OPINION ENTERED: March 5, 2012

CLAIM NO. 201094564

VILLAGE OF LEBANON, LLC PETITIONER

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

SONDRA THOMPSON
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Village of Lebanon, LLC ("Village") seeks review of an opinion, order and award rendered September 26, 2011, by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") awarding Sondra Thompson ("Thompson") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, medical benefits, and

vocational rehabilitation benefits for the left knee injury she sustained when she slipped and fell at work on March 3, 2010. The ALJ denied income benefits and future medicals for injuries she alleged to other parts of her body. Village also appeals from the order denying its petition for reconsideration entered November 16, 2011.

Village argues on appeal the ALJ's finding of no pre-existing active impairment pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) is not supported by the evidence. Village argues the ALJ erred in concluding Thompson is entitled to vocational rehabilitation benefits since she has already found suitable employment. Finally, Village argues the ALJ did not conduct the proper analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2005), in applying the three multiplier pursuant to 342.730(1)(c)(1). We affirm.

At the time of filing this claim, Thompson had a pending claim for another work-related left knee injury occurring on September 7, 2008, while working for US Nursing Staff/Fastaff, Inc. The 2008 injury claim and the 2010 injury claim were consolidated by the ALJ. Thompson subsequently settled her 2008 left knee injury claim against US Nursing Staff/Fastaff. Only Thompson's 2010 left knee

injury is at issue and the parties stipulated Thompson's pre-injury average weekly wage ("AWW") is $942.35.

Thompson testified by deposition on November 29, 2010 and at the hearing held on July 28, 2011. Thompson was born August 25, 1964 and resides in Lebanon, Kentucky. She is a high school graduate and has earned an associate's degree in nursing. Thompson is currently a registered nurse with over fifteen years of experience in the nursing field. Thompson began working for Village in September 2009 as a charge nurse and testified her duties included supervising the care given to residents and the employees administering such care. She intervened with tasks requiring qualifications above a licensed practical nurse level and assisted patients in walking, standing and sitting. Thompson testified she was physically required to kneel, stoop, bend, lift, carry, turn and transfer patients.

Thompson testified on March 3, 2010, as she opened the door to the reception area bathroom at work, she slipped on the wet floor, hitting her neck and shoulder on the door jam and landing on her left knee. Thompson felt immediate pain in her left knee. Thompson testified less than 24 hours after her fall, she sought treatment with Springview Hospital where her kneecap was "replaced" into proper position. After her pain continued, Thompson telephoned her

regular orthopedist, Dr. Mehta, who instructed her to go to Flaget Memorial Hospital for x-rays. Dr. Mehta obtained an MRI and treated her left knee with steroid injections, aspiration, and medication. Thompson testified Dr. Mehta restricted her from bending, stooping, climbing stairs and assisting patients in ambulation. Thompson also saw a specialist, Dr. Sweet, who recommended a partial knee replacement if she lost weight.

Thompson testified prior to March 3, 2010, her left knee did not prevent her from performing her job as a charge nurse which she performed consistently and regularly. Thompson testified she did not obtain any relief for her left knee pain from the injections, and since March 3, 2010, her condition has worsened. Thompson testified she has increased problems lifting, bending, stooping, walking up and down stairs and she cannot walk more than 20 feet without use of a cane or scooter. Thompson testified her left knee pain is constant and has increased since the slip and fall accident.

Thompson testified she returned to work as a charge nurse for Village in June 2010 performing modified duties pursuant to Dr. Mehta's restrictions. She earned the same wages she earned prior to the accident. Thompson continued her supervisory role but was unable to return to

the physical activities she performed prior to the March 3, 2010 accident. Thompson testified she resigned from her job with Village in December 2010, in part due to complaints from her co-workers because they had to perform more work due to Thompson's physical restrictions.

Thompson testified she was able to find a part-time, sedentary job with Care Tenders in April 2011, working as a home health care nurse where she travels to patients' homes and instructs them on care. This job requires no hands-on interaction with patients, and she is not required to lift, bend, stoop, pick-up or clean. Thompson testified at Care Tenders, she is paid $30.00 per visit, for approximately 6 visits a day, totaling $180.00, which is less than she earned at Village.

Concerning her interest in vocational rehabilitation, Thompson stated:

> As far as education goes, I'm not going to go anywhere with where I am right now. As long as I'm unable to walk the distance, carry a load, I'll never go anywhere as a nurse again. The only way that I'm going to recoup the money that I've lost is to go back to school and either go on to be a nurse practitioner or at least get a master's degree where I can teach and any job that would not require, like I said, hands-on experience, and that's the only way I'm going to be able to do it is if I go back to school.

> . . .
>
> With an associate's degree, you cannot move into management. You are a hands-on nurse. So in order for me to move up the ladder, make the money that I used to make, I would need to go back and at least get, at least a bachelor's, if not a master's.

Thompson testified before 2006, she had general knee aches stemming from working 12 to 16 hour shifts. Thompson had a prior workers' compensation claim in 2006 stemming from a physical assault by a patient who kicked her left knee and stomped her right knee. Thompson received medical treatment for her right knee, including arthroscopic surgery, and settled the claim with her employer. Thompson testified she experienced some pain in her left knee following the 2006 incident and received steroid injections and needle aspirations in both knees. Thompson testified she received the injections because Dr. Mehta wanted to stabilize her right knee and, the treatment for the left knee, "was more preventative because he didn't want it to become overburdened because I was relying so much on the left knee." Thompson described the previous left knee pain as intermittent and minor. Thompson has been receiving the injections approximately every three months, the last being late September or October of 2010.

Thompson testified she twisted her left knee at work on September 7, 2008, when a gurney was pushed over her left foot. The injury she sustained required medical treatment from Dr. Mehta. She subsequently settled a claim for the 2008 injury.

Thompson admitted to having some arthritis in her left knee and had suffered left knee pain for a long time prior to March 3, 2010. Thompson admitted she has fallen on multiple occasions causing temporary left knee pain, but could not recall the specific dates. She recovered from those falls to a baseline level. Thompson testified she had periods of time where she was symptom free including the year leading up to the March 3, 2010 fall.

Thompson attached the medical records of Springview Hospital with the Form 101. The record from March 6, 2010, reflects complaints of bilateral shoulder and left knee pain. She was diagnosed with left medial (tibial) ligament strain and a splint was applied. Thompson was released to return to work on March 7, 2010, but had limitations on her activities due to the splint.

Village submitted various medical records regarding Thompson's March 3, 2010 injury. Records from Flaget Memorial Hospital dated March 7, 2010, note Thompson complained of left knee and shoulder pain after she slipped

on a wet floor in a bathroom. Flaget ordered x-rays, diagnosed left shoulder strain and left knee medial collateral ligament strain, instructed her to use a cane and knee immobilizer, and to follow-up with Dr. Mehta. On March 18, 2010, Dr. Mehta diagnosed left knee patellar dislocation with hemarthrosis, an effusion, and a possible medial meniscus tear, and ordered an MRI. Dr. Mehta noted the MRI demonstrated moderate effusion with some meniscal degeneration, but no meniscal tear.

On June 15, 2010, Thompson complained of bilateral knee pain and difficulty with ambulation, stairs and squatting. Dr. Mehta diagnosed degenerative joint disease ("DJD") in both knees with effusion. He administered steroid injections in both knees and prescribed Lortab. On July 13, 2010 and August 3, 2010, Thompson received steroid injections to the left knee. In a medical record dated August 20, 2010, Dr. Mehta noted Thompson was getting progressively worse and referred her to specialists in bariatric and knee replacement surgery.

Thompson was evaluated by Dr. Primm, an orthopedic surgeon, on November 19, 2010, at Village's request. She presented with left knee problems and stated she had no prior left knee injuries. Dr. Primm performed an examination and reviewed medical records dating back to

1990. Dr. Primm noted x-rays of the knees showed early medial compartment degenerative arthritis with early narrowing of the cartilage space and small osteophytes medially in both knees. Dr. Primm diagnosed pre-existing active degenerative arthritis in both knees and found Thompson to be at maximum medical improvement ("MMI"). Dr. Primm noted she had been actively treating for chronic pain in both knees preceding her March 3, 2010 injury and further opined:

> Any impairment applicable to the knee would be a pre-existing active impairment, as evidenced by her medical records showing that she was undergoing active treatment for both knees, and in fact had recently undergone Synvisc injection in both knees January 2010, two months prior to her March 2010 work-related accident.

Dr. Primm declined to assess an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Impairment, 5th Edition ("AMA Guides"). Dr. Primm found no need for permanent restrictions based upon the March 3, 2010 accident but, due to her pre-existing active conditions, opined she should avoid squatting, kneeling, climbing or crawling. Dr. Primm noted Thompson is physically capable of performing the type of work she performed on March 3, 2010 and is not permanently and

totally occupationally disabled. Dr. Primm noted any future treatment or surgery for her left knee would be unreasonable, unnecessary, and unrelated to the March 3, 2010 slip and fall.

Dr. Bilkey evaluated Thompson on January 19, 2011, for the effects of her September 7, 2008 and March 3, 2010 left knee injuries. Dr. Bilkey reviewed medical records dating back to 1998 and performed a physical examination. Dr. Bilkey diagnosed "9/7/08 work injury with aggravation occurring 3/3/10 with left knee strain superimposed on degenerative joint disease of the knee. Ms. Thompson has acquired chronic left knee pain and impairment." Dr. Bilkey noted Thompson had symptomatic osteoarthritis of the left knee and was receiving active treatment, in the form of injections, prior to the initial work injury. However, she was able to function as a registered nurse. Dr. Bilkey opined the effects of her left knee injuries aggravated her pre-existing arthritic knee and she is unable to work. Dr. Bilkey noted the diagnosis is due to the September 7, 2008 and March 3, 2010 injuries and found all treatment to be reasonable, necessary and work-related. In finding no active, pre-existing impairment, Dr. Bilkey stated:

> In my opinion, Ms. Thompson does not have an active pre-existing impairment affecting the left knee. It was

> arthritic. There was some treatment going on however, she was capable of work. There is only one clinic note that describes any prior symptoms involving the left knee. That clinic note does not distinguish in an accurate manner between the knees. There is a pre-existing history of injury and surgery to the right knee. There is no indication of antalgic at that time. For these reasons, based on medical history and based on review of provided records, it does not appear that Ms. Thompson had active pre-existing impairment with respect to the left knee.

Dr. Bilkey noted Thompson has reached MMI and he assessed a 15% impairment rating with respect to her March 3, 2010 left knee injury pursuant to the AMA Guides. As a result of the March 3, 2010 knee injury, Dr. Bilkey restricted Thompson from squatting, kneeling, stair climbing, lifting over 25 pounds, or walking over 25 feet at a time. Dr. Bilkey noted the restrictions precluded Thompson from being able to perform the usual work duties carried out prior to the March 3, 2010 injury.

Thompson also submitted the medical report of Dr. Friesen, an orthopaedic surgeon, dated February 1, 2011, who diagnosed:

> Bilateral knee osteoarthritis, chronic. Obesity. Diagnoses related to her accident of 09/07/08 would be probable contusion left knee tibial plateau, sprain medial capsular ligament and

> strain vastus medialis. As regards to her injury of 03/03/10, I feel that she sustained a sprain of the medial capsular ligament and possible subluxation of the patellofemoral joint.

Dr. Friesen opined Thompson had reached MMI and did not qualify for an impairment rating pursuant to the AMA Guides. Dr. Friesen noted Thompson suffered from significant pre-existing arthritis which he opined was aggravated by her September 7, 2008 injuries and he recommended a total knee arthroplasty. Dr. Friesen concluded the accident accelerated her arthritic problems thus causing the need for the arthroplasty at an earlier date than if the accident had not occurred. Dr. Friesen restricted her to sedentary work activities with no significant walking, standing, kneeling, squatting or climbing stairs.

US Nursing Staff/Fastaff submitted the medical report of Dr. Baker dated February 24, 2011. Dr. Baker noted Thompson had developed progressive degenerative arthritis in both knees which had been going on for years and was symptomatic. Dr. Baker concluded the March 3, 2010 accident exacerbated the arthritic process and there is no evidence of a resulting objective acute change in her left knee. Dr. Baker assessed a 9% impairment rating pursuant to

the AMA Guides due to her gradual development of degenerative arthritic changes.

Dr. Primm supplemented his medical report on April 4, 2011 after reviewing the additional records from Dr. Bilkey, Dr. Friesen and Dr. Baker. Dr. Primm reiterated Thompson was being treated for an active condition of symptomatic arthritis in both knees prior to her work accident, and the accident aggravated or exacerbated her chronic left knee symptoms but did not cause nor result in those changes being accelerated. He opined the recommended left knee arthroplasty is not reasonable, necessary or related.

Village also submitted various medical records documenting Thompson's prior left knee problems beginning with the 2006 injury to her right knee. Independent medical evaluations by Dr. Friesen dated April 23, 2008, and Dr. Baker dated June 4, 2009, were submitted. Dr. Friesen diagnosed, in part, osteoarthritis medial compartment bilateral knee joints right greater than left. Dr. Baker noted Thompson complained of left knee pain due to overcompensation for right knee. Dr. Baker's review of the medical records revealed a complaint of chronic left knee pain on March 28, 2006 and complaints of bilateral knee pain to Dr. Mehta beginning on July 17, 2007.

Village submitted the records of Dr. Mehta, who on July 17, 2007, noted Thompson complained of bilateral knee pain and diagnosed bilateral DJD of the knee with patellofemoral syndrome and recommended she cut back her work hours. A note dated October 16, 2007 indicated she had bilateral knee pain and was required to mobilize in a wheelchair at work. Dr. Mehta aspirated and injected the right knee and opined Thompson was too young for a knee replacement. On July 11, 2008, Dr. Mehta noted bilateral knee pain, diagnosed DJD of both knees and injected both knees.

Dr. Mehta treated Thompson for the September 7, 2008 left knee injury. On September 25, 2008, he diagnosed a left knee injury with synovitis with possible medial meniscus tear. An MRI performed on October 7, 2008 revealed medial knee injury pattern including subcutaneous edema posteriorly, subchondral marrow edema in the medial tibial plateau, moderate chronic appearing chondrosis, meniscal degeneration and lateral patellar tracking with moderate joint effusion.

On October 17, 2008, Dr. Mehta noted Thompson fell on October 1, 2008 due to instability and buckling of her left knee which had been injured during the course of work and she had also been seen at Flaget Memorial Hospital for

x-rays. An MRI performed on October 7, 2008 revealed medial knee pattern including subcutaneous edema posteriorly, subchondral marrow edema in the medial tibial plateau, moderate chronic appearing chondrosis and meniscal degeneration; lateral patellar tracking with a moderate joint effusion; and muscular edema at the distal myotendimous junction of the vastus medialis on the medial patellar retinaculum compatible with muscle strain. Thereafter, Thompson continued to complain of left knee problems and had received injections to her left knee on November 11, 2008, January 13, 2009, April 10, 2009, June 4, 2009, August 21, 2009, December 17, 2009, and January 15, 2010.

In the opinion, order and award rendered September 26, 2011, the ALJ found as follows:

> 9. (a) The ALJ will first address the specific question of whether or not an "injury" occurred on March 3, 2010. Without doubt, a traumatic event occurred. Did the plaintiff, however, suffer any permanent harmful change in her human organism on the date in question? Does the plaintiff have a permanent impairment under the AMA Guidelines, Fifth Edition? The ALJ finds that plaintiff has a permanent impairment of 9% to the body as a whole based on the IME of Dr. Robert F. Baker on February 24, 2011. The 9% impairment was assessed under Table 17-31 based on the medial joint space in the left knee measuring 1.5

millimeters. He opined this rating would be most probably on the basis of her gradual development of degenerative arthritic changes. However, Dr. Baker does not specifically state that a 9% rating would have been appropriate just prior to the March 3, 2010 incident and neither does he opine specifically that plaintiff's condition has returned to the baseline level immediately before the incident on March 3, 2010. The ALJ has considered the opinion of Dr. Warren Bilkey, who assessed a 15% permanent impairment relative to the left knee injury and a 3% permanent impairment relative to her neck and shoulder.

(b) With respect to Dr. Bilkey's 15% rating attributable to the left knee, there is no convincing evidence that plaintiff's use of a cane or supportive device will be permanent in nature. The ALJ is simply persuaded by Dr. Baker that the 9% permanent impairment more accurately assesses the plaintiff's permanent condition in the left knee.

(c) The next question is whether or not this permanent impairment of 9% attributable to the knee is causally related to the incident of March 3, 2010 and/or whether this impairment was pre-existing and active prior to the date in question. On this specific question, the ALJ finds Dr. Bilkey's opinion and explanation to be most persuasive. Dr. Bilkey testified the work injury of March 3, 2010 resulted in a 15% whole person impairment. Although the ALJ has not adopted the impairment rating of 15%, the ALJ is convinced that plaintiff sustained a permanent impairment as a result of the work incident and that the amount of the permanent impairment is more

properly quantified by Dr. Baker. On the question of causation and work-relatedness, however, the ALJ is persuaded by Dr. Bilkey.

(d) The Defendant has argued that plaintiff's condition in the left knee was pre-existing and active prior to the work related event. In order to be characterized as active, a condition must be both symptomatic and impairment ratable under the AMA Guidelines immediately prior to the occurrence of the work related event, Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007). The burden of proving the existence of a pre-existing condition falls upon the employer. Finley, at page 265, citing also Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Not only must the defendant prove that the underlying pre-existing condition is impairment ratable, the defendant must also provide the prior rating. None of the physicians who introduced evidence on behalf of the defendant-employer, including both Dr. Primm and Dr. Baker, ventured to rate the plaintiff's permanent impairment immediately prior to March 3, 2010. Further, none of defendant's physicians specifically stated that plaintiff had returned to her baseline condition immediately prior to March 3, 2010. Dr. Bilkey rated the pre-existing condition at 0%. He noted that plaintiff was performing all of the requirements of her job, and that the job duties of working at Village of Lebanon were quite strenuous in nature, requiring the plaintiff to lift and transfer nursing home patients and engage in various other physical activities. The evidence in the case is that plaintiff was satisfactorily performing the requirements of her job on March 3, 2010. There is also

evidence that her last injection in the left knee was two full months prior to the incident in question. The ALJ agrees with Dr. Bilkey's conclusion and does hereby find that plaintiff was not suffering from an active impairment just prior to the work event in question.

10. The next issue to be considered is whether or not plaintiff is entitled to any of the statutory multipliers provided in KRS 342.730(1)(c). Subparagraph 1 under the statute provides that if, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee was performing at the time of injury, the benefit for permanent partial disability shall be multiplied by three times the amount otherwise determined. Subparagraph 2 of the said statute provides that if an employee returns to work at the same or greater wages, but later said work is terminated due to the injury and resulting impairment, Chrysalis House v. Tackett, 283 S.W.3d 671 (2009), then the employee is entitled to a multiplier of two times the amount otherwise payable. If both sections are applicable, the ALJ must determine which of the multipliers is most appropriate under the facts and circumstances of the case. Fawbush v. Gwinn, 103 S.W.3d 5 (2003). The ALJ finds that plaintiff does not retain the physical capacity to return to the type of work she was doing at the time of the injury and she is entitled to the multiplier of 3x. Even though she returned briefly to the same job at the same wages, the evidence reveals that she did not continue in said position. She was unable to perform all of her job requirements and she felt like the other employees resented her for not doing her share of the work. She resigned her

position and took a lighter position which involves fewer hours and less pay. In her present job, she is paid $30.00 per home visit and she makes approximately 6 visits per day. Thus, she earns $180.00 a day. This job started near the end of April of 2011. In this new part-time position, plaintiff sometimes teaches, starts IV's, draws blood, goes over medications, and talks to patients about disease processes. This current job with Care Tenders is more sedentary in nature and is more in compliance with the permanent restrictions suggested by Dr. Bilkey of lifting no more than 25 pounds, no walking more than 25 feet at a time, no squatting or kneeling, and no frequent stair climbing. Dr. Jerold Friesen, who presented evidence on behalf of the defendant-employer, agreed that plaintiff is restricted by her left knee condition to sedentary activities. Dr. Friesen opined plaintiff should not do significant walking or standing and that she is unable to climb stairs, kneel, or squat.

11. The Plaintiff preserved the issue of her entitlement to vocational rehabilitation pursuant to KRS 342.710. Under this statute, an employee who has suffered an injury covered by the Act is entitled to prompt medical rehabilitation services when, as a result of the injury, the employee is unable to perform work for which he or she has previous training or experience, and is entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment. Plaintiff's right to vocational rehabilitation was listed as an issue at the Benefit Review Conference. The Plaintiff has testified as to her desire to return to college

> and to obtain a four year nursing degree or at least a sufficient additional education as will enable her to perform sedentary duties, such that she does not sustain the loss of income which she is currently experiencing. The ALJ having determined that plaintiff is unable to perform her prior work duties, the plaintiff is entitled to the benefits provided in KRS 342.710.

Village filed a petition for reconsideration requesting additional findings on why the ALJ relied upon Dr. Bilkey's opinions rather than those of Dr. Primm or Dr. Friesen regarding the issue of causation. Village also asked the award of vocational rehabilitation benefits to be vacated as a matter of law. In the order denying Village's petition for reconsideration, the ALJ ruled as follows:

> Further, the ALJ will respond to the defendant's query as to why the reports of Dr. Primm and Dr. Friesen occupied so much space in the summary of the evidence, as compared to the space occupied in the findings of fact and conclusions of law. A lengthy report will sometimes require a lengthy summary. The length of either, however, is not necessarily indicative of weight or value. Dr. Primm found the plaintiff's complaints to constitute a pre-existing, <u>active</u> impairment. Such finding was and is in conflict with the legal definition of an "active" impairment, an analysis of which was set forth on pages 33 through 35 of the Opinion.
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> The Defendant-Employer argues that sufficient findings have not been made

to entitle the claimant to vocational rehabilitation services under KRS 342.710. The ALJ will clarify and supplement such findings. The ALJ has already engaged in an exhaustive explanation as to how and why the plaintiff does not retain the physical capacity to return to the type of work she was doing at the time of the injury. In addition thereto, the ALJ finds that plaintiff's average weekly wage at the time of her injury was $942.35, as stipulated by the parties at the Benefit Review Conference. As a result of the work-related injury found herein, the claimant resigned her position and took a lighter position involving fewer hours and less pay. In her present job, she is paid $30.00 per home visit. She makes approximately six (6) visits per day, although the number of visits is not always the same. The ALJ previously found that plaintiff earns about $180.00 per day. This depends upon the number of visits which she makes. In any event, $180.00 per day is the equivalent of $900.00 per week, based on a 5 day work week. Thus, the plaintiff is now earning less money than she was at the time of the incident. Not only does plaintiff earn less money, her rate of pay is based on specific production as opposed to a salary based on a regular work week. The Plaintiff has indicated she would like to obtain a four (4) year college nursing degree or at least sufficient additional education as will enable her to perform a job which regularly requires sedentary duties only.

In Wilson v. SKW Alloys, Inc., 893 S.W.2d 800 (Ky. App. 1995), the Kentucky Court of Appeals stated at page 802 as follows:

> KRS 342.710(1) states that "[o]ne of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment." Further, KRS 342.710(3) provides that the gainful employment to which the injured employee that is eligible for rehabilitation is to be restored must be suitable employment. Clearly, a purpose of workers' compensation legislation is to restore the injured worker as soon as possible and as near as possible to a condition of self-support as an able-bodied worker.
>
> Worker's Compensation was developed not just to compensate a worker who has been injured on the job, but also to enable the worker to reenter[sic] the job market and become employed again in a position as near as possible in pay and status to the one the claimant has been forced by injury to leave.

The Wilson court held that, in light of the spirit and purpose of the Workers' Compensation Act, "work for which an [employee] has previous training or experience" must be suitable employment. By "suitable employment" we mean work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors

both at the time of the injury and after reaching his post-injury maximum level of medical improvement. It would be unreasonable and unconscionable to force an injured worker who had, by working conscientiously over the years, advanced to a responsible, well-paying, albeit unskilled position to start over at an unskilled job paying the minimum wage by denying him the rehabilitation benefits needed to qualify him for a skilled job with earnings comparable to his prior employment (at page 802).

Even though plaintiff is working within the health industry and is working at a position which could be described as a home health nurse, such work requires the plaintiff to spend substantial time in traveling from house to house and requires a certain level of physical activity. The job also requires the plaintiff to be productive and to make a minimum number of visits per day or else face substantial loss of income.

The claimant is interested in vocational rehabilitation because she has only a two-year associate's degree, which qualifies her only to be a hands-on nurse. She is unable to walk the distances and carry the loads required for that type of nursing. Ms. Thompson wants to return to college and obtain at least a four-year nursing degree or perhaps even a master's degree which would enable her to teach. This is the only chance she will have to earn as much money as she was at the time of her accident. The increased education would afford her a better chance of regular employment and would enable her to hold a job more consistent with her restrictions and limitations and more likely to assure her of steady and uninterrupted employment.

Pursuant to KRS 342.710(3), the goal of rehabilitation must be "feasible, practical, and justifiable." As noted in Wilson, supra, at page 802,

> "In determining a claimant's right to vocational rehabilitation benefits, we must adhere to the general rule that the workers' compensation statutes will be liberally construed to effect the humane and beneficent purposes. Oaks v. Beth-Elkhorn Corporation, Ky. 438 S.W.2d 482, 484 (1969).
>
> [T]he words of the statute must be construed reasonably and liberally with the view of applying the beneficient [sic] provisions of the statute so as to effectuate its purposes, and to extend them to every class of workman and employee that can fairly be brought within the provisions of the law."

When a person has suffered an injury which denies such person a wage rate commensurate with pre-injury earnings and which results in less job security, is it reasonable to expect the worker to be satisfied with work which provides lower wages, less job security, and possibly less professional standing and/or status? If rehabilitation training, education, and/or services are readily available which will allow the employee to enhance his or her wages, job security, and professional standing, is it a reasonable and worthwhile goal or objective which fits within the expectations guaranteed by KRS 342.710? The ALJ believes this inquiry should be

> answered in the affirmative and does so FIND/CONCLUDE.
>
> Whereas, Ms. Thompson may or may not be able to achieve her objectives, the ALJ finds that she is entitled to the opportunities and services offered under KRS 342.710.
>
> Except as where specifically amended and supplemented herein, the defendant's Petition for Reconsideration is hereby DENIED and OVERRULED.

Thompson, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including application of the three multiplier pursuant to KRS 342.730(c)(1). *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Thompson was successful in her burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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 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). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence supporting 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). 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).

Village argues the ALJ did not conduct a proper Fawbush analysis in applying the three multiplier pursuant to KRS 342.730(c)(1). We disagree. When KRS 342.730(1)(c)(1) and KRS 342.730(1)(c)(2) both may be applicable, Fawbush v. Gwinn, supra, and its progeny require an ALJ to make three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.

Although the ALJ did not engage in a step-by-step Fawbush analysis, we can reasonably infer those steps were taken. In addressing the first prong, the ALJ found Thompson did not retain the physical capacity to return to the type of work she was doing at the time of her injury. This is especially true in light of Thompson's testimony and Dr. Bilkey's medical report. Thompson testified she returned to Village in June 2010, but had job restrictions of no stooping, climbing stairs or assisting patients to ambulate. Thompson testified she continued to perform supervisory duties but ceased in the physical aspects she

had performed prior to the injury, such as assisting patients to walk, transferring or lifting patients. Dr. Bilkey restricted Thompson to no lifting over 25 pounds, walking over 25 feet at a time, squatting, kneeling or frequent stair climbing. He further opined the above restrictions preclude her from performing the work duties she carried out prior to the injury.

As for the second prong, the ALJ determined Thompson had returned to the same job earning the same wage. The third prong was satisfied by the ALJ's conclusion she was unable to perform all of her job requirements, and further evidenced by the fact she resigned from her job in December 2010. The ALJ noted Thompson took a lighter position involving fewer hours and lower pay in April 2011. Assuming Thompson earns $180.00/day, or $900.00 per week, this is less than her stipulated pre-injury AWW of $942.35. The ALJ also found her new job with Care Tenders is more sedentary in nature and is compliant with the permanent restrictions imposed by Dr. Bilkey.

Based upon the foregoing, we believe the ALJ performed the proper Fawbush analysis supported by substantial evidence in the record and on this issue, we affirm.

Likewise, the ALJ did not err in awarding vocational rehabilitation benefits provided in KRS 342.710, which states:

> (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment. . .
>
> (3) . . . When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

The Kentucky Court of Appeals in Wilson v. SKW Alloys, 893 S.W.2d 800 (Ky. App. 1995) noted a purpose of this statute is to restore the injured worker as soon as possible and as near as possible to a condition of self-support as an able bodied worker and held "work for which an employee has previous training or experience" must be suitable employment. Wilson defined "suitable employment" as:

> work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational

> aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement. *Id.*

The issue of vocational rehabilitation benefits is entirely within the discretion of the ALJ. Our inquiry is whether the ALJ's decision to award vocational rehabilitation benefits is supported by substantial evidence. Alexander v. S & M Motors, Inc., 28 S.W.3d 303 (Ky. 2000). In the opinion rendered September 26, 2011, the ALJ found Thompson is unable to perform her prior work duties as a registered nurse. He relied on her testimony of the need to return to school to obtain at least a four year degree to enable her to find a more sedentary job within the healthcare field compliant with her restrictions. In his order ruling on the petition for reconsideration dated November 16, 2011, the ALJ made additional findings Thompson is earning less money with her new job than she was prior to the March 2010 injury. Her current job with Care Tenders requires a certain level of physical activity, her current education only qualifies her for a hands-on nurse for which she is physically incapable of doing. Thompson testified additional education would

afford her a better chance of regular employment more consistent with her restrictions.

Finally, although Thompson had the burden of proving each of the essential elements of her cause of action, the burden to establish the affirmative defense of "pre-existing active impairment" rests with Village. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, supra. Since Village was unsuccessful in its affirmative defense burden, the question on appeal is whether the evidence compels a finding in its favor. Wolf Creek Collieries v. Crum, supra. "Compelling evidence" is defined as evidence that 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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Village argues the ALJ erred in finding no pre-existing, active condition pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). We disagree. In Finley, the Court of Appeals held in order to be characterized as pre-existing active, the underlying pre-existing condition must be both symptomatic and impairment

ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. *Id.* In view of the above, the ALJ was required to determine whether the injured worker qualified for an impairment rating involving the same body part immediately prior to the work-related injury for which benefits are being sought.

The record contains the medical opinions of four doctors. Dr. Primm opined any knee impairment would be pre-existing and active since Thompson was undergoing active treatment for both knees, and had Synvisc injections in both knees two months prior to March 3, 2010. Dr. Baker assessed a 9% impairment rating due to her development of degenerative arthritic changes, concluded the March 3, 2010 incident exacerbated the arthritic process and found no evidence of an objective acute change in her left knee due to the accident. Dr. Bilkey opined Thompson did not have an active pre-existing impairment. Dr. Bilkey noted, despite receiving ongoing treatment prior to March 3, 2010, Thompson was functioning as a registered nurse. Dr. Bilkey also cited one clinic note described prior symptoms involving the left knee, and opined it did not distinguish in an accurate manner between the knees. Dr. Friesen opined Thompson did not have a permanent impairment, but noted Thompson suffered

from pre-existing arthritis aggravated by her September 9, 2008 injuries and recommended a total knee arthroplasty.

The ALJ found Dr. Bilkey's report to be more persuasive regarding the pre-existing condition. He further noted Thompson was satisfactorily performing her job requirements prior to March 3, 2010, and had her last injection in the left knee a full two months prior to March 3, 2010. We believe the ALJ's determination regarding the pre-existing condition is supported by the evidence, and a contrary result is not compelled.

Accordingly, the decision rendered September 26, 2011, and the order ruling on the petition for reconsideration entered November 16, 2011, by Hon. Edward D. Hays, are hereby **AFFIRMED**.

ALL CONCUR.

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