowing of the canal with mild central flattening of the cord and there is only mild narrowing of the foramina.
>
> At C6/7 there is mild central narrowing of the canal. There is no narrowing of the foramina.

Affiliated filed no objection to the MRI report of Ball's cervical spine.

Ball filed the records of Dr. Glen McClung from Commonwealth Orthopedic Surgeons, PSC. Dr. McClung's April 5, 2010, record states as follows:

> Ms. Ball returns. I am seeing her today for pain in the trapezius muscles. I have ordered an MRI of her cervical spine, which was denied. I have ordered a sed. rate and CRP, which have been denied. I have also ordered a MRI of the cervical spine, which has been denied, and a pain clinic referral, which has been denied. I have told Sheila that this is out of my hands. Obviously, the problem is not in the shoulder. This is more of either myofascial pain or possibly coming from her cervical spine. Regardless, I have explained to Sheila that I am unable to provide her with any other care at this point in time secondary to the fact that the lab work, pain clinic referrals, and MRIs have all been denied. I have recommended that she get in touch with her workers comp carrier.

Affiliated filed no objection to the introduction into evidence of Dr. McClung's records.

At the hearing, concerning her neck pain Ball testified as follows:

> Q: Shelia [sic], could you tell the Judge how your shoulders and your neck pain interferes with your, I'm going to use the word, daily activities now?
>
> A: Yes. I can't--for--I can go to bed at 9:00 o'clock at night, I'm there tossing and turning and I'll finally doze off to sleep. I'll sleep about two hours. I wake up crying because--

> with pain. And, all through the night I'm up and down from the couch to the bed. As far as doing housecleaning, I can do-- do dishes. I'll have to take breaks in between, find something else to do. Vacuum, I can't finish my vacumm [sic].

Affiliated made no objection to Ball's testimony about her neck pain.

Significantly, Affiliated presented evidence that directly responded to the allegation of a cervical spine injury sustained on April 28, 2009, in the form of Dr. Daniel Primm's deposition testimony on August 3, 2010. Dr. Primm conducted an independent medical examination ("IME") of Ball on April 9, 2010. In his deposition, Dr. Primm testified as follows:

> Q: On her physical examination of the cervical spine, was there anything that would be considered an objective abnormality?
>
> A: Not objective. Her objective findings really were pretty benign. She had-- her range of motion was normal, and as I said, fairly supple, meaning, you know, I didn't see any catching or hesitation. In neck motion, it was pretty smooth and basically unremarkable. The provocative tests for cervical radiulopathy [sic] and radiculitis were negative, Spurling's and Lhermitte's. She did complain of a lot of subjective symptoms which were-- again, I just could not find an explanation for, such as, you know, she told me that she had

tenderness beginning at the base of the skull all the way down the spinal and all the way down both of the paracervical muscles, right and left sides, across the upper third of her thoracic spine, both posteriorly shoulders, both trapezius muscles, and then down and around a fascia tenderness on both upper arms. And it was all this kind of symmetric pattern which when you see that kind of pattern that should tell a physician that it's not a physical, there's not a physical condition. A physical condition just would not produce this type of symmetrical, global type of pattern of tenderness. So you have to think, you know, of other things that might be influencing the patient's pain complaints.

Q: Dr. Primm, prior to going on the record today I asked you to look at the reports from radiologists that Ms. Ball's attorney has recently filed into evidence from Advanced Imaging. I believe they reference an MRI of the cervical spine and an MRI of the left shoulder. You had an opportunity to review those before this deposition today?

A: Yes. Just a few minutes ago, I did.

Q: And is there any abnormality noted on those or any finding that you would attribute to the effects of Ms. Ball's alleged injury at ACS?

A: Well, I don't think any of those findings on the cervical or shoulder scan were specific for a specific injury, no. And particularly, the cervical spine just showed degenerative changes in the lower third of the cervical spine, typical things that you see with age, thickening of the

> ligament and some early narrowing that sounded like some of the foramen. But there are no traumatic or really pronounced findings on the cervical scan....

Dr. Primm further testified as follows:

> Q: With regard to the cervical spine MRI that was performed in May of this year, and I don't think that we have a previous scan for which we can make a comparison, but in looking at the findings noted by the radiologist, and I know we've kind of touched on this briefly and I'm jumping around and I apologize for that, but are any of the findings that the radiologist noted on that scan-- I guess to what would you attribute them? Are they traumatic in nature or are they consistent with the natural aging process and just this lady's even [sic] previous medical history regardless of whatever may have occurred to her in either November of '06 or April of 2009?
>
> A: When you look at the findings, they're not traumatic findings, what you would describe as traumatic or some type of post-injury findings, no. They are typical and very common, probably the most common age-related degenerative findings in the neck. And the location is consistent with where they begin. Usually they begin in the lower portion of the cervical spine, usually at C5-6, C6-7 and then next you may see it at C4-5. In this case, that's where they reported these findings, C4-5, C5-6, and C6-7. And, you know, what they're describing is some narrowing due to the posterior longitudinal ligament thickening, some spurring. I mean it's not pronounced, no. These are just things that you see, that was at C4-5. C5-6, they say

there's moderate to severe narrowing due to posterior longitudinal ligament thickening and end plate spurring. However, when they say it's severe, they measure it at 8 to 9 and C4-5, it was a 10. So I'm not sure I would call it severe by their own measurements. But it was a little bit more than-- a millimeter or two more than the other level. And then at C5-6, the same thing, there's mild central narrowing due to posterior longitudinal ligament thickening and end plate spurring. And this is just what happens with the aging process. The posterior ligaments and the ligament plating do become thicker. And again it has to do just like with the tendinopathy in the rotator cuff. You get changes with age in terms of water content and the composition of the soft tissues. But, you know, these are just, you know, normal changes that occur in all of us. We all have these changes. Certainly, some of us have more than others. And again they begin-- the time when they begin is variable. Sometimes you can even see these changes in very young individuals. And I haven't-- I'm not aware of any study that has definitively demonstrated that there's a difference in the degree of these changes depending upon occupation or anything else. I mean if you have a focal trauma, a neck fracture or something like that, sure, that can produce post-traumatic changes. But other than that, no. I don't know of anything that has indicated that these changes occur just, you know, because of regular activities or work activities.

Q: When you examined Ms. Ball, did she exhibit any objective symptomatology or any objective abnormality that would cause you to believe she had any

> permanent impairment as a result of these degenerative changes in her neck?
>
> A: Well, no. I mean her neck range of motion was fine. Her x-rays actually look good. When you look at the x-rays, you know, her x-rays basically are normal. So you have to even go to [sic] MRI scan to even pick up these early degenerative changes. So that should tell you these are all very early changes. Same type [sic] changes you would see in people with an MRI scan who weren't complaining of any neck pain, just depending on the age. And, no, if you really look at it objectively there really wasn't anything that I could find that would be a ratable impairment in the criteria of the AMA Guide. You know, to get an impairment rating for this lady you would just have to just use purely Chapter 18, just based purely on subjective complaints of pain. But I don't know of any impairment that would-- that would be taken from her objective findings.

Dr. Primm was asked to comment on Dr. Johnson's opinions and impairment ratings. Regarding Dr. Johnson's cervical spine impairment rating, Dr. Primm testified as follows:

> The next thing he says, again this is just Dr. Johnson's term, injury with muscle guarding of the neck. I mean that's a pretty broad, non-specific-- and really is not a diagnosis, it's just a description of her symptoms. And then he puts her in Cervical DRE Category II. And to be in II you've got to have specific objective signs of injury or you've got to have a fracture, you're got to have

> radiculopathy. But he's not saying that, he saying--
>
> Q: She has pain.
>
> A: -- has pain and muscle guarding, whatever that is, and he gives her 5 percent. And then he totals all those up and comes up with a 13 percent impairment.

The record indicates Affiliated was aware of the introduction of lay and medical testimony concerning an April 28, 2009, cervical spine injury and tried the issue by implied consent. *See* Kroger Co. v. Jones, supra. It is abundantly clear that Affiliated understood a 2009 cervical injury was alleged and directly confronted this issue via Dr. Primm's extensive testimony on the subject. We also note that "injury as defined by the Act (cervical spine)" was made a contested issue at the August 5, 2010, BRC. While Ball failed to amend her Form 101 to include a cervical spine injury and in her brief failed to unequivocally assert sustaining an injury to her neck on April 28, 2009, Affiliated did not to make the failure to amend the Form 101 an issue in its May 13, 2010, Statement of Proposed Stipulations and Notice of Contested Issues or at the BRC. 803 KAR 25:010 §13(14) specifically mandates that following the BRC, only those contested issues

identified at the time of the BRC shall be the subject of further proceedings.

ALJ Frasier had the discretion to conform the pleadings to the evidence and *sua sponte* amend Ball's claim. *See* Id. He did so here, and adequately set forth the medical evidence he relied upon in finding Ball sustained an injury to her cervical spine on April 28, 2009, and awarding benefits. This determination is permissible by law and supported by substantial evidence, and it will not be disturbed.

Affiliated's third argument on appeal is that ALJ Frasier's award of benefits for a cervical spine injury related to the April 28, 2009, incident is violative of the U.S. and Kentucky Constitutions. Affiliated argues as follows:

> In this case, the adjudicator readily acknowledged that he was awarding income benefits and lifetime medical benefits to a claimant for an injury that had not been specifically alleged. Not only had the claimant never alleged the injury; she had even argued for the relief awarded by the ALJ. Indeed, her arguments were consistently focused on the assertion that any injury she sustained to her cervical spine occurred in 2006 and she made that argument more in passing than in any focused assertion.
>
> An award of income benefits and lifetime medical benefits by an

> adjudicator based upon the finding of an injury that was never alleged by the claimant is clearly unfair and biased and did not afford the employer of its right to reasonable notice of the matter at issue and an opportunity to be heard to regular and established rules of procedure. As such, it violates the employer's due process rights. This further supports the argument of the Petitioner that the finding of the ALJ that the claimant sustained an injury to her cervical spine as a result of the April, 2009 event must be set aside.

The record reveals Affiliated was on notice of lay and medical evidence in the record, including an impairment rating by Dr. Johnson, for a cervical spine injury sustained on April 28, 2009. Affiliated had ample opportunity to object to this evidence and failed to do so. *Significantly, Affiliated directly responded to the lay and medical evidence regarding Ball's cervical spine injury through the testimony of Dr. Primm.* As previously noted, Affiliated did not make Ball's failure to amend her Form 101 a contested issue both in its May 13, 2010, Statement of Proposed Stipulations and Notice of Contested Issues or at the BRC. In light of the record, Affiliated's Constitutional argument has no merit. There was no abuse of discretion on the part of ALJ Frasier or a failure to afford procedural due process. See Bowerman v. Black

Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). The issue of whether Ball sustained a cervical spine injury on April 28, 2009, was tried by implied consent, and ALJ Frasier acted within the discretion afforded him under the law by acknowledging this issue, conforming the pleadings to the evidence, and ultimately awarding benefits.

Accordingly, those portions of the February 28, 2011, opinion, award, and order and the March 29, 2011, order ruling on the petition for reconsideration relating to the ALJ's findings and award of benefits for the April 28, 2009, cervical spine injury are **AFFIRMED**. Those portions of the February 28, 2011, opinion, award, and order and the March 29, 2011, order ruling on the petition for reconsideration relating to the ALJ's determination Ball sustained a work-related cervical spine injury on November 3, 2006, are **VACATED** and this claim is **REMANDED** to the ALJ for additional findings in conformity with the views expressed herein.

ALL CONCUR.

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