Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 1, 2019

CLAIM NO. 201664679

SHAREEF MARTIN PETITIONER

VS. **APPEAL FROM HON. W. GREG HARVEY, ADMINISTRATIVE LAW JUDGE**

COMMUNITY TRANSITIONS
and HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART & REMANDING
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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Shareef Martin ("Martin") seeks review of the September 18, 2018, Opinion, Award, and Order of Hon. W. Greg Harvey, Administrative Law Judge ("ALJ"), finding he sustained a work-related back injury while in the employ of Community Transitions ("Community") and awarding temporary total disability benefits, permanent partial benefits enhanced by the three multiplier contained in KRS 342.730(1)(c)1, and medical benefits. The ALJ declined to award vocational

rehabilitation benefits pursuant to KRS 342.710(3). Martin also appeals from the October 8, 2018, Order denying his petition for reconsideration.

On appeal, Martin argues the ALJ erred by failing to award rehabilitation benefits since the statute compels an award of such benefits in his case. Martin notes the ALJ specifically found he was unable to perform the work he was performing as a direct support person when injured. Martin maintains the work he performed when injured is the same work performed by a certified nursing assistant ("CNA") for which he had previous training and experience. Therefore, pursuant to Wilson v. SKW Alloys, Inc., 893 S.W.2d 800 (Ky. App. 1995), there is no reasonable basis to deny rehabilitation benefits. Martin asserts he does not have any training or experience in any other job setting. Even though he has a high school diploma and has amassed some college credit, Martin contends his education cannot be used as grounds to deny retraining benefits. Martin notes his average weekly wage ("AWW") was based on an in-patient setting which required 24-hour work for a set period of days each week. Martin observes he only earned $9.25 an hour.[1] Further, the jobs described by the ALJ in determining Martin was not entitled to vocational rehabilitation benefits would not pay him an amount close to his AWW since he worked substantial overtime each week. Since Martin was only trained to perform the work as a CNA, has no other experience performing any other type of skilled labor, and the jobs identified by the ALJ which he could perform post-injury would not pay him an amount approximating his AWW, he asserts there is no reason to deny vocational rehabilitation benefits. We

[1] The records pertaining to Martin's average weekly wage introduced by Community reflect he only earned $9.00 an hour.

vacate that portion of the opinion denying vocational rehabilitation benefits and remand for additional findings.

BACKGROUND

The Form 101 indicates Martin was injured while in the employ of Community on October 14, 2016, when he was "assaulted and wrestled to the ground by a mental patient, causing injury to his lumbar spine." There was no dispute the lumbar injury necessitated multiple surgeries. At the time of the injury, Martin was 35 years old.

Martin was deposed on April 20, 2018, and testified at the July 25, 2018, hearing. Martin has an 8th grade education and obtained a GED in 1998 or 1999. At the age of 23, Martin moved to Kentucky where he obtained his CNA degree through the Job Corps in Morganfield, Kentucky. He returned to Philadelphia in 2009 where he worked as a CNA at four different nursing homes. After working in Philadelphia for approximately a year, he returned to Kentucky where he did not work for a few years. Martin learned he was an insulin-dependent diabetic and was trying to manage his diabetes. He "kept getting sick and [he] became somewhat of a stay at home father to [his] 8 year old." During that time, he also attended classes at Hopkinsville Community College.

His first job after returning to Kentucky was with CAKY[2] working with mentally and physically handicapped individuals as a direct support person for approximately four to five months. In this capacity, he helped the clients with activities

[2] The record does not reflect the actual name of CAKY. The Form 104 lists the entity as Khaki located at 625 Tech Dr., Winchester, KY 40391.

of daily living in a house where the patients resided. He cleaned, bathed, and dressed the patients. He also transferred them from a wheelchair to the bed and prepared meals and administered medication. Sometimes he transported patients to events and appointments.

Martin began working for Community at a job similar to his work at CAKY helping clients with their activities of daily living. He cooked, cleaned, bathed, and transported the clients. His job with Community was full-time. He believed that, by the end of his employment, he was earning $9.25 an hour. His employment with Community in that capacity began sometime in 2014 and lasted until shortly after his injury in October 2016. Martin testified he went to work on Friday and left on Monday. During that time, he lived on site and worked approximately 64 hours. He returned to work days after the injury, but only worked a few hours because he was unable to perform his duties.

As a result of his injury, Martin ultimately came under the care of Dr. Travis Hunt who performed two surgeries. Martin was given the option of a third surgery by Dr. Hunt which he declined. Martin rates his current back pain at 8 or 9 on a scale of 1 to 10. He has leg pain if he walks or stands too long. He has applied for jobs at Amazon working in a call center and at Clark Regional Medical Center working at the front desk. Martin believes he is unable to return to his pre-injury jobs. He explained his pre-injury job did not allow him to work seated, and he was required to lift as much as 220 pounds. He explained assaults by patients are likely to occur.

At the hearing, Martin confirmed he worked for Community for approximately 2 ½ to 3 years as a direct support person. He indicated his prior jobs

entailed a lot of standing, bending, lifting, fixing meals, cleaning the residence, administering prescription medication, and sometimes bathing the clients. He earned between $30,000.00 to $40,000.00 at his job with Community.

After his injury, Martin assumed a new job with Community earning "a flat rate of $20,000.00 a year." His new job was a "sit down job" doing "a lot of paperwork, computer work, and stuff of that, nature." He was discharged because he plead guilty to a disorderly conduct charge. At the time of the hearing, he was scheduled to see a pain specialist.

Community submitted the April 23, 2018, report and a May 14, 2018, addendum prepared by Dr. Thomas E. Menke who assessed a 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Menke concluded both surgeries were related to Martin's work injury. He assigned permanent lifting restrictions of no more than 20 pounds occasionally and 10 pounds frequently. He stated Martin needed to be able to sit when needed; thus, he needed a job allowing him to be seated most of the time. Dr. Menke believed Martin had lost the capacity to perform the work he was performing at the time of his injury.

Martin introduced the May 11, 2018, deposition of Dr. Hunt who diagnosed spinal stenosis due to a disc herniation at L4-5 and L5-S1. As a result, a left-sided decompression, laminotomy at L4-5 and L5-S1 was performed in April or May of 2017. A second surgery was performed on September 9, 2017, consisting of a wider decompression. Dr. Hunt assessed a maximum lifting restriction of 10 pounds. He allowed Martin to occasionally carry such items as dockets, ledgers, and small tools.

Martin should only perform sedentary jobs. Walking or standing on the job should be on an occasional basis. Dr. Hunt assessed a 15% impairment rating pursuant to the AMA Guides.

Community introduced the May 15, 2018, Vocational Rehabilitation Assessment of Dana Ward ("Ward"), a vocational rehabilitation counselor. Based upon the opinions of Drs. Hunt and Menke, Ward concluded Martin did not have the physical capacity to return to work at his same job. She noted both doctors indicated he needed a sedentary job which is primarily a sit down job. Ward believed Martin is qualified to work as a receptionist and noted there were several available positions locally. Martin would become more employable after he completes the computer course he was taking and would also qualify for customer service positions which are increasing in number locally. Ward believed Martin could earn the same or more in a receptionist or customer service position where he would earn between $10.00 and $14.00 an hour.

The AWW records submitted by Community reflect that, in the first quarter nearest in time to the work injury, Martin worked overtime no less than 22 hours overtime each week. During two weeks, he worked overtime in excess of 60 hours. In the second quarter, Martin worked no less than 24 hours overtime each week. During two weeks, he worked 41 hours of overtime. The documents reflect Martin's hourly rate for the last three quarters was $9.00 an hour.

Relying upon Dr. Menke's opinions, the ALJ found Martin's injury resulted in a 10% impairment rating. Relying upon the opinions of Ward and Drs. Menke and Hunt, the ALJ concluded Martin could not return to the work he

performed as a direct support person. The ALJ also noted Martin's testimony supported a finding he could no longer physically restrain patients if the need arose. Thus, the income benefits were increased by the three multiplier. The ALJ concluded Martin was not entitled to vocational rehabilitation benefits, reasoning as follows:

> Plaintiff seeks an award of vocational rehabilitation benefits pursuant to KRS 342.710(3). That statute allows for an award of rehabilitation training where a worker, as a result of the work injury, is unable to perform work for which he has prior training or experience. The statute allows such retraining as is reasonably necessary to restore the injured worker to suitable employment. Defendant argues KRS 342.710(3) takes an expansive view of what work the Plaintiff has performed throughout his adult life and not the narrow analysis contemplated by KRS 342.730(1)(c)1 focused on the work performed at the date of injury.
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> The term "suitable employment" refers to work that has a reasonable relationship to the injured worker's experience and background. In considering whether such a return can occur without retraining, the Courts have instructed the worker's education, age, income level and earning capacity, vocational aptitude, mental and physical abilities and work performed as of the date of injury must all be considered. Martin is 37 years of age with a high school diploma and some college courses. He has training as a CNA and has most recently worked as a direct support person in assisting individuals with physical and mental challenges. As a result of his injury to his back, he can no longer do work that requires him to physically restrain or lift patients.
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> Plaintiff is not currently working. He has applied for positions with an Amazon call center and with Clark Regional Health at the front desk. His pre-injury work was paying him $9.25 per hour. Although he has lifting restrictions he certainly has the physical ability to do work that would pay him in that range. Dana Ward, vocational evaluator, opined Martin could earn the same type of hourly wage doing customer service or receptionist work. Martin has both the physical and vocational aptitude to perform those tasks. The undersigned finds Plaintiff has

> failed to demonstrate entitlement to vocational rehabilitation benefits pursuant to KRS 342.710(3).

Martin filed a petition for reconsideration putting forth the same arguments he makes on appeal. By order dated October 8, 2018, the ALJ overruled the petition for reconsideration, indicating he had weighed the evidence and evaluated Martin's entitlement to vocational rehabilitation pursuant to KRS 342.710, Wilson, supra, and the holding in Haddock v. Hopkinsville Coating Corporation, 62 S.W.3d 387 (Ky. 2001) and determined "Martin has the education and physical capacity to return to suitable employment."

ANALYSIS

Because the ALJ's analysis is insufficient and does not comport with the applicable case law, we vacate the ALJ's determination Martin is not entitled to vocational rehabilitation benefits and remand for additional findings.

KRS 342.710(3) reads in relevant part as follows:

> An employee who has suffered an injury covered by this chapter shall be entitled to prompt medical rehabilitation services for whatever period of time is necessary to accomplish physical rehabilitation goals which are feasible, practical, and justifiable. 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 fundamental purpose of vocational rehabilitation is the restoration of an injured worker to gainful and suitable employment. KRS 342.710(1)(3) and Wilson, supra. "Suitable employment" has been interpreted to mean work that bears:

> [A] reasonable relationship to the employee'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 injury and after reaching his post-injury maximum level of medical improvement.

Wilson, supra at 803.

The determination of whether a claimant has returned to suitable employment is a factual determination solely within the authority of the ALJ as fact-finder.

Although KRS 342.710 specifically provides that a person who is unable to perform work for which he has previous training or experience is entitled to vocational rehabilitation services, that provision cannot be viewed in isolation. Importantly, one of the stated statutory goals is to return the injured worker to "suitable, gainful employment." In Haddock, supra, the Kentucky Supreme Court wrote, "Restoring a worker to 'suitable employment' means attempting to achieve a reasonable relationship between the worker's pre- and post-injury earning capacity…"

The claimant's capacity to labor as a result of the work injury is the standard under both KRS 342.710 and KRS 342.730(1)(c)1. However, the standard for an award of vocational rehabilitation benefits under KRS 342.710 does differ from the standard for entitlement to the three multiplier. For instance, under KRS 342.710, past training and work experience are considered as well as the actual job performed at the time of injury.

Here, the ALJ did not address Martin's prior training, education and job experience. Rather, he stated Martin has training as a CNA and recently worked as a direct support person. Specifically, the ALJ did not address Martin's work history as

set forth in his Form 104 and as reflected in his testimony, revealing his past employment consisted of working as a CNA in Pennsylvania and in Kentucky as a direct support professional. The evidence firmly demonstrates the tasks associated with both jobs are almost identical. Even though Martin is 37 years old, he has no other work history other than engaging in the type of work he was performing for Community when injured.

What gives us pause is that, in denying Martin the opportunity for rehabilitation, the ALJ did not reference the stringent restrictions placed on Martin by Dr. Hunt. Notably, Dr. Menke and Ward agreed Martin did not have the ability to engage in the work he was performing at the time of the injury, which his work history and testimony reveal is the only work he has ever performed. The ability to return to work at a similar wage as a receptionist or customer service representative should not, *per se*, preclude him from entitlement to vocational rehabilitation benefits. Rather, Martin's post-injury work capacity, based upon his physical restrictions, must be given significant weight.

The ALJ failed to address the fact that, even though Martin may be capable of earning a greater hourly rate, he was incapable of working the hours he worked for Community in order to earn additional wages. Martin's unrebutted testimony demonstrates he earned between $30,000.00 to $40,000.00 primarily because he was able to work an extended amount of weekly overtime. This is substantiated by Community's wage records. Ward indicated Martin is limited to working as a receptionist or a customer service job earning between $10.00 and $14.00 an hour, presumably working 40 hours a week. Those jobs do not allow Martin to earn

what he earned as a direct support professional or CNA, the only jobs for which he has training and experience.

In Wilson, supra, the Court of Appeals noted:

> 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. We take judicial notice of the fact that high-paying unskilled jobs are diminishing rapidly, and that every year brings a greater requirement that workers be skilled in order to qualify for the higher-paying jobs. To deny a permanently disabled unskilled worker rehabilitation services is unfair and would only increase the possibility that he would never obtain the skills necessary to restore him to earnings comparable to his pre-injury earnings.

Id. at 802.

Ward's analysis did not take into consideration the fact Martin would be unable to earn wages comparable to the wages he earned at Community, even though his hourly rate may increase to between $10.00 to $14.00 an hour. There was no analysis addressing the amount of available weekly overtime in those positions.

We also find the ALJ's reliance upon Haddock, supra, to be misplaced. In Haddock, supra, the ALJ determined an occupational disease which entitled him to medical benefits did not entitle him to income benefits, because he missed no work due to his condition and he had neither a permanent impairment nor a disability. The ALJ noted Haddock retained the physical capacity to perform all of his past work if he was not exposed to the offending chemicals. Therefore, Haddock was not entitled to vocational rehabilitation benefits. In Haddock, supra, the Supreme Court

recognized: "… a factual finding concerning whether a worker is unable to perform work for which he has previous training or experience is mandatory whenever a worker seeks to obtain rehabilitation benefits." Id. at 391. In the case *sub judice*, there is no question Martin does not retain the capacity to perform the work for which he has previous training or experience, which is as a CNA or direct support person. Thus, Martin has met the standard enunciated in Haddock, supra.

Lending support for our decision is the Supreme Court's holding in Dairy Queen of Frankfort, Inc. v. Surritt, 2009-SC-000303-WC, rendered June 17, 2010, Designated Not To Be Published. Surritt, a minor, was severely injured while performing a part-time job. A divided Board affirmed the ALJ's determination she was not entitled to vocational rehabilitation. However, the Court of Appeals and Supreme Court reversed this Board, directing Surritt was entitled to vocational rehabilitation. In so concluding, the Supreme Court stated as follows:

> KRS 342.710(3) provides benefits for both medical and vocational rehabilitation. The statute entitles every employee who suffers work-related injury "to medical rehabilitation services for whatever period of time is necessary to accomplish physical rehabilitation goals which are feasible, practical, and justifiable." It bases the entitlement to additional benefits for vocational rehabilitation on the worker's ability to perform work for which the individual "has previous training or experience." [footnote omitted] In the case of a worker with no specialized or vocational training who is injured while performing the individual's first job, "previous training or experience" refers to the training or experience received by performing the work that produced the injury.
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> The evidence in the present case compels a finding that the claimant's work-related injury rendered her "unable to perform work for which [she] has previous training or experience." This entitles her under KRS 342.710(3) to receive such "vocational rehabilitation services, including

> retraining and job placement, as may be reasonably necessary to restore [her] to suitable employment."
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> KRS 342.710(1) indicates that a primary purpose of Chapter 342 is to restore injured workers to gainful employment and expresses a preference for returning such workers to work with the same employer or to the same or similar work. *Wilson* concerned whether a 27-year-old worker who had advanced to a well-paying but unskilled job when injured was entitled to vocational retraining. The court determined in *Wilson* that the term "suitable employment" means work that restores the injured worker to earnings comparable to the individual's pre-injury earnings. [footnote omitted]
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> Unlike the claimant, Wilson was an adult. KRS 342.140 measures a minor's pre-injury earning capacity differently from that of an adult. We conclude, therefore, that "suitable employment" refers to a minor's future earning capacity as it existed immediately before the injury. Thus, KRS 342.710(3) entitles a minor who is unable to perform work for which the individual has previous training or experience to vocational rehabilitation services to the extent that they are reasonably necessary to restore the minor's future earning capacity. This claim must be remanded for further consideration because the ALJ misconstrued KRS 342.710(3) and failed to consider the relevant evidence.

Slip Op. at 5.

Based on the above language, we conclude Martin may well be entitled to vocational rehabilitation benefits, as his previous training and experience comprises work as a CNA or direct support person. The evidence establishes the only jobs Martin has performed are the type of job the ALJ determined he was no longer capable of performing. The ALJ must consider that fact in determining whether Martin is entitled to rehabilitation benefits. The ALJ also failed to consider Martin's physical capacity to work substantial overtime post-injury in determining whether he is capable of obtaining suitable employment; "work that restores the injured worker to earnings

comparable to the individual's pre-injury earnings." Id. As characterized by Ward, Martin is strictly limited to sedentary work.

Because the Board is without fact-finding authority, this matter must be remanded to the ALJ to consider whether Martin retains the physical capacity to perform work he has performed in the past or for which he has previous training. KRS 342.710(3). We note KRS 342.710(3) permits the ALJ, upon his or her own motion or by either party after affording the parties an opportunity to be heard, "to refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation." At a minimum, the ALJ should have considered whether a vocational evaluation was appropriate before denying vocational rehabilitation benefits.

Accordingly, that portion of the September 18, 2018, Opinion, Award, and Order denying Martin vocational rehabilitation benefits and the October 8, 2018, Order reaffirming that decision are **VACATED**. This claim is **REMANDED** to the ALJ for further consideration of Martin's entitlement to vocational rehabilitation benefits in accordance with the views expressed herein.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON LARRY D ASHLOCK LMS
236 W DIXIE AVE
ELIZABETHTOWN KY 42701

COUNSEL FOR RESPONDENT:

HON SHERRI KELLER LMS
300 E MAIN ST STE 400
LEXINGTON KY 40507

ADMINISTRATIVE LAW JUDGE:

HON W GREG HARVEY LMS
657 CHAMBERLIN AVE
FRANKFORT KY 40601