
In the Matter of the Vocational Dispute of

Holmes, Steven, Claimant

Contested Case No: H01-078

PROPOSED & FINAL ORDER

January 17, 2002

RSG FOREST PRODUCTS/OLYMPIC DIVISION, Petitioner

STEVEN HOLMES, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

This is a cross request for review of a July 18, 2001 Director's Review and Order which set aside the self-insured employer's decision that claimant was ineligible for vocational assistance. Administrative Law Judge Ella D. Johnson conducted a hearing in this matter on November 29, 2001. Attorney Scott Monfils represented petitioning self-insured RSG Forest Products, Olympic Forest Products Division (petitioner or employer), and its claims processing agent, Self-Insured Management Services, Inc. (SIMS). Attorney Ronald Fontana represented respondent and cross petitioner Steven Holmes (claimant). The Rehabilitation Review Unit (RRU) of the Workers' Compensation, Department of Consumer and Business Services (WCD or the department) waived appearance at the hearing. Petitioner testified on his own behalf and called Neely Holmes and Adriane Navarrte as witnesses. The record closed on following the hearing.

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.

ISSUES

- 1) Whether RRU's order, which determined that the employer's offer of modified work was invalid and claimant, was entitled to vocational assistance should be modified because it is characterized by an abuse of discretion.
- 2) Whether RRU's calculation of claimant's average weekly wage as \$450.52 instead of \$598.98 is incorrect because it fails to include claimant's regular overtime payments.

EVIDENTIARY RULING

The record consists of Exhibits 1 through 35, which were admitted into the record without objection.¹

FINDINGS OF FACT

I adopt the Findings of Fact set forth in the July 13, 2001 Director Review and Order, as corrected on July 18, 2001 (Exs. 29, 32), with the following supplementation:

¹ RRU provided subsequent to the hearing pages 2 and 4 of Exhibit 29, the Director's Review and Order, which were missing from the exhibit packet. Additionally, RRU also provided after the hearing a two-page memorandum from Medical Resources Network dated May 12, 2000 which was marked as Exhibit 34 and a one-page memorandum also from Medical Resource Network dated May 17, 2000 which was marked as Exhibit 35.

In March 1999, claimant was hired by the employer to work in the mill as an off-bearer. On October 5, 1999, claimant sustained a severe left leg crush injury while working in the employer's mill. His injury resulted in, among other things, the amputation of all but the last five inches of his left leg. Claimant was 21 years old at the time of his injury. He is afraid of falling and injuring his leg stump. Claimant's attending physician, Dr. Zegzula, noted claimant's psychological trauma related to his injury. While undiagnosed, claimant suffers from depression and post traumatic stress syndrome symptoms. (Exs. 1, 2, 10, 18; claimant's testimony).

Claimant now wears prosthesis on his left extremity. The prosthesis does not fit properly and cuts into his groin when he sits. He has to hold the prosthesis on his leg stump as he walks and continues to need a crutch to walk. (Claimant's testimony)

After his injury, claimant lived with his father, Neely Holmes, in Clatskanie, Oregon. His father works for the employer in the same mill where claimant was injured. His father's home is in an isolated location on a gravel road. Claimant could not walk on the gravel road because of the instability of the surface, had no one to talk to, and spent the day just watching television. Because of the isolation, claimant moved from his father's house in late February 2000 to live with his sister in Centralia, Washington. (Testimony of claimant and Neely Holmes).

When claimant first visited his sister in Centralia, he did not intend to stay and did not inform his attorney, his attending physician or the employer concerning his new address and telephone number. At the time he moved to Centralia, claimant was working with Mary Theissen (Theissen), a medical case manager with Medical Resource Network, Inc which was hired by the employer to oversee claimant's ongoing care. She told claimant that it would take approximately one year to obtain vocational assistance. Claimant also was not medically stationary² and was not released to return to work³. He did not think that there was any problem with him moving to Centralia. (Ex. 16; claimant's testimony).

Prior to May 15, 2000, claimant's sister, Adriane Navarrete (Navarrete), provided Theissen with claimant's address in Centralia, Washington. Claimant received mail from Thiessen at the Centralia address. On May 4, 2000, claimant's prosthetist provided Theissen with claimant's message telephone number in Centralia, which was Navarrete's cell phone. His father also provided the telephone to her. Theissen did not provide claimant's forwarding address and telephone number to the employer or SIMS. Theissen did not tell Navarrete that the employer was going to offer a modified job to claimant and that he had to report to work by May 18, 2000. (Exs. 10, 20; testimony of Neely Holmes and Navarrete).

After his injury, claimant received mail at his father's address. Every two weeks claimant's sister drove him to their father's house to pick up his time loss payments. On May 17, 2000, claimant's father signed for a certified letter from SIMS addressed to claimant at his father's address. Claimant's father did not open the letter. (Exs. 8 17; testimony of claimant and Neely Holmes).

On May 15, 2001, SIMS, the employer's third party administrator, mailed a modified job

² Claimant was not found to be medically stationary by Dr. Zegzula until July 18, 2000. (Ex. 12).

³ There are several references in the record to Dr. Zegzula's release to work. However, there is no evidence that claimant was ever released to work by his attending physician and I decline to make that finding. (*See e.g.* Ex. 11-7).

offer to claimant. Claimant had no communication with his father between May 22 and May 30, 2000. When he called his father on May 30, 2000 to find out if his time loss check had arrived, his father told him that claimant had a “bunch of mail.” Claimant did not learn of the modified job offer until he picked up his mail on May 30, 2000. His mail also included a termination notice from the employer. Claimant immediately contacted his attorney. (Exs. 6, 9, 17; testimony of claimant and Neely Holmes).

The employer’s offer stated that claimant’s attending physician had “released” him for light/modified duty. Claimant was directed to start work on May 18, 2000. In May 2000, the employer did not tell claimant’s father that it was trying to contact claimant to offer him a modified job. (Ex. 6).

The modified job offer from SIMS was for claimant to return to work at the mill where he was injured as a 4” edger trainee. (Ex. 6) Although the job offer stated that further modifications could be made if necessary, claimant did not believe that the employer would do so. Claimant also felt that the employer could do nothing to change the emotional impact of returning to the site of his injury. (Claimant’s testimony).

Dr. Zegzula found the modified job to be within claimant’s physical capabilities but he was not told about the slippery and littered condition of the metal stairs and the floor that claimant would be required to frequently climb and cross. If he had known about the wet slippery stairs and the littered floor conditions, Dr. Zegzula would have had serious reservations about the work. Dr. Zegzula was also concerned about claimant’s psychological trauma related to his injury and the site of his injury. Dr. Zegzula recommended that claimant seek psychological counseling. (Exs. 5, 18, 20, 23, 28).

In order to return to work at the mill, claimant would be required to ascend two flights of metal stairs, one outside the mill and one inside the mill leading to the machinery. The flights consist of approximately 11 stairs each and they are wet and slippery. Before claimant lost his leg, he had previously slipped and fallen when he walked up the metal stairs at the mill. The mill floor that he would be required to cross to perform the modified work is dangerous for someone with one leg using crutches because the floor is covered with water and sawdust. The condition of the floor improved after Oregon OSHA’s intervention. The work site of the employer’s modified job was within a few feet of the saw where claimant lost his leg. (Testimony of claimant and Neely Holmes).

Claimant moved back to Oregon in June or July 2000. He currently lives in Washington but would move back to participate in vocational assistance. (Claimant’s testimony).

On August 25, 2000, claimant received notification that he was ineligible for vocational assistance because he refused an offer of suitable employment. (Ex. 14).

Claimant’s rate of pay while working for the employer was \$12.61 per hour. He normally worked five hours of overtime each week at time and one half. (Claimant’s testimony).

FINDINGS OF ULTIMATE FACT

Claimant’s difficulty ambulating due to his amputation and need to use a crutch and his

emotional scars caused by his injury renders the modified work in the employer's mill as a edger trainee unsuitable.

Claimant's weekly wage at injury, which includes five hours of overtime at time and a half, is \$598.98.

OPINION AND CONCLUSIONS OF LAW

I may modify the department's vocational assistance order if it: (1) violates a statute or rule; (2) exceeds the statutory authority of the agency; (3) was made upon unlawful procedure; or (4) was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c); OAR 436-001-0225(5). In determining whether one or more of those criteria exist, I may admit evidence, which was not before the department, and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or at 537; *Joseph A. Richard*, 1 WCSR 3 (1996). The burden rests on the proponent of that fact or position. See ORS 183.450(2).

RRU found that the job offer was not made in accordance with OARs 436-120-350(4) and 436-060-0030(5) because it was sent by SIMS instead of the employer. Consequently, RRU concluded that the job offer was invalid and set aside the employer's denial of vocational assistance. The employer argues that RRU abused its discretion. Abuse of discretion exists when an agency "exercises its discretion to an end or purpose not justified by, and clearly against, reason and evidence." *Far West Landscaping v. Modern Merchandising*, 287 Or. 653, 664 (1979); *Casciato v. Oregon Liquor Control Commission*, 181 Or. 707, 717 (1947). While I find that RRU's decision is not characterized by an abuse of discretion in that it is fully supported by the evidence and I agree with RRU that the offer was not in strict conformance with the department's rules, I set aside the denial of vocational services for additional reasons.

The evidence establishes that the modified job offer to work as an edger trainee in employer's mill was not suitable employment for claimant because psychological trauma associated with being in the mill and the barriers presented to claimant's ability to safely walk to his work station through wet, slippery metal stairs and debris-strewn mill floor. Both claimant and Neely Holmes testified that in order to return to work at the mill, claimant would be required to ascend two flights of metal stairs, one outside the mill and one inside the mill leading to the edger. The metal stairs were dangerous even to those without a disability because they are wet and slippery. Claimant testified that he had previously slipped and fallen prior to his injury. Additionally, Neely Holmes testified that although the mill floor was better since Oregon OSHA's intervention, the mill floor was still dangerous because it was covered with water and debris.

Furthermore, claimant credibly testified that it would be extremely difficult of him to work in the mill and on the edger because it was only a few feet from where he was injured. Upon learning of the environmental conditions at the mill and that the edger was only a few feet away from where he was injured, Dr. Zegzula had reservations about the modified job and claimant's ability to walk safely on the wet and slippery surfaces. Consequently, on this record, I conclude that claimant did not refuse suitable work because the edger trainee job was not suitable given the other barriers inherent in the job.

Even if the modified job offer had been suitable, I would still find that claimant did not refuse the job. The employer makes much of the fact that claimant did not keep the employer apprised of

his current address and telephone number and argues that his failure to do so resulted in his failure to report to work and his termination for petitioner's employment. I do not find the employer's argument in that regard persuasive. There were other avenues through which the employer could have contacted claimant. Moreover, I agree with RRU's conclusion that the 24-hour period between the receipt of the modified job offer by claimant's father and the time when claimant was report to work to start the modified job was inadequate and unreasonable.

Accordingly, I affirm RRU's conclusion that claimant is eligible for vocational assistance but modify the order to reflect that claimant's weekly wage at injury was \$598.98.

ATTORNEY FEES

Claimant has successfully defended RRU's decision that he is eligibility for vocational assistance and is therefore entitled to attorney fees. Claimant is also entitled to attorney fees to successfully challenging RRU's calculation of claimant's weekly wage. ORS 656.385(1). Applying the factors set forth in OAR 436-001-0265, I find that claimant's counsel is entitled to an assessed fee in the amount of \$3,500.

ORDER

IT HEREBY ORDERED that RRU's July 13, 2001 Director's Review and Order is modified to find that his weekly wage at injury is \$598.98 and affirmed in all other respects as supplemented herein. The employer is ordered to pay claimant's attorney \$3,500.

Dated this 17th day of January 2002 at Salem, Oregon.

Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel