OPINION ENTERED: October 19, 2012

CLAIM NO. 200801391

MCKESSON CORPORATION PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

PHYLLIS D. HALE
and EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

ALVEY, Chairman. McKesson Corporation ("McKesson") seeks review of the opinion, award and order rendered May 29, 2012 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") awarding Phyllis Hale ("Hale") permanent total disability ("PTD") benefits and medical benefits for injuries to her left shoulder, cervical spine and lumbar spine. McKesson

also appeals from the order rendered July 9, 2012 overruling its petition for reconsideration.

On appeal, McKesson argues the alleged cervical injury claim is barred pursuant to KRS 342.270(1). McKesson argues Hale failed to amend her Application for Resolution of Injury Claim to include the cervical injury and made no such request at any time to the ALJ. McKesson also argues it did not receive due and timely notice of the alleged cervical injury since Hale did not complain of neck problems to a physician until almost a year and a half after the March 13, 2008 accident.

Hale testified by deposition on January 22, 2009 and at the hearing held March 29, 2012. Hale was born on January 12, 1968 and is a resident of Corbin, Kentucky. She completed four years of college, but did not obtain a degree. Hale's work history consists of work as a waitress, secretary, substitute teacher and manager. Hale began working for McKesson in 2006 and was a medical biller at the time of the work incident. As a medical biller, she would telephone insurance companies, answer incoming calls, file insurance claims, pull and carry files, perform computer work, and complete paperwork.

Hale testified that on March 13, 2008, she sat down at a desk at work where a fan was oscillating. The fan

blew two checks onto the ground which Hale bent down and picked up. A third check blew to the ground. When she bent down to pick it up, her "chair shot out from under me, I went airborne and down onto my left side, left shoulder, left side." Hale testified she does not remember feeling any pain at that time, but notified her supervisor within five minutes of the incident. She subsequently completed her work shift and drove home. Later that same night, Hale experienced stabbing pain in her left shoulder and eventually developed low back pain. Hale continued her employment with McKesson for approximately two weeks and thereafter stopped due to pain.

Hale testified she first sought medical attention on April 2, 2008 from Dr. Maxey, her family physician. He prescribed Lortab and muscle relaxers, referred her to physical therapy and ordered left shoulder and lower back MRIs. Hale sought a second opinion from Dr. Dubin. Hale testified she was referred to Drs. Primm and Lester by the "workers' comp insurance."

Hale testified she treated with Drs. Balthrop and D'Angelo for her left shoulder. Dr. Balthrop administered a cortisone injection and referred her to physical therapy. Dr. D'Angelo performed shoulder surgery on February 16, 2009

which helped somewhat, however she continues to experience daily pain.

Hale testified she has seen Drs. Brooks and Dubin for her low back and continues to experience pain. She did not mention neck problems during her deposition. At the hearing, Hale testified she has seen Dr. Brooks, Dr. Stevens and Dr. El-Naggar for her cervical spine. Dr. El-Naggar performed a cervical fusion surgery on June 29, 2010. Hale testified she experiences neck pain on a reoccurring basis which is worsened with walking long distances and sitting without support. On cross-examination, Hale admitted she did not complain of neck problems until May 15, 2009. Hale testified she has used a quad cane for the past three years because her left leg has given out on several occasions since the accident. She also experiences numbness and tingling in her left leg. Hale testified she cannot return to work due to constant left arm and back pain.

Hale testified she has had no prior neck or shoulder injuries. She suffered a prior herniated disc at L4-5 as a result of a motor vehicle accident in 1996, which did not require surgery. As a result, Hale experiences “inadvertent” low back pain, which is not a daily or monthly occurrence. Hale also broke her collarbone and left arm in 1979 and suffered a laceration to her right hand in 1989.

Following the March 13, 2008 incident and subsequent shoulder and cervical surgeries, Hale testified she fell in a movie theater on October 9, 2010 and was involved in a motor vehicle accident on March 21, 2011. She also indicated she injured her back putting up a Christmas tree at McKesson in December.

At the hearing, the ALJ noted at issue was notice regarding the neck injury. The parties later indicated notice had been stipulated, as demonstrated in the following testimony:

> The Court: While we were off the record we had a discussion pertaining to the issue of notice and Defense counsel has agreed that there is no issue now on notice being proper. **There had been reserved notice as to the neck problem but the parties are willing to stipulate to notice in general, correct?**
>
> **Mr. Harding: Correct**
> (emphasis added)

During cross-examination, the following testimony occurred regarding the issue of notice of the neck injury:

> Q: You didn't start complaining to the doctors about a neck problem, though, until about May 15 of 2009. Do you have any reason to dispute that?
>
> A: No.
>
> Q: And the company didn't know anything about any neck allegation until sometime after that, would that be a fair statement?

Mr. Bowling: She wouldn't know what the company knew. She can testify about whether she told anybody.

Q: When did you tell them that you had a neck problem?

A: I had no communication with the company whatsoever.

Q: So you don't know if they have ever gotten notice of any neck problem?

A: They would probably have been notified through the medicals from the doctor.

Q: At the time you were first injured, it looks like from the medical records, that you just complained of left-sided pain, back, left shoulder, and hip, is that right?

A: Yes.

Mr. Harding: Judge, just with regard to the issue of notice, you know, I would just like to retain that insofar as what I just threw out here for the neck if need be, if we get into that, if the issue involves impairment to the neck, that you consider that we do have a notice issue for that.

The Court: I think it's more a question of work relatedness . . .

Mr. Harding: Right, I do too.

The Court: . . . and causation, whether or not the medical evidence ties the neck problem to the work-related injury or not. **But I will note your reservation as to notice.**
(emphasis added)

Hale filed the Form 101, Application for Resolution of Injury Claim, on November 5, 2008 alleging injuries to her “left shoulder, hip and back” after her “chair rolled from beneath her and she fell to the floor landing on her left shoulder and hip.” Hale attached the records of Dr. Jackie Maxey from Parkway Medical Associates. On April 2, 2008, he noted complaints of low back and left shoulder following a work-related fall on March 13, 2008. Dr. Maxey assessed low back pain and spurs, prescribed Flexeril and referred Hale to physical therapy. He also restricted her from work and requested a lumbar spine MRI. On April 9, 2008, Hale complained of spastic pain in her left trapezius region and low back pain with bilateral radicular symptoms. Dr. Maxey diagnosed trapezius spurs, back spurs and low back pain. On April 23, 2008, Dr. Maxey noted “neck/trapezius pain” and assessed neck spurs, trapezius spurs and low back pain. On May 14, 2008, Dr. Maxey requested a left shoulder MRI and subsequently referred Hale to Bluegrass Orthopedics for her left shoulder.

Hale attached to the Form 101 two lumbar spine MRI reports. A May 5, 2008 lumbar spine MRI, requested by Dr. Maxey, revealed multilevel disc disease and facet hypertrophy, small disc protrusions at each level at L3-L4

through L5-S1, with the L4-L5 disc protrusion resulting in mild canal narrowing and potentially resulting in left L5 radiculopathy. The second MRI report, dated August 1, 1996 and done as a result of a motor vehicle accident, revealed degenerative disc changes at L4-L5 with loss of disc height and disc desiccation and a paracentral left-sided disc herniation in the axial plane.

Hale also attached to the Form 101 a medical record from Dr. Ronald Dubin, dated October 24, 2008. Dr. Dubin noted complaints of back pain radiating down her left lower extremity. His examination revealed "her neck is normal." Dr. Dubin diagnosed left shoulder partial rotator cuff tear and low back pain with sciatica symptoms. He opined Hale had reached maximum medical improvement ("MMI"), restricted employment to sedentary type work and recommended physical therapy. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Dubin assessed an 8% impairment rating for her lumbar spine injury and a 9% impairment rating for her shoulder, yielding a combined 17% impairment rating.

Hale attached to the Form 101 the initial physical therapy evaluation performed at PT Pros on April 23, 2008 diagnosing low back pain and left shoulder sprain/strain.

She also attached a questionnaire dated October 16, 2008 and submitted by a case manager to Dr. Lester. Dr. Lester opined the March 13, 2008 fall was the major contributing cause of Hale's shoulder and back injury, and recommended physical therapy for her shoulder.

McKesson submitted Dr. Daniel Primm's report dated January 20, 2009. Dr. Primm noted Hale has suffered from chronic low back pain for the past twelve years due to an unrelated motor vehicle accident. Dr. Primm diagnosed morbid obesity, lumbar strain superimposed on history of chronic low back pain symptoms, and left shoulder strain. He opined her symptoms should resolve uneventfully and she had reached MMI. Dr. Primm noted Hale did not need a shoulder arthroscopy. He recommended a weight loss reduction program and exercise. Dr. Primm opined Hale did not sustain a permanent injury due to the March 2008 accident and he declined to recommend restrictions. However, he did note her chronic active lower back condition may have been aggravated, at least temporarily, by the March 2008 accident.

Hale submitted Dr. William Brooks' record dated January 29, 2009, who saw Hale for back pain radiating into her lower extremities. Dr. Brooks diagnosed degenerative disc disease and musculoligamentous strain. He recommended

physical therapy, followed by a functional capacity evaluation, and he prescribed Tofranil. He noted Hale's symptoms were worsened by the March 13, 2008 accident, albeit a pre-existent condition. He opined no neurosurgical intervention was necessary.

Hale submitted the medical records of Drs. John Balthrop and Gregory D'Angelo at Bluegrass Orthopaedics & Hand Care who treated Hale's left shoulder. On November 12, 2008, Dr. Balthrop diagnosed an incomplete rotator cuff tendon tear and bursitis, and administered a cortisone injection. He then referred Hale to Dr. D'Angelo for surgery after no signs of improvement despite physical therapy and the injection. Dr. D'Angelo subsequently performed shoulder arthroscopy on February 16, 2009 and diagnosed left shoulder chronic impingement, acromioclavicular joint arthritis and supraspinatus rotator cuff tear.

Following her shoulder surgery and during the pendency of this claim, Hale filed a "Motion to Place Claim in Abeyance and to Reinstate TTD Benefits," which the ALJ granted on April 16, 2009. In her Status Report filed June 28, 2010, Hale stated she is still receiving medical treatment and is "expected to undergo surgery at the end of June 2010." Hale noted her TTD benefits had been terminated

in February 2010 and would seek to have them reinstated. In response, McKesson noted it had "not received any medical information to indicate a relationship between the most recent proposed surgery and the original injury." In a later Status Report filed by Hale on September 28, 2010, she indicated she underwent surgery in late June or early July, 2010. Thereafter, the ALJ removed the claim from abeyance, established proof time and scheduled the Benefit Review Conference ("BRC") on March 17, 2011.

Subsequently, Hale submitted a medical report dated September 13, 2010 by Dr. D'Angelo. He noted following the shoulder surgery, Hale continued to have left arm symptoms and requested a cervical MRI. He then referred Hale to a neurosurgeon to address her left arm complaints. Dr. D'Angelo noted he placed Hale at MMI for her left shoulder on August 27, 2009 and permanently restricted her to the sedentary physical demand level. Dr. D'Angelo assessed a 7% impairment rating for Hale's shoulder injury pursuant to the AMA Guides.

Hale also submitted the medical records of Dr. Amr El-Naggar, a neurologist, who performed cervical fusion surgery at C5-C6 on June 29, 2010. In a July 12, 2010 follow-up note, Hale reported improvement in her left arm. On August 16, 2010, Dr. El-Naggar again noted improvement to

her neck and left upper extremity, but with some remaining left arm pain. Dr. El-Naggar diagnosed "HNP cervical," cervical spondylosis, neck pain and cervical radiculitis. He placed Hale at MMI and assessed a 25% impairment rating pursuant to the AMA Guides. Dr. El-Naggar released her to return to work and restricted her to no pushing, pulling or lifting greater than 20 pounds.

Hale submitted Dr. William Lester's medical report from an evaluation performed on July 17, 2008 at McKesson's request. He noted complaints of pain in her left shoulder, left hip and complete left side; weakness in her left hand, arm, left leg and lower back; and numbness and tingling in left arm, hand, leg and toes. Dr. Lester diagnosed back pain and left shoulder pain. Regarding her left shoulder, he recommended physical therapy and an MRI. Dr. Lester also opined Hale had not reached MMI and he could not give an opinion on permanent injury until an MRI was performed. Regarding her back, he opined no surgery is necessary and declined to assess a permanent impairment rating. Dr. Lester returned Hale to light duty work with restrictions.

Hale also submitted Dr. Christopher Stevens' report generated as a result of a July 24, 2009 evaluation performed at McKesson's request. He noted complaints of neck pain radiating into the left arm and low back pain

radiating into the left leg. He diagnosed right carpal tunnel syndrome, non-work-related; cervical disk herniation producing left C6 radiculopathy; and low back pain with some radiation into the left leg secondary to degenerative disk disease. Dr. Stevens opined her neck, arm and low back complaints all relate to the March 13, 2008 accident. Regarding her low back, Dr. Stevens opined Hale is not a surgical candidate, recommended she lose weight and assessed a 5% impairment rating pursuant to the AMA Guides. Regarding her cervical spine, Dr. Stevens opined Hale is a candidate for surgery and assessed a 5 to 25% impairment rating, depending on the type of treatment chosen. He also noted Hale is unable to do her job at McKesson. He opined should Hale opt to not have neck surgery, she would be at MMI and he would recommend restrictions. Dr. Stevens declined to assess Hale's shoulder since it is not his specialty.

In an addendum dated March 23, 2010, Dr. Stevens noted his July 24, 2009 opinion had not changed assuming Hale's symptoms remain the same with regard to her neck pain radiating into left arm. He opined cervical surgery would provide a reasonable chance at improvement or relief of her cervical radiculopathy. In a second addendum dated October 12, 2011, Dr. Stevens clarified at the time of the July 24,

2009 evaluation, Hale could return to her job at McKesson given the low physical demands. He noted restrictions of no over-head work, no repetitive head turning and no lifting repetitively greater than twenty pounds. He also noted her recovery, particularly her low back symptoms, is significantly hindered by her morbid obesity.

McKesson filed the July 21, 2011 medical report of Dr. Martin Schiller who opined the March 13, 2008 fall should have, at the most, caused a contusion to her left shoulder and buttock. He also opined Hale suffered from a psychiatric disease. He opined Hale's rotator cuff tear did not result from landing on the lateral aspect of the shoulder. Rather, the cuff tear is a pre-existing, degenerative finding not related to an injury. He found Hale has long standing, pre-existing degenerative disc disease in the lumbar and cervical spine, and further noted her cervical surgery was done because of the degenerative changes. He noted Hale exhibited several Waddell findings and engaged in symptom magnification.

Dr. Schiller opined it is highly unlikely Hale will ever be able to function normally and does not believe any further medical treatment will help her. He opined not all of Hale's problems are work-related, but are caused by her morbid obesity and degenerative changes of her neck,

lumbar spine and left shoulder. Dr. Schiller noted Hale will never reach MMI and is not capable of returning to work. He recommended psychiatric or neuropsychological evaluations, as well as weight reduction surgery, all of which are unrelated to the March 2008 fall.

McKesson timely filed a Form 111, Notice of Claim Denial, on December 22, 2008, denying the claim because "the plaintiff did not give due and timely notice to employer of the injury."

The BRC Order and Memorandum dated March 8, 2012 indicated the following issues are in dispute: Benefits per KRS 342.730 including multipliers and total occupational disability, work-relatedness/causation, notice to neck injury as defined by the ACT, exclusion for pre-existing disability/impairment and total temporary disability benefits.

In the opinion, award and order rendered May 29, 2012, the ALJ initially identified notice regarding Hale's neck injury as one of the issues for resolution. He then later stated: "At the hearing the parties agreed to stipulate to notice, as to the neck problem" and specifically found again: "At the hearing, the parties agreed to stipulate to due and timely notice of the accident and injuries." The ALJ subsequently did not address the

issue of notice of the alleged neck injury in his opinion. After reviewing the lay and medical evidence, the ALJ found as follows with regard to injury, causation/work-relatedness, pre-existing condition and PTD:

> The first issue which the ALJ will address is the question of causation and work-relatedness. The ALJ finds that the injuries to the left shoulder, low back, and cervical spine were all related to the work incident. This finding is supported by medical evidence. First, Dr. William J. Lester, who performed an independent medical evaluation on July 17, 2008, opined in a questionnaire which he completed on October 16, 2008 that the fall which occurred at work on March 13, 2008 was the major contributing cause of the claimant's shoulder and back injuries. Dr. Ronald S. Dubin, who examined Ms. Hale on October 24, 2008, diagnosed a left shoulder partial rotator cuff tear and low back pain with sciatica symptoms. He opined that Ms. Hale was at maximum medical improvement and would probably not return to regular employment. If she were to engage in future work, Dr. Dubin would restrict it to mostly sedentary type work. Dr. Johnny Balthrop obtained a history of Ms. Hale falling from a chair and landing directly on her left shoulder, left hip, and left side. He noted an onset of low back pain and ultimately a diagnosis of a bulging disc and a herniated disc. He noted that Ms. Hale complained of constant pain in her shoulder, grinding, popping, and some numbness and tingling from it, as well as lateral burning which radiated into the trapezius area. Dr. Balthrop referred the claimant to Dr. D'Angelo.

Dr. D'Angelo, who first saw Ms. Hale on January 9, 2009, and Dr. William L. Brooks, who had examined Ms. Hale for back problems in 1996 and again on January 29, 2009, diagnosed degenerative disc disease at multiple levels in the lumbar spine, which he opined had clearly progressed since he saw the patient in 1996.

Dr. Christopher Stephens opined that Ms. Hale's complaints of neck, arm, and low back pain were all related to the fall which she had at work. He agreed with Dr. Brooks that in terms of her low back, Ms. Hale is not a candidate for surgical or other invasive treatment.

Based on plaintiff's description as to how the injuries occurred and on the medical evidence which has been summarized above, the ALJ finds that all of Ms. Hale's problems to her left shoulder, cervical spine, and lumbar spine are related to the work injury.

The weight of the medical evidence substantiates that Ms. Hale was suffering from a pre-existing degenerative condition in both her cervical spine and her lumbar spine. However, this condition was obviously dormant and was not a pre-existing active condition. In order to be classified as active, her condition would have had to have been both impairment ratable and symptomatic. The record does not contain evidence of an active, symptomatic condition within a period of several years prior to the work incident. Ms. Hale had worked at McKesson since 2006 without limitation or restriction. On the question of whether or not the intervening accidents, either the fall at the theater on October 9, 2010 or the

automobile collision on March 24, 2011, both of these incidents occurred subsequent to the diagnosis of plaintiff's injuries, including the cervical injury, which are the subject of this claim.

KRS 342.0011 defines "injury" as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." The ALJ finds that Ms. Hale sustained an injury as defined by the Act and as quantified by several of the physicians. The ALJ finds that Ms. Hale has sustained a 7% permanent impairment to the body as a whole under the AMA Guides, Fifth Edition, based on the injury to her left shoulder. This opinion is supported by the impairment rating of the treating surgeon, Dr. D'Angelo. With respect to the cervical spine, the ALJ finds that claimant has sustained a total body impairment of 25% based on the AMA Guidelines, Fifth Edition. This finding is supported by the opinion of Dr. El Naggar, the treating surgeon. Finally, as to the lumbar spine, the ALJ finds that claimant has sustained a permanent impairment of 8% to the body as a whole, and this opinion is based on the impairment rating of Dr. Dubin. These impairment ratings add to a total of 40%; however, under the combination chart under the AMA Guidelines, the combined total impairment is 38%.

The difficult question in this claim is whether the claimant has sustained a permanent total disability as a result of the work-related injury. As defined in KRS 342.0011(11)(c),

"permanent total disability" means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. "Work" is defined in subsection (34) of this statute as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. In making this assessment, the ALJ must consider a variety of factors such as a workers' post-injury physical, emotional, intellectual, and vocational status and how those factors interact. KRS 342.730; Osborne v. Johnson, 432 S.W.2d 800 (Ky. App. 1968); Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (2001); and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (2001). In analyzing these factors, the ALJ finds that it is highly unrealistic to expect that Ms. Hale will ever return to the job market and be able to find consistent work in a competitive economy. She is suffering from substantial impairment in three separate portions of her body – the lumbar spine, the cervical spine, and the left shoulder. She has undergone two major surgical procedures, which have been only partially successful. She still has substantial pain in multiple areas of her body and she is convinced that she cannot go back to work. She does not believe she is capable of performing all of the work duties of any of her former jobs. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

. . .

These restrictions would apply to both her cervical and lumbar injuries. Ms. Hale routinely uses a quad cane because

> she has had episodes of her left leg suddenly giving way in the past. The ALJ does not believe Ms. Hale to be malingering or exaggerating those symptoms. She has a commendable work history for more than 20 years. She attempted to return to work and did in fact work for a couple of weeks after this injury in question. None of her treating physicians have questioned her sincerity or motivation. The ALJ found no basis during the hearing on which to doubt her sincerity or her overall credibility. Based on all of these factors, and considering the authorities cited hereinabove, the ALJ finds that Ms. Hale is permanently totally disabled and is entitled to the commencement of disability benefits from the date on which she ceased work. The best evidence which can be found in the record is that plaintiff continued to work from the date of the accident on March 13, 2008 until she sought medical attention on April 2, 2008. Thus, her benefits will commence on April 2, 2008. She is entitled to benefits equivalent to 2/3 of her average weekly wage of $317.25 or $211.50 per week. She is also entitled to future medical expenses pursuant to KRS 342.020.

In its petition for reconsideration, McKesson argued the cervical injury was "not pled in the Application for Resolution of Claim, Form 101. No amendment of the Form 101 was filed" and requested additional findings of facts regarding the compensability of any cervical problems. McKesson also argued it did not stipulate due and timely notice of Hale's neck problem and requested

additional findings of fact regarding the issue of notice. McKesson argued the amount of disability assigned to the cervical spine must be excluded and requested "the amounts listed in the award will need to be recalculated, and a [permanent partial disability] award confined to 425 or 520 weeks." McKesson also requested further findings of fact with regard to the ALJ's determination of PTD benefits given Hale completed four years of college and her treating physicians would allow her to return to her regular work. The ALJ overruled McKesson's petition by order dated July 9, 2012 finding "The Petition constitutes nothing more than a re-hashing of the issues which were discussed thoroughly in the Opinion, Award, and Order."

On appeal, McKesson argues the alleged cervical claim should be barred pursuant to KRS 342.270(1) since Hale failed to amend her Application for Resolution of Injury Claim to join her alleged cervical injury and never requested permission to do so to the ALJ. McKesson notes the case *sub judice* is distinguishable from Kroger v. Jones, 125 S.W.3d 241 (Ky. 2004). McKesson also argues it did not stipulate due and timely notice of the neck injury, and noted the medical evidence establishes Hale made no neck complaints until almost one and a half years after the March 13, 2008 fall.

As the claimant in a workers' compensation proceeding, Hale had the burden of proving each of the essential elements of his cause of action, including notice and joinder of all injury claims. KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Hale was successful in his burden, the question on appeal is whether the ALJ's finding is supported by substantial evidence. 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of the evidence. Square D Co. 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 same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); 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). Although a party may note evidence supporting a different

outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Although Hale failed to formally amend the Form 101, Application for Resolution of Injury Claim, we find the issue of Hale's cervical spine injury was tried by the consent of the parties. KRS 342.270(1) specifically provides as follows:

> If the parties fail to reach an agreement in regard to compensation under this chapter either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. **When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which**

> **are known, or should reasonably be known to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.** (Emphasis added.)

Once an application for benefits is filed by an injured worker, KRS 342.270(1) places a burden upon the worker to join all accrued and known causes of action that may exist against the same employer during the pendency of the claim. CR 15.02 permits a motion to amend the pleadings in order to conform to the evidence to be made by "any party at any time, even after judgment." *See* CR 15.02; Kroger Co. v. Jones, 125 S.W.3d 241 (Ky. 2004); Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (Ky. 1991); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). CR 15.02 states, in relevant part, as follows:

> 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.

It is also well established that an ALJ may consider and decide an issue or claim tried by consent of the parties, even when an issue or claim is never formally incorporated as part of an injured worker's application for benefits. *See Id*., Kroger Co., supra, Nucor Corp., supra,

Collins, supra. The Kentucky Supreme Court held whether an issue has been tried by consent is within the sound discretion of the trial court and such a finding will not be reversed absent clear abuse. Nucor at 145. The Court went on to state in order to preserve an objection to a deficient pleading is by way of objecting to the introduction of evidence on an unpleaded issue. *Id*. The Court further stated,

> "[t]he theory of implied consent does not turn on actual consent but on actual prejudice. The concept of actual prejudice is not related to winning or losing, but to being unable to present a defense which would have been otherwise unavailable."
>
> Id. at 146.

In the case *sub judice*, Hale filed her Form 101, Application for Resolution of Injury Claim alleging injuries to her "left shoulder, hip and back," but did not specifically allege an injury to her cervical spine. However, in the attached medical records supporting her Form 101, Dr. Maxey noted complaints of pain in her low back and left shoulder, as well as "neck/trapezius pain." He also diagnosed, in part, neck and trapezius spurs on April 23, 2008.

Following her left shoulder surgery in February 2009, the claim was placed in abeyance. In a status report

dated June 28, 2010, Hale informed McKesson and the ALJ she "expected to undergo surgery at the end of June 2010." In response, McKesson noted it had "not received any medical information to indicate a relationship between the most recent proposed surgery and the original injury." In a later Status Report filed by Hale on September 28, 2010, she indicated she underwent surgery in late June or early July, 2010. Thereafter, on March 17, 2011, the ALJ removed the claim from abeyance, established proof time and scheduled the BRC.

McKesson requested Hale be evaluated by Dr. Christopher Stevens who prepared a medical report, dated July 24, 2009. This report was submitted into evidence by Hale. Regarding the cervical spine, Dr. Shields noted Hale complained of neck pain radiating into her left arm and diagnosed, in part, cervical disk herniation producing left C6 radiculopathy. He found her neck complaints related to the March 13, 2008 accident and opined she is a candidate for surgery. Dr. Stevens also prepared two addendums, one dated March 23, 2010 and another October 12, 2011.

McKesson submitted another medical report, dated July 21, 2011, by Dr. Martin Schiller who, in part, found Hale has long standing, pre-existing degenerative disc disease in the cervical spine, and opined the cervical

surgery was done because of the degenerative changes. He further noted no relation between the work accident and Hale's neck complaints.

McKesson failed to object to Hale's submission of evidence regarding the alleged neck injury. Likewise, McKesson did not object to evidence regarding the neck at the hearing. Finally, it is noted while several contested issues were listed on the March 8, 2012 BRC order, Hale's failure to amend her Form 101 was not made a contested issue. 803 KAR 25:010, Section 13(14) provides as follows regarding BRCs: "Only contested issues shall be the subject of further proceedings." Based upon the foregoing, we find the issue of Hale's alleged neck injury was tried by consent.

That said, this Board remands the claim for further findings of fact with regard to whether McKesson received due and timely notice of Hale's alleged neck injury. As noted above, 803 KAR 25:010, Section 13(14) provides only contested issues raised in the BRC shall be subject to further proceedings. In the case *sub judice*, the March 8, 2012 BRC identified in part "notice to neck" as an issue in dispute.

In his opinion, award and order rendered May 29, 2012, the ALJ stated, "At the hearing the parties agreed to

stipulate to notice, as to the neck problem" and subsequently did not address the issue. It is true the parties initially stipulated to notice in general at the hearing. However, later during cross-examination, counsel for McKesson preserved the issue of notice regarding the neck injury in the following testimony:

> Mr. Harding: Judge, just with regard to the issue of notice, you know, I would just like to retain that insofar as what I just threw out here for the neck if need be, if we get into that, if the issue involves impairment to the neck, that you consider that we do have a notice issue for that.
>
> . . . .
>
> The Court: . . . and causation, whether or not the medical evidence ties the neck problem to the work-related injury or not. But I will note your reservation as to notice.

Thereafter, in its petition for reconsideration, McKesson specifically argued it did not stipulate due and timely notice of Hale's neck problem and requested additional findings of fact regarding the issue of notice. The ALJ summarily denied the petition by order dated July 9, 2012. Therefore, we find the issue of notice regarding Hale's neck injury was properly identified as an issue in the BRC and was not stipulated at the hearing in light of the above cited testimony.

Therefore on remand, the ALJ must determine whether Hale provided due and timely notice of the cervical injury. By doing so, we are not requiring any particular result. Any finding of fact lies within the discretion of the ALJ.

Accordingly, the May 29, 2012 Opinion, Order and Award, the July 9, 2012 Order on Petition for Reconsideration, are hereby **AFFIRMED IN PART, VACATED IN PART** and this matter is **REMANDED** to the ALJ for additional findings of fact regarding whether McKesson received due and timely notice of Hale's alleged neck injury.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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