OPINION ENTERED: SEPTEMBER 17, 2012

CLAIM NO. 201073619

PATRICIA DEVINNEY PETITIONER

VS. **APPEAL FROM HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE**

COMMUNITY ALTERNATIVES
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Patricia Devinney ("Devinney") seeks review of the decision rendered April 25, 2012 by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ"), awarding permanent partial disability ("PPD") benefits based upon an 8% impairment rating, and medical benefits against her employer, Community Alternatives. Devinney

also appeals from the order on reconsideration entered May 30, 2012.

On appeal, Devinney argues the ALJ erred by failing to enhance her PPD benefits with the 3.4 multiplier found in KRS 342.730(1)(c)1 & 3 because she does not retain the capacity to perform her pre-injury work. We affirm.

Devinney filed a Form 101 on August 5, 2011 alleging injury dates of November 29, 2009; December 22, 2009; and July 21, 2010. Devinney claimed she injured her right knee on November 29, 2009 when she tripped over a client's duffle bag. She claimed a second injury occurred on December 22, 2009 when she tripped over a bulge in the carpet causing injuries to her left knee, her chin and loosened her lower teeth. Finally, Devinney claimed she sustained injuries resulting in vaginal bleeding on July 21, 2010 as she attempted to prevent a falling client from striking his head.[1]

Devinney testified by deposition on October 11, 2011, and at the hearing held on February 27, 2012. She was born on October 7, 1951. She is a high school graduate, and has a bachelor's degree in social work from Murray State University. Her previous work experience

[1] No evidence was developed regarding the July 21, 2010 injury, and Devinney testified the condition had resolved. The injury date is not part of the issue raised on appeal, and will not be discussed further.

includes working as a telephone operator and performing general office duties. She began working for Community Alternatives in 1999, and managed two group homes for over eleven years. Her job duties included managing staff at the homes, shopping and preparing paperwork. She testified she worked sixty-five to seventy hours per week prior to her injuries.

On November 29, 2009, one of the residents had returned to the home from a visit with his family. Devinney asked him to take his duffel bag to his room and she continued with her household tasks. The resident moved the duffel bag, but rather than placing it in his room, he placed it around the corner from the kitchen. She tripped over the bag landing primarily on her right knee. She continued to work that evening, and was off for the next four days, which were regularly scheduled days off. She missed no time from work, and the knee was surgically repaired nearly a year later. Devinney stated the right knee still bothers her, but is better since the surgery. She has had episodes with the right knee locking, causing her to fall.

On December 22, 2009, Devinney was carrying Christmas presents for the residents when she tripped over a bulge in the carpet. Devinney struck her chin against a

chair, and injured her left knee in the fall. She later had surgery on the left knee, which provided relief, and she only had occasional stiffness until she fell again at home when her right knee locked. She subsequently underwent a cortisone injection in the left knee.

Devinney continues to work for Community Alternatives. Devinney is now a staff member at a home, and no longer works as a residential manager. She earns the same hourly pay rate, but works fewer hours per week. She stated her current position is more physically demanding than the job she performed at the time of the injuries. She testified she now works in a double staffed home, which she described entails two staff members being present, rather than one. She testified she has had to modify the way she cleans the bathtub in the home where she is assigned.

Frank Wilford, the human resources manager with Community Alternatives, testified at the hearing held February 27, 2012. He assigned Devinney to her current work assignment. He noted she is paid the same hourly rate, and has been accommodated by being reassigned to a double staffed home. He testified the physical requirements of Devinney's job are the same now as before her accidents. He also stated overtime was available to

her if she wanted it, and everyone else who works at her present job site works overtime.

In support of her claim, Devinney filed treatment records from Dr. Martin Fulbright, her treating orthopedic surgeon. Dr. Fulbright diagnosed her with bilateral tears of the meniscus. In his report dated September 20, 2011, Dr. Fulbright assessed 4% impairment ratings to each knee pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), for a total rating of 8%, all due to the work injuries. He indicated Devinney could perform light duty.

Community Alternatives filed the report of Dr. Jeana Lee, an orthopedic surgeon, who evaluated Devinney on November 15, 2011. Dr. Lee noted Devinney moved around the office without difficulty, and had a full range of motion. She diagnosed bilateral meniscus tears with pre-existing asymptomatic patellofemoral arthritis and mild medial compartment arthritis. She stated the meniscal tears were causally related to the work injuries. She stated Devinney reached maximum medical improvement for the left knee three months after the surgery and for the right knee on September 20, 2011. Dr. Lee agreed with Dr. Fulbright's assessment of an 8% impairment pursuant to the AMA Guides.

She also stated Devinney could return to work at her previous job.

Community Alternatives also filed the November 23, 2011 return to work slip signed by Dr. Regina Poudel, Devinney's family physician. Dr. Poudel noted Devinney could return to work on November 28, 2011 with no restrictions.

In the opinion, award and order rendered April 25, 2012, the ALJ found as follows:

> **ANALYSIS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW**
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> The issue to be decided by the ALJ is whether Plaintiff retained the physical capacity to return to the type work that she performed prior to her injuries, whether she actually returned to that type work not being material. The parties have conceded that Plaintiff did not return to work at the same or greater wage. Therefore, the two multiplier is not an issue.
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> In deciding the issue the ALJ has to look at the Plaintiff's testimony as well as the medical evidence. A claimant's own testimony is competent evidence of his or her retained physical capacity to return to the same type of work performed at the time of the injury. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).
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> In summary, the ALJ finds that the only specific job that Plaintiff

testified that she has had to modify is washing a bathtub. She had trouble specifically identifying jobs formerly done that she could not do now. She was mistaken in thinking that Dr. Lee restricted her in having to work with other people. She testified that the work that she does now is physically harder that[sic] what she did previously. She is not restricted in the number of hours that she can work, and said she would like to work more. She said her current job in working with women was more exhausting than working with men patients.

The ALJ finds that Plaintiff has failed to prove that she does not have the physical capacity to return to the type work that she performed prior to knee injuries. The fact that she has not returned to the same type work is not material to the issue. Plaintiff is not entitled to the three multiplier.

Defendant has argued that Plaintiff is not entitled to future medical treatment for her knees, citing Dr. Lee's report. Plaintiff has been found to have significant injuries and impairment to her bilateral knees. The fact that one physician has stated that she "does not feel that any future medical treatment pertaining to her work injuries … are indicated," the ALJ is of the opinion that he cannot rule that all future treatment for her bilateral knees would be unnecessary or unreasonable.

The ALJ finds that Plaintiff has sustained 8% impairment to her bilateral knees.

Devinney filed a petition for reconsideration arguing she was entitled to the application of KRS 342.730 (1)(c)1 & 3. The petition for reconsideration was overruled by order entered May 30, 2012.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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 were unreasonable based upon 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 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

We do not believe the evidence compels a finding in Devinney's favor. Compelling evidence is defined as evidence which is so overwhelming no reasonable person

could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). Although Devinney argues she could not perform certain aspects of her job, the ALJ determined she was not precluded from doing so based on the restrictions of record. Based upon a review of the evidence, we do not believe the ALJ's conclusions were unreasonable.

Although a party may note evidence supporting a different outcome than that reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

KRS 342.730(1)(c)(1) provides as follows:

> 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent

> partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or

Despite her argument to the contrary, the ALJ determined Devinney could return to her pre-injury job, and therefore she was not entitled to the 3.4 multiplier. This determination is supported both by Dr. Lee's assessment that Devinney could return to her previous job, and by Dr. Poudel's note allowing her to return to work with no restrictions. This determination is also supported by Mr. Wilford's statement that her current job is more physically demanding than the one she previously performed.

Accordingly, the decision by Hon. Joseph W. Justice, Administrative Law Judge, rendered April 25, 2012, as well as the order ruling on the petition for reconsideration dated May 30, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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