Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 16, 2018

CLAIM NO. 201700343

R & L CARRIERS, INC. PETITIONER

VS. **APPEAL FROM HON. BRENT E. DYE, ADMINISTRATIVE LAW JUDGE**

LESLIE TRAMMELL
and HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. R & L Carriers, Inc. ("R & L") appeals from the June 29, 2018, Opinion, Award, and Order and the July 24, 2018, Order of Hon. Brent E. Dye, Administrative Law Judge ("ALJ"). The ALJ awarded Leslie Trammell ("Trammell") temporary total disability ("TTD") benefits, permanent partial disability benefits, and medical benefits for a work-related right knee injury.

On appeal, R & L asserts compelling evidence establishes Trammell was suffering from a pre-existing, active right knee condition at the time of the alleged work injury. It also asserts the ALJ erred by applying the three multiplier. In the alternative, R & L argues the two multiplier should apply.

The Form 101 alleges Trammell sustained a work-related right knee injury on February 26, 2015, when "he slipped on ice in the course of employment."

Trammell was deposed on May 1, 2017. He began his employment with R & L in 1994, and his last day of work was July 12, 2016. He hauled "[a]nything and everything" as freight, and he was sometimes responsible for loading and unloading his truck.

Immediately after the February 26, 2015, fall, he called the dispatch office, and was directed to go to the company doctor at BaptistWorx. Trammell explained what occurred after his initial treatment:

> Q: After you left Baptist Health, where did you go?
>
> A: I went home.
>
> Q: And did you advise your supervisor or your employer that you were on light duty?
>
> A: Yeah. I had to come back in this morning, come back in, give him the note from the doctor – from the nurse – oh, what do you call them, practitioners.
>
> Q: So after you went home, the next morning, which would be the 27th, you went back to work to give them the off-work note?
>
> A: Yeah.
>
> Q: Or the light duty note, I guess. Did they have light duty for you?

A: Yeah. Sitting – sitting in the office, you know, answering phones.

Trammell used crutches until his September 2015 right knee surgery performed by Dr. Sanjiv Mehta. After his surgery, he underwent physical therapy. He returned to full-duty work on February 1, 2016.

Q: So you went straight back to work at full duty?

A: Well, I was off so long after the surgery, and on February 1st I went back to work with, you know, no restrictions.

Q: No restrictions. So you were working as a driver?

A: Yeah.

Q: How many hours a week were you working?

A: Between 40 and 50.

…

Q: Who was it that released you to full duty?

A: To come back to work?

Q: Yes.

A: That BaptistWorx across the street.

Q: And that was in February of 2016?

A: Yeah. They offered me – they okayed me to go back to work on February 1st, 2016.

Regarding his rate of pay post-surgery, he testified:

Q: And do you know what your rate of pay was when you came back in 2016?

A: $26 or $27 an hour or something. Like 20 – I can't remember if it was like $26.49 or $27.49.

Q: Sure. Now, before your injury in February of 2015, what was your – what were your hours? Was it 40 to 50?

A: Yeah, 40 to 50.

Q: And do you know what your rate of pay was?

A: That was – now, you're talking about after I had my surgery and I came back, right?

Q: No. We talked about that already. I said going back to February when you had the accident, do you know how many hours you worked per week?

A: Well, I was averaging about 50 hours a week.

Q: Okay. And do you know what your rate of pay was before the injury?

A: I can't think what it was. It was –

Q: If I said about $25.17, would that sound right?

A: It would be close.

Q: Okay. So do you think you came back to the company, then, in February of 2016 making the same or greater –

A: Yeah, the same pay rate.

Q: Okay. And about same hours?

A: No. I probably was working a few hours less, because they was [sic] keeping me fairly close to Louisville until they started running me back out again with stuff that I just couldn't handle.

Trammell testified he eventually reached a point where he could not work anymore.

A: I made it all the way until like July something and they gave me this load that was – I said I can't take this, I just can't do it. They gave me a load that was 5- gallon buckets of chemicals, the whole load was, going to, oh, nursing homes and hotel laundries and stuff like that. I said,

> you've got to pick that stuff up, put it on a two-wheeler, no more than three, and wheel them inside. They're pretty heavy.
>
> Q: Okay. So in July of 2016 they give you a load that you didn't think you could handle?
>
> A: I told them I just couldn't handle it.
>
> …
>
> A: I stayed on until finally I told my boss, Brandon, I said, Brandon, I said September 12th will be my 22 year anniversary here. I said I'm going to submit my letter of resignation for then, and he said okay. That's what I did.

At the May 22, 2018, Hearing, Trammell testified he sustained two right knee injuries before the 2015 incident; one in 1980 or 1981 and the other in 2003. He detailed the nature of each injury:

> Q: You had a right knee injury in approximately 1981? Is that –
>
> A: Yeah, '80 or '81.
>
> Q: Okay. After you finished your treatment for that injury, did you return to your regular work?
>
> A: Yes, I did.
>
> Q: Did you have any continuing symptoms?
>
> A: No.
>
> Q: Did you have any continuing treatment?
>
> A: No.
>
> Q: Okay. Did you have any treatment until [sic] 1993 [sic] work-related injury?
>
> A: No. I did not.

Q: For the – I'm sorry. I said 1993 and I should've said 2003.

A: 2003, right.

Q: Yeah. For that 2003 injury after your completed your treatment, did you return to your regular work?

A: Yes, I did.

Q: And just to clarify, the 2003 injury was with R & L Carriers as well?

A: Yes.

Q: Okay. Did you have any problems doing your regular work after the 2003 –

A: Not after I came back to work.

Q: Did you have any continued symptoms after the 2003 injury until 2015?

A: No.

Q: Did you have any continuing treatment for the 2003 injury?

A: No. I did not.

He continued as follows regarding the 2003 injury:

Q: Okay. So let's just, then, go through a few things here I want to address. So you had [sic] injury [sic] 2003 to your knee; is that right?

A: Yes.

Q: Okay. And an MRI was performed?

A: Yes.

Q: And do you recall – I mean, it showed that there were some degenerative changes in your knee; is that correct?

A: Yeah. I had a – the doctor called it a Baker's cyst about the size of a golf ball sticking out the back of my knee,

> and he asked me, he said, 'You think you can live with that?' And I said, 'Well, will it go away?' And he says, 'Maybe not.' I said, 'No, I can't live with that.'
>
> Q: Okay. And there was also a meniscus tear; is that right?
>
> A: Yes. He cut – he cut the back of my knee open, removed that Baker's cyst and then trimmed some cartilage, I think.

Trammell had no right knee problems following the 2003 injury until the 2015 injury.

He underwent right knee replacement surgery on September 15, 2015. He described his symptoms prior to and after surgery:

> A: Before and after. Well, I mean, I couldn't walk – I walked on crutches, probably, for at least a week or so, and I got to where I could walk on a cane and I – I couldn't bend or anything. And after – that was before the surgery. After the surgery, I told you, I still got [sic] that popping, clicking noise in my knee, and it – it, like – I'll walk on my heel and it'll hyperextend backwards sometimes just a hair and send me through the roof.
>
> Q: From pain?
>
> A: Yeah, from pain.

Trammell returned to work at R & L in February 2016. He recounted the type of work he performed upon returning to work.

> Q: What kinds of things were you doing when you returned to work in February of '16?
>
> A: I asked my terminal manager, I said, 'Can you give me some – a little bit easier work?' I said – I said, 'My knee is just not quite up to it.' And he said, 'Yeah.' And so I gave up my route, and he had me doing little things where it wasn't so hard on me, but as time went by, I guess they just forgot about me, because next thing I know, they was

[sic] loading me up with just the stuff like I used to do, and I said, 'I just can't do it. It's just killing me.'

Q: And you last worked in July of '16?

A: I know I retired on September 12th of '16. I can't remember the last day I worked exactly. It – do you have it down for sure?

Q: In your deposition you testified that you last worked in July of 2016.

A: Okay. Probably was, then.

He testified as to why he stopped working in July 2016:

A: Oh, yeah. I went in and saw that load. It was nothing but hotels. I mean the whole trailer, and…

Q: What do you mean by that.

A: The whole trailer was loaded with stuff with – going to hotels that – laundry chemicals, cleaning chemicals, all that in them [sic] big, heavy buckets.

Q: Okay. And the hotels, do they have docks where you can –

A: No. No. Nope. You got [sic] to unload it, carry it inside yourself and put it where they want it.

Q: Okay. Did you feel like you would be able to finish that load that day?

A: No. My – it was just killing me trying to climb in and out of the back of the trailer, and after that I said I just can't do this.

Q: Okay. What would give you so much problem with climbing in and out of the trailer?

A: Bending the knee, if I'm going to pull with that pallet jack, like I said, 3,000 pound skid, push the pallet jack under it. You have to jack it up. Now, you got [sic] to dig your feet into the floor and just pull with all your might

> on a 2- 3,000-pound skid. I mean, that's really heavy, and my knees just wouldn't take it.

Trammell still experiences clicking, popping, and pain in his right knee. He testified he is unable to bend his right knee in a squat. "If I wanted to squat down right here, my right leg would have to stick out. I could only go down on one knee." Trammell is also unable to extend his right leg backwards without experiencing pain.

Trammell filed the May 16, 2017, Independent Medical Examination ("IME") report of Dr. Warren Bilkey. After performing a physical examination and medical records review, Dr. Bilkey diagnosed the following: "2/26/15 work injury, a fall, right knee contusion/strain injury, aggravation of degenerative joint disease of the right knee. Mr. Trammell has undergone knee replacement surgery right knee." He further opined as follows:

> Mr. Shockey [sic] had a fall at work, landed on his right knee, and strained the knee. He had persistent knee pain and has undergone knee replacement surgery. He is complex because of a prior history of surgery twice. However, Mr. Trammell did very well in particular following the second surgery as documented by Dr. Mehta. Mr. Trammell appeared to be minimally symptomatic with respect to his right knee prior to the 2/26/15 work injury and had no limitation in physical functioning. He then had a traumatic injury 2/26/15 and a sudden change in his physical work capability. It appears therefore that Mr. Trammell had a dormant condition that was not symptomatically active prior to the 2/26/15 work injury. That dormant condition was then brought into disabling reality by the 2/26/15 work injury.
>
> In my opinion, the above diagnoses are due to the 2/26/15 work injury. The evaluation and treatment procedures that have been carried out appear to have been reasonable, medically necessary and work injury related.

Dr. Bilkey opined Trammell reached maximum medical improvement one year following the right knee replacement surgery, and assessed a 20% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. He apportioned no impairment rating to a pre-existing active right knee condition. Dr. Bilkey assessed the following permanent restrictions:

> Work restriction recommendations for Mr. Trammell are that he not be lifting over 10 lbs from the floor. He should not be pulling/pushing over 100 lbs. He should not be carrying over 20 lbs. These restrictions are due to the 2/26/15 work injury and they do preclude Mr. Trammell from being able to return to the full scope of the usual work duties successfully performed prior to 2/26/15.

Several medical records of Dr. Mehta were filed in the record by both parties. Trammell filed Dr. Mehta's May 19, 2015, letter in which he opined that, while Trammell had been experiencing arthritic symptoms in his right knee prior to the February 26, 2015, injury, the work injury brought Trammell's "symptoms into a disabling reality." He further opined it would be difficult for Trammell to work without surgical intervention. In a medical report dated April 22, 2015, Dr. Mehta opined as follows regarding the February 26, 2015, injury:

> I do understand that he has had knee problems in the past, but I feel like this fall has pushed him over the edge. His knee arthritis has flared up and become a disabling reality, and at this point, I do not think that he is going to be able to go back to work safely in the trucking business without a knee replacement.

R & L filed a job description for Trammell's position of "city truck driver." The job description indicates lifting and carrying up to 50 pounds is "occasionally" required; lifting and carrying 51 to over 100 pounds is "rarely"

required. Bending, stooping, kneeling, crouching, crawling, twisting, pushing, and pulling are "occasionally" required. Climbing is "frequently" required. Under "additional comments" is the following:

> Approximately 85% of freight picked up or delivered is palletized. Drivers are considered pick up and delivery or 'pedal driver routes'. Twenty five percent of the routes are considered 'inside delivery required' which may involve lifting and or carrying. However, while delivering to inside delivery required destinations, the driver is not required to climb steps, enter basements or residences.
>
> *In general, lifting/carrying/pushing/pulling is at the driver's discretion.
>
> Hand trucks and hand operated pneumatic lift trucks are used occasionally to maneuver loads within the trailer. Trailer length for a pedal driver is 48'. Maximum occasional lift appeared to be 50 pounds, which may be lifted from floor to chest height. Force required to initially push a pneumatic hand truck loaded with 710 pounds of material loaded on a skid was 45#'s. Force required to sustain the movement of the hand truck declined to 35# after starting from a dead stop.
>
> Use of a two wheel hand dolly which itself weighed 40#'s required 30#'s of either push or pull force to move the dolly from a dead stop.

The May 9, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: "Injury" under the Act, work-relatedness/causation, notice, TTD benefits, KRS 342.730, and unpaid or contested medical benefits. Under "other contested issues: is the following: "The Defendant accepts the left [sic] meniscal tear and surgery, but contests and denies the left [sic] total knee replacement's work-relatedness."

In the June 29, 2018, Opinion, Award, and Order, the ALJ set forth, in relevant part, the following findings of fact and conclusions of law:

I. "Injury" under the Act & Work-related/causation

…

After reviewing the medical evidence, as well as the testimony, the ALJ finds Trammell met his burden. Trammell proved he sustained a work-related right knee injury that necessitated his right total knee replacement. The evidence's totality supports this finding. R&L Carriers is liable.

Dr. Bilkey's findings, opinions, and conclusions, are the most credible. The primary reason is Trammell's testimony, as well as even Dr. Shockey's opinion, support Dr. Bilkey. Dr. Bilkey opined the work accident caused a right knee contusion/strain, which aroused Trammell's pre-existing, dormant, asymptomatic, and non-disabling, degenerative joint disease, into an active, symptomatic, and disabling, state, necessitating the total knee replacement. The ALJ agrees.

Trammell's testimony supports Dr. Bilkey's opinion. Although Trammell sustained 1981 and 2003 right knee injuries, the evidence shows they fully resolved. Trammell testified he did not experience any ongoing right knee problems between 2004, when his knee surgeon released him, and February 25, 2015, the day before his injury. This period spanned approximately 13 years.

During this period, there is not any evidence Trammell: (1) experienced right knee problems; (2) received right knee medical treatment; (3) took any prescribed medications for his right knee; (4) had any difficulties performing his normal activities due to right knee problems; (5) did not perform his full-duty job, and (6) missed any work due to right knee problems. Instead, Trammell testified he did not experience any right knee problems. R&L did not rebut Trammell's credible testimony. The ALJ does not have any reasons to disregard it.

Trammell's testimony and actions, concerning these six points, bolsters Dr. Bilkey's opinion. The six factors support Dr. Bilkey's opinion that Trammell's accident aroused, aggravated, and accelerated, his pre-existing, dormant, asymptomatic, and non-disabling, degenerative

joint disease, and necessitated the total knee replacement. Dr. Bilkey did not just rely on Trammell's actions and statements. He also reviewed Trammell's medical history, and thoroughly examined him.

Other physicians also support Dr. Bilkey's opinion. Significantly, these physicians include Dr. Shockey, who is R&L's primary expert. Dr. Shockey, in addressing causation, stated, "…causation, in my opinion is partially related to the work-related event at a maximum of 20% apportionment for reasons previously documented." (emphasis added). He also stated, "[i]t is the opinion of this reviewer that total knee replacement was reasonable, necessary, to a degree related to his work-related event, and appropriate based on his overall clinical diagnosis." (emphasis added).

The statements illustrate that, even though Dr. Shockey opined Trammell's pre-existing degenerative changes primarily necessitated the surgery, the work accident played a role and contributed. As the ALJ previously discussed, the medical evidence shows the pre-existing degenerative changes were dormant, asymptomatic, and non-disabling, until the work accident. Dr. Shockey's statements support a causation finding.

Dr. Mehta, who treated Trammell's prior right knee injuries, as well as performed his recent total knee replacement, supported Dr. Bilkey's opinion. On April 22, 2015, Dr. Mehta recommended a total knee replacement. He stated, "I do understand that he has had knee problems in the past, but I feel like this fall has pushed him over the edge. His knee arthritis has flared up and become a disabling reality." In a May 19, 2015 letter, Dr. Mehta stated, "…it is my opinion that the injury to the knee has brought the patient's symptoms into a disabling reality." Dr. Mehta's statements support a causation finding.

Based on the evidence's totality, the ALJ finds Trammell sustained a compensable right knee injury that aroused, aggravated, and accelerated, his pre-existing, dormant, asymptomatic, and non-disabling, degenerative joint disease, into an active, symptomatic, and disabling, state. It further necessitated the total right knee replacement procedure.

…

IV. Benefits per KRS 342.730

…

A) Permanent impairment rating

Trammell's right knee injury produced a 20% permanent impairment rating. Drs. Bilkey and Shockey found Trammell's total right knee replacement procedure had a fair outcome. A fair outcome produces a 20% impairment rating. Although Dr. Shockey apportioned the rating, the ALJ does not find this credible. The ALJ previously discussed his rationale.

Again, the ALJ found Trammell had pre-existing, dormant, asymptomatic, and non-disabling, degenerative joint changes that did not require a total knee replacement immediately before the accident. The accident aroused, aggravated, and accelerated, the degenerative joint changes into a manifest active, symptomatic, and disabling, state, necessitating the total right knee replacement procedure. The whole 20% impairment rating is work-related.

B) Physical capacity

The ALJ finds Trammell does not retain the physical capacity to perform his pre-injury job. The ALJ relies on Trammell's testimony, as well as Dr. Bilkey's opinion. The ALJ finds Trammell credible. He knows his body, symptoms, physical abilities, and what his pre-entry job required. In fact, Trammell performed the job approximately 22 years.

Trammell testified he voluntarily retired, because he could no longer perform his job duties. Trammell returned to work, following his surgery, on February 1, 2016, and worked until around July 12, 2016. This is over six months. During this time, Trammell discovered the activities he could and could not perform. He tested his right knee. Trammell testified he could no longer perform the difficult deliveries, and the ones that did not have docks. Trammell realized he could no longer perform the heavier delivery loads, and retired.

> Specifically, Trammell testified he could not perform the lifting requirements. Moreover, climbing into and out of the trailers caused Trammell pain. As the ALJ previously noted, Trammell's job required repetitive bending, lifting, sitting, etc. The job description matches Trammell's testimony. It indicates Trammell occasionally had to lift and carry up to 50 pounds, and, on rare occasions, 100 pounds or more. The ALJ finds Trammell cannot perform these activities. These activities exceed the restrictions Dr. Bilkey recommended.
>
> Dr. Bilkey recommended Trammell not lift more than 10 pounds from the floor, push or pull over 100 pounds, and carry over 20 pounds. Trammell's pre-injury job required these activities. The ALJ notes Dr. Shockey even stated, "[r]estrictions currently necessary with regard to the work-related event do include, in my practice, restrictions of heavy lifting, pushing, or pulling in excess of 25 to 50 lb." These restrictions exceed Trammell's pre-injury duties. Based on the evidence's totality, the ALJ finds Trammell does not retain the physical capacity to perform his pre-injury job.
>
> C) Weekly amount and duration
>
> The PPD calculation is: **$580.21 x .20x 1.00 x 3.6 = $417.75**. The ALJ finds Trammell is entitled to $417.75 a week, for 425 weeks, commencing February 26, 2015. The payments are subject to KRS 342.730(4)'s pre-1996 version. This version tiered-down a claimant's benefits at certain ages. The PPD benefits are suspended during the TTD period.

Both parties filed petitions for reconsideration. In the July 24, 2018, Order, the ALJ granted Trammell's, denied R & L's, and set forth, in relevant part, the following additional findings:

> The Plaintiff and Defendant filing petitions for reconsideration, from the Administrative Law Judge's 6/29/18 Opinion, Award and Order, and the ALJ being in all ways sufficiently advised;
>
> It is hereby **ORDERED**: The ALJ, for the below reasons, is **Granting** the Plaintiff's petition, and **Denying** the Defendant's petition.

…

The Defendant first asserts the ALJ patently erred, because he did not realize, or at least consider, sleep apnea partially led to the Plaintiff's retirement. It asserts this omission and misunderstanding significantly affects the triple multiplier issue. Although the ALJ considered the Plaintiff's sleep apnea, when analyzing whether the Plaintiff retained the physical capacity to perform his pre-injury job, the ALJ acknowledges his decision is not clear. Therefore, the ALJ will make it crystal clear. The ALJ notes he realized and understood the Plaintiff's sleep apnea played a role in his retirement. In fact, in his decision, on pages 14-15, the ALJ wrote:

…

The ALJ finds the Plaintiff's health problems, which included sleep apnea and his right knee, were the reasons he voluntarily (not terminated or laid off) retired. The reason the Plaintiff retired is not an end-all, be-all. It is only one relevant evidence piece. Therefore, even if the sleep apnea constituted 50% of the reason the Plaintiff retired, it still would not have affected this issue's ultimate outcome. The knee was also a main reason.

The ALJ has considered the reasons the Plaintiff retired, but found, and still finds, the Plaintiff's testimony, as well as his restrictions/limitations, are this issue's most material evidence. The ALJ found the Plaintiff extremely credible. The ALJ also found Drs. Bilkey and Shockey credible.

The ALJ previously provided his rationale, and stands by it. For the Defendant's convenience, the ALJ will restate it. In his decision, on page 25-26 (paragraphs 2-4), the ALJ wrote:

> The ALJ finds Trammell does not retain the physical capacity to perform his pre-injury job. The ALJ relies on Trammell's testimony, as well as Dr. Bilkey's opinion. The ALJ finds Trammell credible. He knows his body, symptoms, physical abilities, and what his pre-injury job required. In fact, Trammell performed the job approximately 22 years.

> Trammell testified he voluntarily retired, because he could no longer perform his job duties. Trammell returned to work, following his surgery, on February 1, 2016, and worked until around July 12, 2016. This is over six months. During this time, Trammell discovered the activities he could and could not perform. He tested his right knee. Trammell testified he could no longer perform the difficult deliveries, and the ones that did not have docks. Trammell realized he could no longer perform the heavier delivery loads, and retired.
>
> Specifically, Trammell testified he could not perform the lifting requirements. Moreover, climbing into and out of the trailers caused Trammell pain. As the ALJ previously noted, Trammell's job required repetitive bending, lifting, sitting, etc. The job description matches Trammell's testimony. It indicates Trammell occasionally had to lift and carry up to 50 pounds, and, on rare occasions, 100 pounds or more. The ALJ finds Trammell cannot perform these activities. These activities exceed the restrictions Dr. Bilkey recommended.
>
> Dr. Bilkey recommended Trammell not lift more than 10 pounds from the floor, push or pull over 100 pounds, and carry over 20 pounds. Trammell's pre-injury job required these activities. The ALJ notes Dr. Shockey even stated, "[r]estrictions currently necessary with regard to the work-related event do include, in my practice, restrictions of heavy lifting, pushing, or pulling in excess of 25 to 50 lb." These restrictions exceed Trammell's pre-injury duties. Based on the evidence's totality, the ALJ finds Trammell does not retain the physical capacity to perform his pre-injury job.

The ALJ respectfully asserts he properly understood this issue's evidence, summarized the relevant evidence, cited

> the appropriate legal authority, made the necessary factual-findings, and applied said findings to the correct law.
>
> …

R & L first argues that compelling evidence establishes Trammell was suffering from a pre-existing active right knee condition at the time of the February 26, 2015, work incident. We affirm on this issue.

The employer bears the burden of proving the existence of a pre-existing, active disability. To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable prior to the occurrence of the work-related injury. *See* Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Since R & L was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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).

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). In that regard, an

ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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).

Here, the ALJ relied upon Dr. Bilkey's opinions set forth in the May 16, 2017, IME report and Trammell's testimony in determining Trammell was not suffering from a pre-existing active right knee condition at the time of the February 26, 2015, work incident. Dr. Bilkey opined Trammell "had a dormant condition that was not symptomatically active prior to the 2/26/15 work injury. That dormant condition was then brought into disabling reality by the 2/26/15 work injury." He apportioned no impairment rating to a pre-existing active condition.

Dr. Bilkey's opinions were bolstered by Trammell's testimony indicating he had no residual symptoms from his right knee injuries in 1980/1981 and 2003, and he was able to return to full-duty work at R & L after the 2003 injury. He testified he had no further treatment for or problems with his right knee after returning to work following the 2003 injury until the February 26, 2015, work injury.

The ALJ also relied upon the opinions of Dr. Mehta who opined the February 26, 2015, injury pushed Trammell's right knee problems "over the edge" and "into a disabling reality."

While there are medical opinions in the record supporting the existence of a pre-existing active condition, specifically the opinions of Dr. Steven Shockey as set forth in his August 18, 2017, IME report, mere evidence to the contrary is inadequate to require reversal on appeal. In order to reverse the decision of the ALJ, it must be shown there is no substantial evidence of probative value to support the decision. Here, Dr. Bilkey's opinions and Trammell's testimony constitute substantial evidence supporting the ALJ's determination Trammell suffered only from a pre-existing *dormant* right knee condition brought into disabling reality by the February 26, 2015, injury. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). As noted by the ALJ, even Dr. Shockey apportioned 4% of the 20% whole person impairment rating to the February 26, 2015, work injury. As substantial evidence supports the ALJ's determination Trammell did not suffer from a pre-existing active right knee condition at the time of the February 26, 2015, injury, we must affirm.

Next, R & L asserts the ALJ erred by applying the three multiplier since substantial evidence does not support a finding Trammell is unable to perform his job duties. In the alternative, R & L asserts Trammell, at most, would be entitled to income benefits enhanced by the two multiplier because he testified he returned to work following his knee replacement surgery at his customary hourly wage, albeit he worked fewer hours per week, and he had ceased working.

As an initial matter, we note R & L did not raise the issue of the applicability of the two multiplier in a timely manner in its brief to the ALJ or in its petition for reconsideration. Further, this Board has been unable to locate wage records from the time period Trammell returned to work in February 2016 following his right knee replacement surgery. R & L references Trammell's equivocal deposition testimony regarding the wages he earned when he returned to work following his knee replacement surgery as support for application of the two multiplier. However, in light of the fact wage records from this time period were not filed in the record, the ALJ is not required to rely upon Trammell's testimony regarding his wages.

More importantly, this argument was put forth for the first time in R & L's brief to this Board and not in its brief to the ALJ or, at a minimum, in its petition for reconsideration. Thus, this issue was not preserved for our review.

Regarding application of the three multiplier, KRS 342.730(1)(c)1 states, in relevant part, as follows:

> 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. . .; or

As the claimant in a workers' compensation proceeding, Trammell had the burden of proving each of the essential elements of his cause of action, including entitlement to the three multiplier. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Trammell was successful in his burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, supra. "Substantial evidence" is 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).

We find no error in the ALJ's enhancement of Trammell's income benefits by the three multiplier. In finding the three multiplier applicable, the ALJ relied upon the job description filed in the record by R & L and Dr. Bilkey's restrictions indicating Trammell can no longer perform the listed activities. As cited by the ALJ, Trammell's job description indicates he "occasionally" was required to lift and carry up to 50 pounds and "rarely" had to lift and carry 100 pounds or more. In his May 16, 2017, report, Dr. Bilkey opined Trammell would not be able to meet those requirements, as he is unable to lift over ten pounds from the floor or carry over 20 pounds. Dr. Bilkey opined the restrictions he imposed would preclude Trammell from being able to return to the full scope of the usual work duties he was able to perform before February 26, 2015.

Further bolstering the ALJ's application by the three multiplier is Trammell's deposition and hearing testimony demonstrating he is unable to perform his pre-injury job tasks. An ALJ may give weight to a claimant's own testimony regarding her retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The claimant's own testimony is competent evidence as to whether the claimant retains the physical capacity to return to the type of work performed at the time of injury. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). Trammell testified that, at the time he stopped working for R & L in July 2016, he was unable to continue performing his required duties. He testified in specific detail concerning a load he hauled containing five-gallon buckets of

chemicals that he was required to unload and carry into nursing homes and hotel laundries. He was unable to fulfill his job tasks. Trammell also testified he is unable to squat down with his right leg, and this is an "occasional" requirement of his job according to the filed job description. As substantial evidence supports the ALJ's award of the three multiplier, we affirm on this issue.

Accordingly, on all issues raised on appeal, the June 29, 2018, Opinion, Award, and Order and the July 24, 2018, Order are **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION: **METHOD**

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