

In the Matter of the Vocational Assistance Dispute of
Ozias, Craig, Claimant
Contested Case No: H01-133
PROPOSED & FINAL ORDER
March 8, 2002
SAIF CORPORATION, Petitioner
CRAIG OZIAS, 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 SAIF Corporation (SAIF or insurer) appeared through attorney Larry Schucht. Respondent Craig Ozias (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. Petitioner called Adele Bostwick as a witness. Respondent testified on his own behalf.

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 SAIF was required to determine claimant's eligibility for vocational assistance.

EVIDENTIARY RULINGS

WCD Exhibits 1-24 were admitted without objection. Petitioner's Exhibits 22A, 22B, 22C, 23A and 25 were admitted without objection. Respondent's Exhibits 25A and 26 through 34 were admitted without objection.

FINDINGS OF FACT

I adopt the findings of fact from the Director's Review and Order dated October 5, 2001 in this matter. In addition, I make the following supplementary findings:

On September 1, 2001, Dr. Dickinson (claimant's attending physician) spoke to the vocational consultant conducting the Director's Review in this matter. Dr. Dickinson's chart notes in regard to this consultation state in relevant part:

I had a telephone conversation with Teresa Fultz with State Department of Labor about Craig's situation. I think this is certainly contradictory picture. Initially, I thought Craig was very compliant with therapy and did well. He went back to work and then had recurrent symptoms. The person who did the arbiter exam agreed with my impression of Craig, although the PCE this year, he gave very inconsistent performance. On the whole, I am still inclined to give him the benefit of the doubt and suggest vocational rehabilitation for him. (Ex. 33).

On November 9, 2001, a Work Capacity Evaluation was performed at Providence Health System by evaluator Larry Andes, PT. The evaluator concluded that testing demonstrated claimant was capable of full-time work in the Medium-Heavy range of physical demand, and that claimant had demonstrated the ability to perform all activities on a frequent basis. The evaluator compared claimant's measured capacities "with the physical demands of his job at injury as a Gutter Installer Helper, as described in a job analysis and as depicted on a video tape supplied by the vocational rehabilitation counselor. He did demonstrate adequate capacities to perform this job as described with the exception of lifting and carrying 100 lb., 40-foot aluminum extension ladders." (Ex. 34). The evaluator went on to state: "Mr Ozias admitted that he would be capable of performing the Gutter Installation Helper job currently, however he predicts that his right elbow condition is certain to flare-up performing this kind of work due to the amount of repetitive and forceful gripping activities required. He would prefer to obtain some vocational assistance to renew his Merchant Marine certifications so that he could return to that line of work." (Ex. 34).

On November 26, 2001, Dr. Dickinson met with Adele Bostwick, the rehabilitation consultant employed by insurer in this matter. Prior to meeting with Dr. Dickinson, Bostwick sent him a video tape she had prepared showing gutter installation work being performed. The work was being performed at a construction site by the employer at injury and showed work typical of that performed by claimant before he was laid off. Dr. Dickinson's chart note describes the meeting as follows:

I had a meeting with Adele Bostwick, rehabilitation consultant for Mr. Ozias. She is here as they sent me a video tape showing the type of work that he usually did for the Continuous Gutter contractor that he worked for. I am actually quite familiar with this work from my previous experience working in the construction industry. Furthermore, I have the work capacity evaluation from Providence Medical Center and I think that these all indicate that Mr. Ozias should be capable of going back to his previous employment as a gutter hanger with his employer at injury, on a full time basis. Ms. Bostwick had also developed a possible alternative employment for Mr. Ozias working as a construction inspector. This would also be very appropriate for him and I signed off on that for her. I wrote her a hand written note stating Mr. Ozias could go back to his regular employment. I suppose we will need to see him for a closing examination so that his claim can be closed. (Ex. 33).

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).

Regular Employment – OAR 436-120-0005(7)

OAR 436-120-0005(7) defines regular employment to mean “the employment the worker held at the time of injury or claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance.” The order prepared by RRU found that claimant was unable to return to regular employment. RRU first noted that although claimant had been released to return to work two weeks prior to claim closure, he was never able to return to work due to a layoff. RRU then reviewed the medical evidence, and while recognizing that claimant’s treating physician had released him to return to his job at injury, found “a lack of consistency in Dr. Dickenson’s statements.” RRU further found that a work capacity evaluation performed on July 23, 2001 was not helpful because its findings were not valid. Instead, the RRU vocational counselor found that claimant had fully participated in medical treatment and physical therapy in the past and gave greater weight to past medical findings, in particular to the finding of the medical arbiter.

The record before me differs markedly from that before RRU. The questions raised by RRU in regard to the reliability of the July 2001 Work Capacity Evaluation have been addressed and answered by a November 2001 Work Capacity Evaluation with valid findings. The evaluation concluded that claimant is currently capable of returning to his regular employment as a Gutter Installation Helper. Further, the record demonstrates that since the September discussion between the RRU counselor and the attending physician, Dr. Dickinson, he has had the opportunity to further review the newer Providence Work Capacity Evaluation as well as a video tape of the job at injury. Dr. Dickinson remains of the opinion that claimant is capable of returning to his regular employment as a Gutter Installation Helper. The additional evidence before me significantly alters the balance of evidence as to whether claimant is capable of returning to regular employment in favor of the determination that he is. Indeed, as indicated in my fact findings above, although claimant remains concerned about the possibility that he could someday aggravate his accepted condition, he has admitted “that he would be capable of performing the Gutter Installation Helper job currently.” (Ex. 34). Accordingly, I find that the administrative order should be modified; SAIF is not required to determine claimant’s eligibility for vocational assistance.

ORDER

IT IS HEREBY ORDERED that RRU's Director's Review in this matter, dated October 5, 2001, is reversed. SAIF is not required to determine claimant's eligibility for vocational assistance.

DATED this ____ day of March, 2002.

By: _____
Paul Vincent, Hearing Officer
Hearing Officer Panel