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In the Matter of the Vocational Assistance Dispute of

**Garcia, Sigifredo, Claimant**

Contested Case No: H02-063

**AMMENDED PROPOSED & FINAL ORDER**

December 26, 2002

SIGIFREDO GARCIA, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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Administrative Law Judge Paul Vincent conducted a telephone hearing in this matter on August 28, 2002. Petitioner Sigifredo Garcia (claimant) appeared on his own behalf. Respondent SAIF Corporation (insurer) appeared through attorney Philip Garrow. The Workers' Compensation Division (WCD) waived appearance. The petitioner appeals an administrative order by the Workers' Compensation Division, Rehabilitation Review Unit (the director or RRU) finding claimant ineligible for vocational assistance. Testimony was taken from Sigifredo Garcia, Mathew Davis, Steve Raugh, Gilbert DeLosRios, John Robinson. On December 17, 2002, an order issued in this matter. On December 23, 2002, claimant's attorney filed an exception requesting that the order be amended to include the awarded attorney fee in the Order. This Amended Order corrects that omission.

The record was left open for four weeks for the receipt of documentary evidence.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

**ISSUE**

The issue is whether claimant is ineligible for vocational assistance under ORS chapter 656 and OAR chapter 436, in that the limitations caused by claimant's bilateral synovitis condition do not prevent him from returning to regular work as a marker.

**EVIDENTIARY RULINGS**

WCD Exhibits 1-29 were admitted into the record without objection. Petitioner's Supplemental Exhibit 18a was admitted into the record without objection. Respondent's Supplemental Exhibit 30 was admitted into the record without objection.

**FINDINGS OF FACT**

I adopt the findings of the Administrative Order issued by RRU in this matter on May 14, 2002. (Ex. 20). I make the following additional findings of fact:

On November 28, 2001, insurer issued a Notice of Closure determining that the claimant was entitled to temporary total disability (TTD) for the period from April 24, 2001 through August 1, 2001 and permanent partial disability (PPED) of 8.00 percent for the left wrist/forearm and 11.00 percent for the right wrist/forearm. The accepted condition was bilateral wrist synovitis. (Ex. 19). The worker disputed the period of total disability, and on January 8, 2002, an Order on Reconsideration awarded claimant temporary total disability for the period from April 24, 2001 through November 5, 2001 and permanent partial disability as per the Notice of Closure. (Ex. 21).

Claimant is a native Spanish speaker who speaks some English. Claimant's injury occurred in August 2000. At time of injury he was performing the job of "marker" at the plant in Madras. He continued to do this job until March 2001. While performing the job, however, claimant informed his immediate supervisor that he couldn't continue to do the job because it was causing pain in his hands. The marker job he was doing in March did require him to reach over his shoulder. Sometimes the wood would get stuck in the "elevator" and he would have to stick his arms up to free the wood. Since working at Brightwood Corporation claimant has worked at two other jobs. At the time of hearing, he was working at Oregon Woodworking, where he has worked for approximately 2 ½ months. Has also worked at a company called Posey Windows for about 2 months (March to May 2002) but for only 2-3 days a week. At Posey his job was to put cardboard in a corner of a window using a staple gun. He was continuously dropping the piecework at Posey because of pain in his hands. (Testimony of Sigifredo Garcia).

Mathew Davis is a production manager for Posey Windows who has supervised claimant. Davis supervised approximately 30 people per shift. The claimant worked as a "capper" who applied cardboard protective materials on the corner of each window. The claimant processed approximately 80-100 windows per day in an 8-hour shift. Claimant was continuously using his hands and arms during this operation. He never complained of wrist problems to Davis, nor did Davis see claimant display any symptoms. He also didn't see him drop staple gun any more than anybody else. When claimant left Posey Windows he told Davis the reason for quitting the job was that he wasn't getting enough hours. (Testimony of Mathew Davis).

Steven Raugh is employed as a vocational rehabilitation counselor and performed the vocational evaluation in this case for SAIF corporation. He found that claimant didn't possess a substantial handicap to employment because he believed claimant was capable of performing the job at injury and voluntarily left the job. (Testimony of Steve Raugh).

Gilbert DeLosRios is a product manger for Bright Wood Corporation and was employed as such at their Bend plant in March 2001. During that time period he was approached by Garcia regarding the possibility of a transfer to the Bend facility. DeLosRios remembers that the reason claimant gave for the job request was because he was now living in Bend and wanted to work closer to his home. He remembers that claimant asked about jobs for both himself, his son and his wife. He remembers that claimant requested the position of cutter in the Bend plant. DeLosRios is familiar with both the cutter and marker positions. Of the two jobs, cutter is the more repetitive position. He does not remember claimant ever mentioning the problem with his hands. (Testimony of Gilbert DeLosRios).

John Robinson is a Safety Coordinator at Bright Wood. He produced the job description for marker job at Bright Wood. (Ex. 29). The job does require repetitive use of the arms, wrists, hands and grasping. He is familiar with job from having observed it himself. In his observation of the job, a worker performing this job would seldom have to flip the boards being marked. He believed that only “one in a hundred” boards need to be flipped. The number of boards marked per hour depends on the worker. A “top” marker would mark in the neighborhood of 8,000 boards per week. He believes Sigfriedo did approximately 6000 per week, which was an adequate amount. (Testimony of John Robinson).

The marker job requires a worker to handle a board which comes down to the work station on a slide onto rollers over a mirror. As the board comes out, the board is pulled over the rollers to a marking station equipped with mirrors. Once the board is at the station, the worker identifies and marks defects on the board as it continues through the station. Sometimes the worker is required to flip the boards for marking, although not every board needs to be flipped. Boards are marked with a florescent crayon with the right hand holding the crayon, and the left hand guiding the board over the marking station. The boards are of varying length from 8 – 15 feet, and are approximately 6 inches wide. After the board passes the marker station, the worker uses the right hand to guides it to drop in position on a chain. On an average day, he would have to flip boards 60 times more or less. He would have to flip boards because they were crooked or bowed. When the wood has a lot of marks on one side, it has to be flipped also. The claimant marked approximately 7500 boards per week on average. (Testimony of Sigifredo Garcia, Gilbert DeLosRios, John Robinson). He quit the job because he couldn't do it any more because his hands hurt. (Testimony of Sigifredo Garcia).

### **FINDINGS OF ULTIMATE FACT**

The claimant is eligible for vocational assistance under ORS chapter 656 and OAR chapter 436. Limitations caused by claimant's bilateral synovitis condition prevent him from returning to his regular work as a marker.

### **OPINION AND CONCLUSIONS OF LAW**

#### Standard of Review

I may modify the director's order only if it: violates a statute or rule; exceeds the statutory authority of the agency; was made upon unlawful procedure; or was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). In determining whether one of those criteria exists, I may admit evidence, which was not before RRU, and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); see also *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proof rests on the proponent of that fact or position. ORS 183.450(2).

This case involves claimant's appeal of an eligibility evaluation which concluded that claimant was ineligible for vocational assistance because claimant was able to return to other

suitable work that was made available to him and voluntarily terminated by claimant<sup>1</sup>. The vocational consultant (and later RRU), determined that the claimant's job limitations were not imposed by the accepted injury. Claimant contends that the evaluation's determinations were in error because he was incapable of performing the job due to limitations caused by the accepted injury. See *Steven H. James*, 4 WCSR 305 (1999)(Worker not returned to regular employment where job was beyond his physical limitations).

RRU summarized its view of the dispute before me in its Director's Review and Order as follows:

"No one denies that Mr. Garcia experiences pain in his wrists. The question before me is whether Mr. Garcia's pain symptoms result from the accepted bilateral synovitis condition, or from other, as yet unidentified factors."

Claimant asserts that RRU's order erred by relying on contradictory medical evidence to find that that he was able to return to "regular employment." Having reviewed the evidence submitted to RRU and the additional evidence and testimony presented at hearing, I agree with claimant that the evidence does not support the director's finding that claimant is able to return to "regular employment." Having found RRU's determination in error on these grounds, I do not address the issue of whether RRU is bound by the "law of the case" in this matter<sup>2</sup>.

RRU relies primarily on Dr. Laycoe's IME examinations to find that the claimant's pain did not result from the accepted bilateral synovitis condition, but from other, unidentified factors. The difficulty with RRU's reliance on Dr. Laycoe is that Dr. Laycoe has never found claimant to have *any* work related medical conditions, even during the time period in which insurer has accepted that claimant was temporarily totally disabled. I find Dr. Laycoe's reports unpersuasive. During Dr. Laycoe's first examination on November 15, 2000, his "diagnosis" consisted wholly of symptom identification, without any attribution of injury. Upon examination, he found "no synovitis" present in claimant's wrists. (Ex. 3 at 4). He did, however, plainly acknowledge that claimant's symptoms were associated with work activity through history:

"The complaint of wrist pain is, by history, associated with this work activity. I cannot make a more specific causation with regard to off-work activity, however, it is important to realize that I cannot make a more specific diagnosis than his complaint of wrist pain." (Ex. 4 at 6).

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<sup>1</sup> Pursuant to OAR 436-120-0320(9)(c)(B), a worker entitled to an eligibility evaluation is entitled to vocational assistance if, among other things, the worker "(B) Is not able to return to any other suitable and available work with the employer at injury or aggravation."

<sup>2</sup> The director has previously found that RRU is not bound under the "law of the case" doctrine by the determinations of ARU. See, e.g., *Mark B. Hardman*, 7 WCSR 22 (2002); *Kurt Vandervort*, 7 WCSR 148 (2002). However, neither of the cited cases is directly on point in that they did not involve the reliance by RRU on doctor's reports that conclude that claimant was not suffering from any disabling injury whatsoever at a time when ARU had previously concluded that claimant was suffering from a temporary and totally disabling injury based on the same reports.

On January 8, 2001, Dr. Lieuallen provided written clarification to insurer that he concurred with Dr. Laycoe's "diagnosis" of "right and left wrist pain" which was not attributable to a specific diagnosable condition, such as tendonitis. He also noted that he believed claimant's pain to be valid and the result of repetitive activities due to claimant's employment at Brightwood Corporation. Then, on February 22, 2001, Dr. Laycoe clarified that he should be understood to have had found no "objective findings of injury or disease to Mr. Garcia's wrists." (Ex. 5). On March 5, 2001, however, Dr. Lieuallen clarified that while he had agreed with Dr. Laycoe's diagnosis of right and left wrist pain, he found objective findings of injury or disease in claimant's presentation of "tenderness." (Ex. 6). RRU's order, apparently relying on this March 5, 2001 letter, reached the following conclusion:

"Dr. Lieuallen initially agreed with Dr. Laycoe that there was "no specific diagnosable condition, such as tendonitis;" however, three months later, Dr. Lieuallen noted "objective findings" of tendonitis, without explanation. Tendonitis is not an accepted condition. I therefore conclude Dr. Lieuallen's opinions do not support the theory that Mr. Garcia's injury-related medical limitations prevent him from returning to regular employment." (Ex. 27 at 5).

This conclusion is simply not supported by the record, which I read to find Dr. Lieuallen ultimately supportive of Dr. Thayer's opinion that there are objective findings of injury, not Dr. Laycoe's findings that there are not. Further, neither of Dr. Lieuallen's March 5, 2001 comments contain any reference to a diagnosis of tendonitis. Taken together, Dr. Laycoe's reports and Dr. Lieuallen's clarifications indicate that Dr. Lieuallen believed that claimant was presenting with objective symptoms of right and left wrist pain, which Dr. Lieuallen was not able to attribute to a specific diagnosable condition. Contrary to RRU's conclusion, this opinion supports claimant's contention that he was suffering from a work-related injury during his period of temporary disability and this injury has continued as a permanent partial disability which limits his work activities.

RRU also placed great weight on its conclusion that "Dr. Thayer ultimately bases his opinion that Mr. Garcia cannot return to work as a marker on Mr. Garcia's subjective complaints of pain symptoms." RRU found this evidence less persuasive than "Dr. Laycoe's opposite opinion ... because he could not identify objective findings that would account for Mr. Garcia's subjective complaints, and because Mr. Garcia continued to report pain symptoms four months after he stopped working." In these discussions of objective and subjective findings, both RRU and Dr. Laycoe appear to be using a interpretation of "objective evidence" or "findings" that is inconsistent with its usage in the Workers' Compensation Law. ORS 656.005(19) defines "objective findings" as follows:

"Objective findings' in support of medical evidence are verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and palpable muscle spasm. 'Objective findings' does not include physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable."

In a unanimous opinion, the Oregon Supreme Court has recently examined this statute in relation to whether self-reported symptoms can constitute “objective findings.” The court concluded that the definition of “objective findings” does not require that the injury or disease be present at the time of claimant’s physical examination; rather, “objective findings” require that an indication of injury or disease be capable of being reproduced, measured or observed. This observation can occur through a patient’s historical presentation to a treating physician:

“The same capability of observation applies to other conditions that claimant reported, such as the presence of phlegm and sputum. Both the board and Stringham determined that claimant was a credible witness, and they accepted as true claimant’s factual claim that he had suffered the additional symptoms recited above immediately after his toxic exposure.

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“We agree with the board that that circumstance does not preclude a determination that claimant’s indications of disease were verifiable within the meaning of ORS 656.005(19). All that the statutory definition requires is that the indication of disease be verifiable at some time. The definition does not require that the indication of disease be present during a physical examination of the claimant, including an examination that occurs after the claimant’s symptoms have subsided.” *SAIF Corporation v. Lewis* \_\_ OR \_\_ (SC S47997)(2002).

In regard to this, it is important to note that the RRU reviewer also found that while claimant has had both a functional capacity evaluation (FCE) and physical capacity evaluation (PCE) that support the conclusion that claimant is limited in his ability to perform repetitive hand and arm movements, “information from the FCE and PCE reports is not helpful in resolving the matter before me” because the question is “whether such limitations result from the accepted bilateral synovitis condition.” It is difficult to see how the reviewer reached the conclusion that this evidence had no importance, given the emphasis that the reviewer placed on objective versus subjective evidence. As the *Lewis* court stated,

An essential characteristic of the definition in ORS 656.005(19) is that it does not constrain the person who identifies an indication of injury or disease to rely solely on his or her own perceptions or examinations. Medical personnel act in accordance with ORS 656.005(19) by employing the range of diagnostic methods that their professions prescribe, including such techniques as consulting with nurses, technicians, therapists, and other health care professionals; examining the patient’s medical records; reviewing the reports of witnesses, investigators, and police officers; and interviewing the patient, family members, friends, coworkers, and others who might have information that pertains to an indication of injury or disease. Information gleaned from such sources may be sufficient to establish that a claimant had or has an indication of

injury or disease. If so, then the board properly may characterize that indication as "verifiable." *Lewis, supra*.

As Dr. Thayer notes, in his August 17, 2001 response to Dr. Laycoe's IME, in interpreting the claimant's report of pain, the validity of the functional capacity evaluation is an important factor in his diagnosis as it indicates that claimant was cooperating fully with the test and did perceive himself to be in pain. (Ex. 13). The results of the FCE and PCE thus support Dr. Thayer's opinion that claimant's symptoms from the accepted injury continue unabated and prevent him from returning to his regular work. These conditions have continued without significant abatement since March of 2001. *See, e.g.*, Exs. 7, 8, 10, 11, 12, 13. Indeed, Dr. Laycoe's report of August 1, 2001 supports the conclusion that there had been no significant change in claimant's symptoms. It states that upon examination "[claimant's] current complaints are in essence identical to those that we determined when we saw him last." (Ex. 12 at 2).

Ultimately, I agree with claimant that the record supports the conclusion that he continues to suffer from the same disabling condition for which he has received both temporary and total disability. Dr. Thayer, after reviewing a video tape of the marker job which claimant performed at injury, and discussing the requirements of the job with claimant, concludes that it is inappropriate for claimant due to its highly repetitive nature. He concludes that claimant is capable of performing only light work of limited to moderate repetition. (Ex. 18a). This conclusion is persuasive. It is supported by my review of the video tape, along with the credible testimony of claimant at hearing.

#### **ATTORNEY FEES**

Pursuant to OAR 436-001-0265(1), claimant's attorney has requested an attorney fee of \$1,457.50 based on a rate of \$275 an hour for 5.3 hours of attorney time. However, claimant's attorney's normal hourly fee is \$175 per hour. Based on all of the factors listed in OAR 436-001-0265(1), I determine that a proper award for attorney fee in this matter is \$927.50.

#### **ORDER**

IT IS HEREBY ORDERED that the RRU order in this matter, dated May 15, 2002, is reversed. Claimant is entitled to further evaluation for vocational assistance. Insurer shall pay claimant's attorney a fee in this matter of \$927.50

DATED this 26th day of December, 2002.

By: \_\_\_\_\_

Paul Vincent, Hearing Officer  
Hearing Officer Panel