
In the Matter of the Vocational Assistance Dispute of

Helman, William, Claimant

Contested Case No: HH01-136

PROPOSED & FINAL ORDER

March 22, 2002

LIBERTY NORTHWEST INSURANCE CORPORATION , Petitioner

WILLIAM HELMAN , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge Paul Vincent conducted a hearing in this matter on January 17, 2002. Petitioner Liberty Northwest Insurance Corporation (Liberty or insurer) appeared through attorney Meg Carmen. Respondent William Helman (claimant) appeared without counsel. The Workers' Compensation Division (WCD) waived appearance. The petitioner appeals an administrative order issued by the Workers' Compensation Division, Rehabilitation Review Unit (RRU) requiring insurer to determine whether claimant has a substantial handicap to employment. Testifying witnesses included Joel Scott, Ken Potter, Shar Liske and William Helman.

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 RRU correctly determined that Liberty was required to determine claimant's eligibility for vocational assistance.

EVIDENTIARY RULINGS

WCD Exhibits 1-11 were admitted without objection. Petitioner's Exhibits 1a, 1b, 1c, 1d, 1e, 2a, 2b, 2c, 2d, 2e, 2f, 3a, 6a, 7a and 12 were admitted without objection.

FINDINGS OF FACT

Claimant was a permanent, year-round delivery driver for the employer, Dynagraphics, Inc. (Dynagraphics) when he was injured. The claim was accepted for a left shoulder strain and impingement syndrome. Claimant has been awarded 32 percent unscheduled permanent partial disability (PPD) for his injury.

On April 12, 2000, examining physician Scott Jones, MD, released claimant to light duty work with no use of his left arm above shoulder height. On April 16, 2000, claimant's condition became medically stationary. On April 19, 2000, treating physician Stephen Brenneke, MD (Orthopedic Surgery) released claimant to regular duty as of April 21, 2000.

Joel Scott is employed at Dynagraphics as a Systems Manager, and has worked for

Dynagraphics for the last 5 years. He was not claimant's supervisor. On approximately April 26, 2000, Scott received complaints from two female employees in regard to behavior by claimant that they considered harassing. Scott went to Dynagraphics' founder and President, Ken Potter, and told him about the statements made by the two women. (Testimony of Joel Scott). The two women signed written statements describing claimant's inappropriate and harassing behavior and submitted them to Dynagraphics. Ken Potter interviewed claimant regarding the accusations, some of which claimant admitted, others of which he denied. Potter determined that the accusations had merit and terminated claimant's employment for cause. (Testimony of Ken Potter; Exs. 1c, 12).

On May 3, 2001, a job analysis was completed by Judy Rothery, a vocational consultant, for a permanent, modified position of janitor/inventory person. The job would have been available to claimant if he had not been terminated for cause. The job was created specifically for claimant, but involved duties that were currently being performed by other employees in an inadequate manner because they had other duties to attend to. The job was to have paid 80 percent of claimant's wage at injury, or \$10.40 per hour. (Ex. 10-2; Testimony of Ken Potter, Joel Scott).

Dynagraphics has no formal policy of offering modified work to injured employees, but has consistently tried to place employees with physical restrictions into positions appropriate to their capacity. At the time claimant's employment with Dynagraphics was terminated, Dynagraphics also employed a worker who had been placed in a permanent modified position to accommodate her permanent disability. At the time of hearing, that employee remained employed with Dynagraphics. (Ex. 10-2; Testimony of Ken Potter, Joel Scott).

On May 16, 2001, a physical capacities evaluation (PCE) was performed at Providence Worker Rehabilitation Services. The PCE found claimant able to work in the light range of physical demand, with limited overhead reaching with the left arm and vertical ladder climbing limited to an occasional basis. The PCE reviewed the janitor/inventory job analysis and found it appropriate for claimant. (Ex. 4). On June 14, 2001, Dr. Brenneke concurred with the PCE findings. (Ex. 5).

On June 18, 2001, Liberty determined claimant ineligible for vocational assistance because Dynagraphics would have offered Mr. Helman the janitor/inventory position had he not been terminated for cause. (Ex. 6).

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).

Conditions of Eligibility – OAR 436-120-0320(9)

OAR 436-120-0320(9) provides, in relevant part, that the conditions of eligibility for vocational assistance include:

- (c) As a result of the limitations caused by the injury or aggravation, the worker:
 - (A) Is not able to return to regular employment;
 - (B) Is not able to return to any other suitable and available work with the employer at injury or aggravation;
 - (C) Has a substantial handicap to employment and requires assistance to overcome that handicap.

At issue in this case, as before RRU, is whether claimant was “able to return to any other suitable and available work with the employer at injury.” Based on the following reasoning, RRU found that the janitor/inventory job was unavailable to claimant and therefore he was eligible to be further evaluated for a substantial handicap to employment:

“The employer initially said the janitor/inventory job was created for Mr. Helman. Later he said the job was “made available” in April 1998, over a year prior to Mr. Helman’s accident. At the time Mr. Helman was injured someone was already working in janitorial position, but Mr. Scott said there was enough work for two people. The inventory part of the job was vacant, the duties being performed by a committee of two people. *** I find that Dynagraphics had a job that might have been appropriate for Mr. Helman. However, I also find the

information the employer provided to be inconsistent. The job was not “created” for Mr. Helman with the intention of offering it to him, but only for the purpose of alleging his lack of suitable employment was not due to the injury.

“Dynagraphics has no written policy or history of returning injured workers to suitable employment. Since 1989, they have not provided permanent modified employment for any of their injured workers with the possible exception of the employee with three claims. Mr. Scott did not know if her job had been modified. They offer no compelling evidence to support their contention that they would have accommodated Mr. Helman’s permanent restrictions. I am not convinced that Dynagraphics ever had the intention of offering permanent modified employment to Mr. Helman.” (Ex. 10-4).

At hearing, claimant contended that the order should be upheld because the facts support RRU’s conclusion that the offered job was, in effect, a sham. As demonstrated by my fact findings above, however, I do not reach the same factual conclusions as RRU. In the administrative order Scott’s statements were found to have been “inconsistent;” the order leaped from this finding to a conclusion that therefore “[t]he job was not created for Mr. Helman with the intention of offering it to him, but only for the purpose of alleging his lack of suitable employment was not due to the injury.” This is a leap that I cannot make on the record before me, which contains consistent and believable testimony by the employer to the contrary. Having had the opportunity to appraise Mr. Scott’s testimony at hearing, and the consistent and supporting testimony of company president Potter, I find that the preponderance of the evidence does not support RRU’s contention that the job was not created with then intention of offering it to claimant. Stated simply, Mr. Scott and Mr. Potter testified truthfully as to their present intention in June of 2001 to offer claimant a job had he not been discharged with cause.

Based on the findings of fact above, I conclude that claimant is not unable to return to suitable and available work with the employer at injury as a result of the limitations caused by the injury or aggravation, but rather due to his termination for cause. Therefore, pursuant to OAR 436-120-0320(9), claimant is ineligible for vocational assistance. Accordingly, I find that the administrative order should be modified and Liberty is not required to perform a substantial handicap evaluation in this matter.

ORDER

IT IS HEREBY ORDERED that RRU's Director’s Review, dated October 29, 2001, is reversed. SAIF is not required to perform a substantial handicap evaluation in this matter.

DATED this ____ day of March, 2002.

By: _____
Paul Vincent, Hearing Officer
Hearing Officer Panel