

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."
PURSUANT TO THE RULES OF CIVIL PROCEDURE
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000763-WC

VILLAGE OF LEBANON, LLC

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-000608-WC
WORKERS' COMPENSATION NO. 10-94564

SONDRA THOMPSON;
HONORABLE EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Village of Lebanon, LLC, appeals from a judgment which granted former employee, Sondra Thompson, vocational rehabilitation benefits pursuant to KRS 342.710. Village of Lebanon argues that the Administrative Law Judge ("ALJ") applied the wrong standard to find that Thompson is unable to attain "suitable employment" as a result of her work-related injury. For the reasons set forth below, we reverse the Court of Appeals and remand this matter back to the ALJ for further proceedings.

On March 3, 2010, Thompson fell and sustained a knee injury while employed as a charge nurse for Village of Lebanon. Her duties as charge nurse involved supervising the care given to residents by other employees and

assisting patients with tasks such as walking, standing, and sitting. Her job required her to kneel, stoop, bend, lift, carry, turn, and transfer patients. At the time of her injury, Thompson was a forty-seven-year-old woman who had fifteen years experience in the nursing field. Thompson also had an associate's degree in nursing. Thompson filed the present claim on September 1, 2010.

After her injury, Thompson returned to her job at Village of Lebanon, but with instructions from her treating physician not to bend, stoop, climb stairs, or assist patients with walking. She effectively resumed her supervisory position, but was unable to perform many of the physical activities she did before. Because of her physical restrictions, Thompson believed that her co-workers resented her for not doing her share of the work, and she voluntarily resigned in December 2010.

In April 2011, Thompson began working as a home health care nurse. In her new job, Thompson earns approximately \$900 per week, as opposed to the average weekly salary of \$942.35 she earned at Village of Lebanon. However, Thompson now works fewer hours, approximately twenty-four per week, instead of the forty per week she worked at Village of Lebanon. Her job as a home health care nurse involves making home visits, instructing patients on proper care and providing basic medical services. Her physical restrictions do not impede her ability to work as a home health care nurse.

The ALJ reviewed Thompson's claim and found that she was entitled to workers' compensation benefits for her knee injury. He also ordered that pursuant to KRS 342.710 Thompson "shall be referred for a vocational

rehabilitation evaluation, and shall be entitled to the benefits enumerated therein.” KRS 342.710(3) provides in pertinent part:

. . . 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 ALJ believed that Thompson satisfied the requirements for vocational rehabilitation because her new job paid less per week and required travel unlike her job at Village of Lebanon. The ALJ also focused on Thompson’s desire to obtain a bachelor’s degree or a master’s degree so she could obtain a better job in the nursing field. Village of Lebanon appealed, but both the Workers’ Compensation Board and Court of Appeals affirmed.

Village of Lebanon now appeals to this Court arguing that the ALJ used the incorrect standard to determine that Thompson cannot obtain “suitable employment” as a result of her injury. It contends that Thompson’s job as a home health care nurse is suitable employment based on her skills and education. Village of Lebanon also points out that Thompson is only receiving approximately \$40 less per week with her new job, yet is working far fewer hours, and thus she is making a greater hourly wage than before.

In reviewing Village of Lebanon’s arguments, deference will be given to the ALJ’s decision as long as he has not “misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992). Additionally, the ALJ’s decision will be reviewed to determine if his

findings were reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ has discretion to determine whether to award vocational rehabilitation benefits. *Commonwealth, Transportation Cabinet v. Guffey*, 42 S.W.3d 618, 621 (Ky. 2001). A review of the facts in this matter leads to the conclusion that the ALJ abused his discretion in granting Thompson vocational rehabilitation benefits.

Workers' compensation aims to return an injured employee to a condition where she can support herself by her own labors. Accordingly, KRS 342.710 gives injured workers the opportunity to receive vocational training if their injury prevents them from being able to find "suitable employment."

Suitable employment is defined 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.

Wilson v. SKW Alloys, Inc., 893 S.W.2d 800, 802 (Ky. App. 1995). Suitable employment also requires that the injured worker receive earnings "comparable to his pre-injury earnings." *Id*; see also *Haddock v. Hopkinsville Coating Corp.*, 62 S.W.3d 387, 391 (Ky. 2001)(holding that suitable employment means there is a reasonable relationship between the worker's pre- and post-injury earning capacity). Due to the definition of what constitutes suitable employment, a factual finding that an employee "is unable to perform work for which he has previous training or experience" is mandatory to a determination that a

claimant qualifies for vocational rehabilitation benefits. *Edwards v. Bluegrass Containers Div. of Dura Containers, Inc.*, 594 S.W.2d 900, 902 (Ky. App. 1980).

While it is clear that Thompson's injuries did impact her ability to perform the physical aspects of her job with Village of Lebanon,¹ those injuries did not prevent her from being able to return to employment there after her accident. Thompson voluntarily quit that job because she believed her co-workers resented her. While Thompson did not have to endure what she perceived to be a hostile work environment, the fact that she was able to perform her job at Village of Lebanon to the satisfaction of her employer post-accident indicates that she can obtain comparable and suitable employment with a different employer.

More importantly, Thompson's current job as a home health care nurse bears a reasonable relationship to her experience and background. The skills she has obtained through her education and experience are necessary to be a traveling nurse. We note that Thompson is only earning \$40 less per week in her new position than she did at Village of Lebanon, while working far fewer hours indicating there is a reasonable relationship between her pre-injury and post-injury earning capacity. *Haddock*, 62 S.W.3d at 391; *Wilson*, 893 S.W.2d at 802. We also note that there is no indication that her home health care nurse job is temporary or offers less job security than her position at Village of Lebanon, based on Thompson's own testimony that she could perform this type

¹ The ALJ awarded Thompson the triple multiplier provided in KRS 342.730(1)(c) because she could not perform the same job tasks post-injury as she could pre-injury.

of work indefinitely. Thompson's current job as a home health care nurse is suitable employment.

For the above reasons, we find that the ALJ abused his discretion by awarding Thompson vocational rehabilitation benefits. We therefore, reverse the decision of the Court of Appeals and remand this matter back to the ALJ for entry of an order consistent with this opinion.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ. sitting. All concur. Keller, J., not sitting.

COUNSEL FOR APPELLANT,
VILLAGE OF LEBANON, LLC:

Johanna Frantz Ellison

COUNSEL FOR APPELLEE,
SONDRA THOMPSON:

Jackson W. Watts