**OPINION ENTERED: January 4, 2013**

CLAIM NO. 201195108 & 200978479

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER,**
**ADMINISTRATIVE LAW JUDGE**

BRIAN STRANGE
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**

* * * * * *

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

**ALVEY, Chairman.** Petitioner, Lexington-Fayette Urban County Government ("LFUCG") appeals from the August 3, 2012 opinion rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ") awarding permanent partial disability ("PPD") benefits and medical benefits to Brian G. Strange

("Strange"). The ALJ also ordered Strange undergo a vocational rehabilitation evaluation at LFUCG's expense. LFUCG also appeals from the September 4, 2012 order denying its petition for reconsideration.

LFUCG argues on appeal the ALJ failed to make accurate findings of fact regarding Strange's symptoms prior to the dates of injury. LFUCG also argues the ALJ's reliance upon Dr. Menke's testimony regarding impairment was the result of a misunderstanding and a misapplication of the law to the facts. Finally, LFUCG argues Dr. Menke's testimony regarding impairment does not constitute substantial evidence. We disagree and affirm.

Strange began working for LFUCG as a firefighter in January 1996, and during the course of his employment, he sustained numerous injuries. However, none prevented him from eventually returning to unrestricted employment until he slipped and fell on ice on December 29, 2010.

On December 6, 2011, Strange filed a Form 101 alleging injury dates of September 13, 2009; March 18, 2010; September 22, 2010; November 20, 2010 and December 29, 2010. On September 13, 2009, Strange experienced a pop in his back as he was rising from a chair which caused a burning sensation into both legs. On March 18, 2010, he experienced a pop in his back while putting on boots. On

September 22, 2010, he experienced a pop in his back while getting up from a computer desk. On November 20, 2010, he alleged injuries to his right ankle, right wrist, low back neck, right knee and right shoulder when he fell down stairs. On December 29, 2010, he sustained injuries to his low back and left knee when he slipped and fell on ice.

Strange testified by deposition on March 13, 2012, and again at the hearing held June 6, 2012. Strange was born on April 2, 1972 and is a resident of Union, Kentucky. He earned an associate's degree in Fire Science from a community college and later completed some coursework at Eastern Kentucky University. He is a state certified firefighter and emergency medical technician (EMT). His work experience includes work as a firefighter, EMT, computer salesman, and computer technician. Subsequent to the December 29, 2010 injury, Strange managed the safety and health program for the Lexington Fire Department. His job duties included reporting and ensuring a health and safety program was in place, and he facilitated training drills. His job duties no longer included responding to structure fires, except to ensure safety at the site. He is restricted from lifting over fifty pounds; however, his job as a firefighter required lifting up to seventy-five pounds.

Strange was off work from September 13, 2009 through December 9, 2009, and then returned to regular duty. He was on light duty from March 18, 2010 through September 22, 2010, and then returned to regular duty. He began working restricted duty after the December 29, 2010 injury, and was taken off work on February 11, 2011. He then returned to light duty work on August 16, 2011.

Strange stated the December 29, 2010 injury was the worst of his incidents, and he never returned to regular duty after that date. He continued to work on restricted or limited duty, and stated he will be forced to retire on December 29, 2012 because he cannot return to regular duty. He continues to experience low back and left knee pain, and believes he does not retain the physical capacity to return to work as a firefighter. He occasionally takes Skelaxin and Flexeril, and uses a TENS unit twice per day. He has also been prescribed Lortab. Prior to September 13, 2009, Strange worked without restrictions and took no pain medication.

In support of the Form 101, Strange filed the September 30, 2011 report completed by Dr. Christopher Stephens, an orthopedic surgeon who evaluated him at LFUCG's request. Dr. Stephens noted the history of Strange twisting his knee when he slipped on a patch of ice on

December 29, 2010, and subsequently popping his back in physical therapy resulting in a three-day hospitalization. Dr. Stephens diagnosed chronic back and leg pain secondary to lumbar degenerative disk disease. Dr. Stephens opined the December 29, 2010 incident was a temporary exacerbation of chronic back and leg pain. He assessed a 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), and noted Strange reached maximum medical improvement ("MMI") in May 2011.

Also with the Form 101, Strange filed numerous off-work slips from Dr. Thomas Menke, an orthopedic surgeon, covering the period from September 15, 2009 through August 15, 2011.

Strange subsequently filed a Form 107-I medical report completed by Dr. Menke dated March 23, 2012. Dr. Menke saw Strange on numerous occasions between January 21, 2002 and March 5, 2012, and noted a history of various injuries. Dr. Menke noted a previous MRI demonstrated small disk protrusions at L4-L5 and L5-S1. He noted Strange continues to have low back and leg symptoms, and stated he has been released to medium demand work which precludes him from working as a firefighter. Dr. Menke opined Strange does not retain the capacity to perform the

job he was performing at the time of his injuries. Dr. Menke assessed a 5% impairment rating pursuant to the AMA Guides, and stated Strange had no active impairment prior to his work injuries.

LFUCG filed Dr. Menke's office records from 2004 through September 18, 2009. Those records reflect Dr. Menke treated Strange for a low back sprain resulting from lifting a generator on June 9, 2004, which resolved by September 2004. He treated Strange for complaints of left shoulder pain going down the left arm to the elbow on February 23, 2005. Dr. Menke next saw Strange on January 5, 2007 for a lumbar strain which occurred on January 3, 2007 when he slipped while filling a bird feeder at home. On February 13, 2007, Dr. Menke released Strange to regular duty. He next saw Strange on September 18, 2009 for complaints of low back pain stemming from a pop in his low back when he attempted to arise from a chair at work. Dr. Menke noted mild degenerative changes, and indicated Strange's condition had improved with taking Prednisone.

LFUCG deposed Dr. Menke on March 27, 2012. Dr. Menke stated he first treated Strange in 2002, for a cervical injury resulting in a cervical fusion. He treated Strange for low back pain in June 2004, which had resolved by September 2004. He again treated Strange for a low back

strain in July 2006, which resolved by February 2007. Strange was released to return to regular work with no restrictions, and no additional treatment was provided for low back pain until the September 2009 incident. He opined Strange's low back condition was no longer active prior to September 18, 2009. Dr. Menke further stated the lack of treatment for a low back condition for two and a half years indicates Strange had no active low back problem, and he did not believe an impairment rating would have been applicable prior to the more recent injuries.

Dr. Menke indicated although Strange could have been assessed a 5% impairment rating in 2004, he would have qualified for a 0% impairment rating in 2007. He further noted MRIs demonstrated a progression of Strange's low back condition, and now show disc material bulging into the foramen.

In addition to Dr. Stephens' September 30, 2011 report, LFUCG filed his report dated April 11, 2011. Dr. Stephens stated as follows:

> It is my opinion that this gentleman's low back pain did seem to initially start after a work incident occurring in 2004. By review of my record, I do not see that I assessed his impairment to the September injury. It is my opinion that his degenerative disk disease first became symptomatic after the 2004 injury. He has had multiple

> exacerbations since that time including the 12/29/10 exacerbation.

Dr. Stephens further opined he would have assessed a 5% impairment rating subsequent to the 2004 injury. In his report dated September 30, 2011, Dr. Stephens opined the December 29, 2010 incident was a temporary exacerbation of Strange's active degenerative disk disease.

In the Opinion, Order and Award rendered August 3, 2012, the ALJ stated as follows:

> **Was there an injury as defined by the Act versus a temporary exacerbation?**
>
> Plaintiff has the burden of proving each of the essential elements of his claim, including that he is entitled to benefits. *Snawder v. Stice,* 576 S.W.2d 276 (Ky. App. 1979). As fact finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. *Square D Co. v. Tipton,* 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.,* 951 S.W.2d 329 (Ky. 1997); *Jackson v. General Refractories Co.,* 581 S.W.2d 10 (Ky. 1979).
>
> In his application plaintiff contends that he sustained distinct injuries on September 13, 2009 (pop in back while rising from seated position), March 18, 2010 (pop in back while putting on bunker boots), September 22, 2010 (pop in back getting up from computer desk), November 20, 2010 (while going downstairs fell on

concrete floor resulting in injuries to multiple body parts including low back) and December 29, 2010 (slip and fall on ice). In addition, plaintiff testified and the medical evidence confirms that the plaintiff's low back became exquisitely painful on or about February 10, 2011 while performing physical therapy for the injuries received in the slip and fall event of December 29, 2010. Following the September 13, 2009 incident he was off work for approximately three months and returned to work at full duty on December 9, 2009. The March 18, September 22 and November 20, 2010 incidents resulted in no lost time. Plaintiff initially lost no time from work following the December 29, 2010 slip and fall injury but continued to work at full duty until placed on disability leave when taken off work as of February 11, 2011, the date following the physical therapy incident. Plaintiff testified that he returned to work at modified duty on August 16, 2011 and that he continues to work in modified duty capacity. He expects, however, and has been told by a supervisor that his employment will terminate as of December 29, 2012 since he has been given permanent restrictions which preclude his ability to work as a full duty firefighter. Plaintiff acknowledged prior[sic] a low back injury occurring in 2004 for which he was treated by Dr. Menke and for which he was ultimately released to return to work at full regular duty. He had another low back injury/incident in 2007 for which he required a short course of treatment following which he was again released to return to full regular duty. He continued to work full regular duty without restrictions from February 2007 until the incident of September 13, 2009. In support of

his claim plaintiff has submitted the records, report and deposition testimony of his treating orthopedic surgeon, Thomas Menke, who is of the opinion that although plaintiff had prior incidents of low back pain, that the events of September 13, 2009 and subsequent thereto, including the physical therapy incident of February 10, 2011, resulted in nerve irritation, low back and leg symptoms. Review of an MRI scan from February 11, 2011 showed small disc protrusions at L4-5 and L5-S1 with evidence of annular tear. He indicated in his Form 107 that the incidents of September 13, 2009 and February 10, 2011 are the cause of the plaintiff's complaints and that the activities at work, beginning on September 13, 2009 and culminating in the February 10, 2011 injury at physical therapy have caused spasms, muscle guarding and asymmetric loss of range of motion along with non-verifiable radicular complaints. As a result he assigned a 5% impairment rating having assessed the plaintiff with a DRE Lumbar Category II impairment.

The defendant, for its part, has submitted Dr. Menke's prior treatment records reflecting that plaintiff sustained a work-related low back injury in 2004 for which he received treatment and diagnostic testing. In addition, the defendant has submitted a report from Dr. Menke's associate, Dr. G. Christopher Stephens, who opined that the work incidents in question merely exacerbated a chronic active lumbar spine condition consisting of degenerative disc disease which first became symptomatic in 2004. Dr. Stephens is of the opinion that the plaintiff would have qualified for an impairment rating of 5% based on a DRE

Lumbar Category II assessment as a result of the 2004 incident and that he carries that same impairment rating currently. Likewise, the defendant has submitted deposition testimony from Dr. Menke in which he confirms that MRI scans taken in 2004, 2009 and 2011 are fairly similar but while the latter scans demonstrate some progression of the plaintiff's lumbar disease, he was unable to say whether that progression was traumatically induced or simply the natural progression of the disease. The defendant argues, therefore, that the plaintiff did not sustain an injury defined by the Act but has experienced a mere temporary exacerbation of his chronic and ongoing pre-existing active lumbar condition.

"Injury" is statutorily defined in KRS 342.0011(1) as a work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which proximally causes a harmful change in the human organism evidenced by objective medical findings. "Objective medical findings" is defined by KRS 342.0011(33) as information gained through direct observation and testing of the patient, applying objective or standardized methods. In *Gibbs v. Premier Scale Co./Indiana Scale Co.,* 50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) and (33) if it is based upon symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. See also *Staples, Inc. v. Konvelski,* 56 S.W.3d 412 (Ky. 2001), in which the Court held that while objective medical evidence must support a harmful change

diagnosis, it is unnecessary to prove causation of any injury through objective medical findings.

*FEI Installation v. Williams,* 214 S.W.3d 313 (Ky. 2007), explains that the post-1996 Act equates impairment and disability. *University of Kentucky Family Practice v. Leach*, 237 S.W.3d 540 (Ky. 2007). The 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment defines the term "impairment" as being a loss, loss of use, or derangement of any body part, organ system, or organ function. The court in *Williams* held that when viewed in terms of KRS 342.0011(1) impairment demonstrates that a harmful change in the human organism has occurred. Citing *W. L. Harper Constr. Coal, Inc. v. Baker*, 858 S.W.2d 202, 204 (Ky. App. 1993). Derangement is defined as "a disturbance of the regular order or arrangement." Stedman's Medical Dictionary, 27th Edition. When dealing with a pre-existing condition, the Supreme Court in *Finley v. DBM Technologies,* 217 S.W.3d 261 (Ky. App. 2007) ruled that the pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant state, the arousal is considered temporary. If the pre-injury condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent.

When viewed against the foregoing legal framework, it is clear to the ALJ that the events of March 18, September 22 and November 20, 2010 resulted merely in temporary injuries resulting from the temporary derangement of the plaintiff's lumbar spine. After each such event the ALJ is persuaded from

the plaintiff's testimony that he reverted to his baseline state. This finding is further supported by plaintiff's testimony that he did not miss any time from work as a result of any of those incidents although each produced, at least temporarily, symptoms. Likewise, the September 13, 2009 incident which the plaintiff felt a pop in his low back arising from the chair while producing severe symptoms initially and necessitating an absence from work of almost three months was a temporary event in the sense that plaintiff reverted to his baseline condition thereafter and returned to full regular duty. The incident of December 29, 2010 which itself resulted in a severe onset of symptoms on February 10, 2011 is a different story. The evidence is uncontroverted that subsequent to the physical therapy incident, an activity in which the plaintiff was engaging as a direct consequence of the December 29, 2010 low back injury resulting from a slip and fall on ice, produced symptoms from which the plaintiff has never recovered to the extent that he returned to his baseline condition. While it is uncontroverted that the plaintiff sustained a back injury in 2004 for which he received medical treatment but was ultimately and in short course released to return to work at full duty, plaintiff's testimony is uncontroverted that he was, for all intents and purposes, asymptomatic until 2007 when he had an exacerbation of his symptoms after which he was again asymptomatic until September 13, 2009 upon which he again became asymptomatic until December 29, 2010. Clearly, the plaintiff has not reverted to his baseline condition (i.e., being asymptomatic with respect to his lumbar spine and capable of performing full

regular duty) subsequent to February 10, 2011. While it is clear that the first three injury events in 2010 were merely temporary, self-limited exacerbations of the plaintiff's underlying lumbar spine condition and while it is arguable that the September 13, 2009 injury resulted simply in a temporary, albeit more lengthy, exacerbation of underlying lumbar spine pathology, the evidence is undisputed that the final injury event and the result of the treatment directed at that event have resulted in a permanent injury given that the plaintiff has not returned to his baseline status at any point since February 10, 2011. Accordingly, the ALJ finds and concludes that the plaintiff sustained work-related injuries to his lumbar spine on September 13, 2009, March 18, 2010, September 22, 2010, November 20, 2010 and December 29, 2010. Given the plaintiff's pre-existing lumbar degenerative disc disease at L4-5 and L5-S1, the 2009 and first three injury events of 2010 resulted in temporary exacerbations of plaintiff's underlying lumbar disc disease but the injury of December 29, 2010 resulted in a permanent injury to the lumbar spine as diagnosed by Dr. Menke.

Although the plaintiff has included in his claim injuries occurring to his right ankle, right wrist, neck, right knee and right shoulder occurring on November 20, 2010 and an injury to the left knee occurring on December 29, 2010, no medical evidence has been submitted in support of those claims. Moreover, the ALJ infers from the plaintiff's testimony, taken as a whole, that any such additional injuries completely resolved. Accordingly, plaintiff's claim for injuries occurring to his

right ankle, right wrist, neck, right knee and right shoulder on November 20, 2010 and to his left knee occurring on December 29, 2010 are hereby dismissed.

**Benefits per KRS 342.730; exclusion for pre-existing disability/impairment.**

Plaintiff's treating orthopedic surgeon, Dr. Menke, assigned a 5% impairment rating to the plaintiff's lumbar spine which he attributed to the March[sic] 13, 2009 incident and the physical therapy incident of February 10, 2011 which was precipitated by the December 29, 2010 injury. The defendant's evaluating orthopedic surgeon, Dr. Stephens, is of the opinion that while the plaintiff has a 5% impairment rating presently, that impairment is attributable to the residual effects of the 2004 work injury and that the December 29, 2010 event resulted in a mere temporary exacerbation of what he considered to be plaintiff's chronic active lumbar disc disease. Plaintiff contends that he is entitled to an award of permanent partial disability benefits based on the 5% rating assigned by Dr. Menke while the defendant argues that plaintiff has no greater level of permanent impairment now than he did in 2004 and that, therefore, he is not entitled to an award of permanent disability benefits as his condition was wholly pre-existing and active at the time of the September 13, 2009 work injury and at all times subsequent thereto.

In order to be considered, a pre-existing condition must be both symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. *Finley, supra.*

Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Wolf Creek Collieries v. Crum,* 673 S.W.2d 735 (Ky. App. 1984). While there is no doubt that the plaintiff sustained an injury in 2004 for which Dr. Stephens assessed a 5% whole person impairment rating, an opinion that Dr. Menke felt was reasonable, the ALJ finds the testimony of Dr. Menke to be even more persuasive with respect to the plaintiff's condition immediately prior to September 13, 2009. Considering that the plaintiff was asymptomatic at that time and had been able to work full duty as a firefighter and considering the rigorous nature of that employment, for at least two and a half years before the 2009 injury date, Dr. Menke felt that his lumbar condition was no longer active at that point and that if one looks at the plaintiff "in the snapshot" at that instant he would not receive a rating under the AMA Guides. Whether one accepts the opinion of Dr. Stephens that the plaintiff had a condition which was impairment ratable immediately prior to his most recent work injury or the opinion of Dr. Menke that although plaintiff previously qualified for an impairment rating based on prior symptoms and exam findings at a point in time prior to the current set of injuries and that plaintiff was asymptomatic immediately prior to September 13, 2009 and would not qualify for an impairment rating, the simple fact is that there is no evidence that the plaintiff was symptomatic with respect to his lumbar spine immediately prior to September 13, 2009 or, more importantly, immediately prior to December 29, 2010. Under the standards announced in *Finley*, therefore, the ALJ finds that the plaintiff did not have a pre-

existing active condition immediately prior to September 13, 2009 or December 29, 2010 and, therefore, as a matter of law, his pre-existing condition was not active on either of those occasions.

Even were the ALJ to accept Dr. Stephens' opinion that plaintiff had a 5% impairment rating immediately prior to December 29, 2010 as a result of the original 2004 injury, that would not preclude a finding that the plaintiff sustained a new separate and distinct injury on that date and would not preclude an award of benefits based on the impairment rating attributable to that new specific injury even though the injury and impairment resulting therefrom is attributable to the same body part. The ALJ notes that KRS 342.730(2) specifically provides for successive compensable injuries to the same body part. Under that section, when income benefits are payable on account of an injury, the period such benefits are payable is reduced by the period of income benefits paid or payable under Chapter 342 on account of a prior injury where both injuries result in disability of the same member or function and the income benefits payable on account of the subsequent disability in whole or in part would duplicate the income benefits payable on account of the pre-existing disability. The gist of this section is that it is the period of income benefits which is reduced to offset against the second injury benefit period by virtue of that portion of the initial benefit period which overlaps the second. In other words, there is no prohibition against successive injuries to the same body part resulting in the same impairment rating. As long as the first injury does not result in disability which is

active as of the date of the second injury, benefits for the second injury are not completely eliminated, but the payment period is simply reduced during the period of overlap. In the present case, had benefits been paid or payable with respect to the 2004 injury date, benefits otherwise payable with respect to the 2010 injury date would be reduced or suspended during the portion of the 425 week benefit period for the 2004 injury remaining as of the date of the December 29, 2010 injury to the extent that benefits payable for the 2010 injury duplicated benefits which were being paid for the 2004 injury. In the present case, however, no benefits were paid or payable as a result of the 2004 lumbar spine injury and no offset or suspension is appropriate under this statutory section.

Having carefully considered the medical evidence and in reliance upon the report and testimony of Dr. Menke as well as the plaintiff's testimony with respect to the residual effects of his work-related injuries, the ALJ finds and concludes that the plaintiff has sustained an injury to his lumbar spine on December 29, 2010 resulting in a 5% permanent impairment under the AMA Guides. To argue that simply because the plaintiff may have had a 5% impairment as the result of a remote injury after which he fully recovered and returned to a rigorous and physically demanding line of work, plaintiff could never again have an injury to his lumbar spine resulting in a separate and distinct 5% impairment rating defies logic and common sense. To accept that reasoning would result, in the present case, of denying benefits to an injured worker who, as a result of a distinct and undisputed

event, has developed symptoms and been assigned restrictions which completely preclude him from performing the work that he was fully capable of performing immediately before the event occurred. Neither KRS Chapter 342 nor any case law construing the Act compel much less support that result.

With respect to the application of statutory multipliers, the evidence compels a finding that the plaintiff does not retain the physical capacity to return to the type of work performed at the time of injury. Plaintiff testified with respect to his ongoing symptoms and his own assessment that he no longer is capable of performing the full gamut of duties required of a front line firefighter. Having had the opportunity to observe the plaintiff at the Formal Hearing, the ALJ found him to be extremely credible and persuasive as a witness and his testimony is accepted as accurate. Moreover, plaintiff's long time treating orthopedic surgeon, Dr. Menke, has assigned restrictions which limit the plaintiff to medium duty work as defined by functional capacity evaluation and, based on those restrictions, Dr. Menke has opined that the plaintiff does not retain the physical capacity to return to work as a firefighter. Plaintiff has been placed by the fire department on restricted duty and his unrebutted testimony establishes that as of December 29, 2012, unless he has improved to the extent that he has been released to return to work without restrictions, his employment will be terminated. Based on the plaintiff's credible testimony as well as the report and opinions of Dr. Menke, the ALJ finds that the plaintiff does not retain the physical capacity to return

to the type of work performed at the time of injury.

Having made the foregoing finding with respect to plaintiff's residual physical capacity, the ALJ is mindful of the stipulations of the parties that the plaintiff has, in fact, returned to work at an average weekly wage equal to or greater than the average weekly wage at the time of injury. Accordingly, the ALJ is required to analyze this claim under the precepts of *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky. 2003) to determine whether the plaintiff is entitled to the application of the triple multiplier of KRS 342.730(1)(c)(1) or the double multiplier of KRS 342.730(1)(c)(2) (should the plaintiff experience a cessation of employment at an average weekly wage equal to or greater than his average weekly wage at the date of injury). Under *Fawbush*, an ALJ must determine whether the claimant is likely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future. If not, the triple multiplier of paragraph (1)(c)(1) is appropriate. If, however, the ALJ determines that the employee is able to earn a wage equal to or greater than the wage at the time of injury for the indefinite future, at any point when his employment earning such a wage ceases for a reason that relates to his disabling injury the claimant is entitled to the enhancement of his permanent partial disability award by application of the two multiplier of KRS 342.730(1)(c)(2). *Chrysalis House v. Tackett,* 283 S.W.3d 671 (Ky. 2009). This issue is quickly disposed of. Plaintiff testified that pursuant to the policies of the defendant, if he is unable to return to his full regular

> duty within two years of the date of his last injury, i.e., on or before December 29, 2012, he must either resign or his employment will be terminated by the employer. The defendant has not offered any testimony in contradiction to the plaintiff's assessment of his employment prospects with the defendant. Based on the plaintiff's unrebutted testimony, the ALJ finds, therefore, that in light of the current restrictions to medium duty work, it is likely that the plaintiff's employment will terminate as of December 29, 2012, and, therefore, that it is unlikely he will be able to continue earning an average weekly wage of $1,800 for the indefinite future. Plaintiff is, therefore, entitled to the application of the triple multiplier per KRS 342.730(1)(c)(1).
>
> Plaintiff is entitled, therefore, to an award of permanent partial disability benefits calculated as follows: $533.84 X 5% X .65 X 3 = $52.05 per week for 425 weeks.

In addition to the above, the ALJ awarded future medical benefits for treatment of the injuries sustained pursuant to KRS 342.020, and additionally ordered a vocational rehabilitation evaluation to be conducted at LFUCG's expense.

LFUCG filed a petition for reconsideration on August 20, 2012, alleging Strange met the criteria for assessment of a 5% impairment rating pursuant to the AMA Guides, prior to the occurrence of the work injuries alleged in the Form 101. LFUCG also argued it was unclear

whether Strange had a prior ratable impairment pursuant to the AMA Guides. LFUCG also questioned the ALJ's referral for a vocational rehabilitation evaluation.

In the order overruling the petition for reconsideration entered September 4, 2012, the ALJ specifically found as follows:

> The defendant's first contention is that the ALJ found plaintiff met the AMA Guides criteria for a 5% impairment rating prior to the occurrence of the work-related injuries alleged in the application. As a result, the defendant contends that the ALJ was required to make a finding that the injury occurring in December of 2010 caused an increase in impairment or a new impairment. Having reviewed the Opinion, Award & Order the ALJ would point out that he did not make a finding that the plaintiff had a 5% impairment rating prior to the December 2010 work injury. The ALJ simply noted that Dr. Stephens was of the opinion that the plaintiff had a 5% impairment rating attributable to the residual effects of the 2004 work injury. The ALJ noted that "even were the ALJ to accept Dr. Stephens' opinion the plaintiff had a 5% impairment rating immediately prior to December 29, 2010…" a finding with respect a new specific injury was not precluded. For the purpose of clarity, the ALJ finds, based on the testimony of Dr. Menke, that immediately prior to December 29, 2010, the plaintiff did not have a permanent impairment rating referable to his lumbar spine.
>
> The defendant next contends that with respect to the issue of pre-

existing impairment, the ALJ found the 2009 injury and the first three injuries of 2010 were mere temporary exacerbations "of his ongoing and chronic back condition." The defendant reasons therefrom that the ALJ made a contradictory finding that the plaintiff was not symptomatic immediately prior to the December 2010 work injury. First, the ALJ did not find that the 2009 injury and the first three injuries of 2010 temporary exacerbations of the plaintiff's "ongoing and chronic back condition" but merely that they were self-limited exacerbations of the plaintiff's underlying spine condition. The term "ongoing" implies to the undersigned "symptomatic." The ALJ specifically found, however, that the plaintiff was not symptomatic immediately prior the December 2010 incident. While the plaintiff did have a temporary exacerbation of his underlying degenerative disc disease on November 20, 2010 evidence is clear that that[sic] incident was short-lived and that it did not result in any lost time nor any substantial medical treatment to his low back. The plaintiff continued to work at full regular duty up until the event of December 29, 2010. That the plaintiff was temporarily symptomatic on November 20, 2010 does not compel a finding that he was symptomatic immediately prior to the slip-and-fall of December 29, 2010.

The defendant next contends that it is not clear whether the ALJ found that the plaintiff did indeed suffer a prior ratable impairment under the AMA Guides. As set forth at length in the Opinion whether the plaintiff had a 5% impairment rating as a result of the 2004 incident has no bearing on the award of benefits with respect to the

present claim. That said, however, in reliance upon the testimony of Dr. Menke, the ALJ finds that the plaintiff did not have a prior ratable impairment of 5% prior to the slip-and-fall of December 29, 2010.

The defendant finally contends that the ALJ, in awarding a vocational evaluation, inconsistently found the plaintiff was not a customary vocational rehabilitation candidate. Further, the defendant contends that the ALJ did not make any findings from the record supporting the conclusion that in the present economy it was questionable whether the plaintiff could transition to employment with similar earnings. The defendant finally contends that the ALJ did not make findings of fact from the record supporting the conclusion that the plaintiff's pre-injury work as a firefighter has no direct civilian counterpart.

The description of the plaintiff as a "non-customary" vocational rehabilitation candidate does [sic] have any bearing on his entitlement to a vocational rehabilitation evaluation. While the plaintiff may have more education and lesser restrictions than many vocational rehabilitation candidates each claimant must be looked at in light of his or her own circumstances and having done so the ALJ found the plaintiff entitled to the vocational rehabilitation evaluation. There is no patent error with respect to the referral of the plaintiff for a vocational evaluation. Moreover, with respect to the issue of the plaintiff's transition from his present job to another employment with similar earnings the ALJ takes judicial knowledge of the fact that, at present,

> the economy, both locally and generally, is stagnant. The ALJ finds, under current economic circumstances where even individuals graduating with four-year college degrees and three-year law degrees are having difficulty finding suitable employment that the plaintiff, given his specific and limited education (fire science) plaintiff is unlikely to find employment paying approximately $1,800 per week without additional training. Finally, the undersigned is not aware of any civilian fire department as that function is uniquely, if not exclusively, a municipal/governmental service/operation. Therefore, **IT IS HEREBY ORDERED** that the defendant's petition for reconsideration is **OVERRULED.**

In this instance, we believe the outcome selected by the ALJ in finding the low back injury was causally work-related is both supported by substantial evidence and in conformity with the Act. For purposes of workers' compensation in Kentucky, the term "injury" is defined in relevant part as any work-related traumatic event or series of traumatic events 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. *See* KRS 342.0011(1). It is undisputed work events occurred on September 12, 2009; March 18, 2010; September 22, 2010; November 20, 2010 and December 29, 2010. Likewise, it is undisputed Strange has been

restricted from performing his regular job duties since the December 29, 2010 injury. It is additionally undisputed Strange was working without restrictions prior to September 13, 2009. He was able to resume his regular duties at some point after each of his alleged injuries until December 29, 2010, and has never been able to return to unrestricted work since that time.

It is well established where the evidence concerning an issue is conflicting, the ALJ as fact-finder is free to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003). For that reason, we cannot say the ALJ's conclusions regarding causation and active disability were unreasonable under the evidence. Speedway/Super America v. Elias, 285 S.W.3d 722, 730 (Ky. 2009); Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). The opinions expressed by Dr. Menke in both the Form 107-I and his deposition, qualify as substantial evidence sufficient to support the ALJ's ruling. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

There is no question Strange previously sustained injuries to several body parts, including his back and legs, during the course and scope of his work with LFUCG,

but he was always able to return to work with no restrictions or limitations until December 29, 2010.

As noted in the ALJ's opinion, KRS 342.0011(33) defines "objective medical findings" as "information gained through direct observation and testing of the patient applying objective or standardized methods." In Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court, in addressing this definition, recognized in addition to objective diagnostic tools such as x-ray, CT scan, EMG/NCV or MRI, there is a wide array of standardized laboratory tests and tests of physical and mental function available to the medical practitioner. The Court further emphasized, "[w]e know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrate the existence of symptoms of such a change." It is also noted Dr. Menke specifically found a progression of Strange's degenerative disc disease documented by MRIs taken over a period of time. He noted the most recent MRI depicted bulges into the foramen which apparently had not been present previously.

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). The ALJ 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). Although a party may note evidence that would have supported a different outcome than that 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky.1999). 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, supra.

The ALJ found Strange sustained an injury resulting from the work-related incidents while working for LFUCG. The ALJ's finding as to causation and work-relatedness of Strange's condition is supported by substantial evidence and will not be disturbed on appeal.

LFUCG argues Strange's condition was pre-existing and active, and therefore should have been found non-compensable. However, although it argued an impairment rating could have been imposed in 2004, there is no evidence such rating was in fact assessed. Even if Strange had a ratable condition prior to September 13, 1009, there is no evidence his condition was active or symptomatic for at least two and a half years prior to that date.

In Finley v. DBM Technology, 217 S.W. 3d 261 (Ky. App. 2007), the Court of Appeals held the burden to prove the existence of a pre-existing condition falls upon the employer who must prove that immediately prior to the injury: 1) the pre-existing condition is symptomatic; and 2) that condition is impairment ratable. In the case *sub judice*, while LFUCG introduced evidence of previous bouts of low back pain, it failed to establish Strange suffered from a symptomatic low back condition immediately prior to

his series of work-related injuries. Therefore, the ALJ did not err in finding Strange's impairment was not due to a pre-existing active condition.

Accordingly, the opinion, order and award rendered by Robert L. Swisher, Administrative Law Judge, on August 3, 2012, as well as the order on reconsideration dated September 4, 2012 are hereby **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON MARCUS A ROLAND
P O BOX 910454
LEXINGTON, KY 40591

**COUNSEL FOR RESPONDENT:**

HON MICHAEL F EUBANKS
P O BOX 157
RICHMOND, KY 40476

**ADMINISTRATIVE LAW JUDGE:**

HON ROBERT L SWISHER
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511