

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Green, Charles W., Claimant

Contested Case No: H02-009

PROPOSED AND FINAL ORDER

March 20, 2003

SAIF CORPORATION, Petitioner

CHARLES W. GREEN Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an August 2, 2002 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On November 22, 2002, Administrative Law Judge (ALJ) Paul Vincent conducted a hearing in this matter. Attorney Mary Goebel Adams represented petitioner SAIF Corporation (insurer). Attorney Christine Jensen represented respondent Charles W. Green (claimant). WCD waived appearance at hearing. Claimant and Fred Green testified and the record closed on the date of 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.

ISSUE

Whether RRU correctly determined that claimant remains eligible for vocational services.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 21 as well as claimant's Supplementary Exhibit R1 were admitted into the record without objection.

FINDINGS OF FACT

- (1) On July 31, 2000, claimant suffered a low back injury while working as a truck driver. (Ex. 1.) The job at injury was permanent and the wage was \$17.24 per hour. (Ex. 5.)
- (2) On March 13, 2001, Michael Van Anrooy MD performed an L5-S1 discectomy. (Ex. 2.) Insurer accepted lumbosacral strain and L5-S1 disk herniation as compensable conditions. (Ex. 4.)
- (3) On June 19, 2001, Dr. Van Anrooy declared claimant's conditions medically stationary and imposed the following work restrictions: "Light to medium duty; Not

- lifting more than 40 pounds, avoiding frequent bending and stooping activity. Avoid prolonged sitting, standing and walking.” (Ex. 3.)
- (4) (4) From the time claimant recovered from surgery until October 2002, claimant worked as a relief truck driver and shop supervisor for a logging truck company owned by his father. Claimant worked flexible hours according to his fluctuating pain level and his father paid him a salary of \$1,400 per month in order to meet claimant’s family’s basic needs temporarily. (Ex. 9-2; testimony of claimant and Fred Green.)
- (5) On July 12, 2001, the claim was closed with an award of 17 percent permanent partial disability (PPD). (Ex. 4.)
- (6) Claimant underwent vocational eligibility evaluations and on October 15, 2001, insurer notified claimant that he was eligible. The employer at injury is out of business. (Exs. 5, 6, 7, and 8; testimony of claimant)
- (7) On October 31, 2001, Registered Occupational Therapist (OTR) Susan Bottomley, conducted a work capacity evaluation. Claimant reported that sitting was the most comfortable position and that he was able to drive logging trucks 60 to 75 minutes at a time up to 8 hours in a 12-hour day. Bottomley adopted claimant’s report as the recommended maximum for claimant’s ability to sit. (Exs. 9-2 and 9-5.) Bottomley also recommended a 60 to 75 minutes restriction for stationary standing. Additionally, Bottomley found the evaluation invalid due to inconsistent demonstration, marked disability focus and behavior consistent with symptom magnification. (Ex. 9-4.)
- (8) On November 7, 2001, the Bottomley viewed a surveillance film provided by insurer and observed that claimant moved more spontaneously in bending, kneeling and crouching that he demonstrated during the work capacity evaluation. Based on the videotape, Bottomley removed the stationary standing restriction. (Ex. 10.)
- (9) Dr. Van Anrooy concurred with Bottomley’s November 7, 2001 report. (Ex. 11.) James J. Hoyne DO concurred with Bottomley’s October 31 and November 7, 2001 reports. (Ex. 12.)
- (10) On January 15, 2002, insurer sent claimant a Notice of End of Eligibility for vocational assistance and claimant appealed. (Exs. 13 and 14.)
- (11) On April 15, 2002, Dr. Van Anrooy opined that claimant’s ongoing symptoms were not work-related, but caused by constitutional issues. (Ex. 15.)
- (12) On July 3, 2002, Timothy A. Hill conducted a medical arbiter’s examination and rated claimant’s ability to sit to a maximum of 4 to 5 hours per day with breaks every 60 minutes to change position. He also recommended limiting work shifts to 10 hours per day. (Ex. 16-5.)

- (13) In an Order on Reconsideration dated July 12, 2002, WCD increased claimant's PPD award to 47 percent. (Ex. 17.) In an Opinion and Order dated November 15, 2002, a Workers' Compensation Board ALJ affirmed the Order on Reconsideration. (Ex. R-1.)

CONCLUSION OF LAW

RRU correctly determined that claimant remains eligible for vocational assistance.

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if it: (1) violates a statute or rule; (2) exceeds the agency's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283; OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence that was not before the department and make independent findings of fact. *Colclasure v. Washington County School District*, 317 Or 526 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proving any fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of the evidence).

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(6)(a) provides:

(6)(a) A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury or aggravation, and the worker has a substantial handicap to employment.

ORS 656.340(6)(b)(A) defines "substantial handicap".

"A 'substantial handicap to employment' exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment."

OAR 436-120-0005(12) provides in relevant part:

"Suitable employment" or "suitable job" means employment or a job:

(a) For which the worker has the necessary physical capacities, knowledge, skills and abilities;

(b) Located where the worker customarily worked, or within reasonable commuting distance of the worker's residence.

(c) Which pays or would average on a year-round basis a suitable wage as defined in section (13) of this rule.

(d) Which is permanent.

OAR 436-120-0005(13)(b) provides:

(13) "Suitable wage" means:

(b) For the purpose of providing or ending vocational assistance, a wage as close as possible to 100 percent of the adjusted weekly wage. This wage may be considered suitable if less than 80 percent of the adjusted weekly wage¹, if the wage is as close as possible to the adjusted weekly wage.

RRU determined that claimant was eligible for vocational assistance. RRU relied on the opinion of medical arbiter Hill in finding that claimant was unable to return to his regular employment as a truck driver. RRU further found that claimant had a substantial handicap to employment.

Insurer contends that claimant lacks a substantial handicap because he obtained suitable employment with the logging truck company owned by his father. In support of its position, insurer argues that claimant's representations to the contrary are not credible as reflected in the work capacity evaluation and the surveillance video. Insurer further argues that claimant's work activities with his father's business belie his inability to return to regular work as a truck driver.

¹ OAR 436-120-0007 provides in relevant part:

To determine a suitable wage as defined in OAR 436-120-0005(13), the insurer shall first establish the adjusted weekly wage as described in this rule. The insurer must calculate the "adjusted weekly wage" whenever determining or redetermining a worker's eligibility.

(1) For purposes of this rule, the following definitions apply:

(a) "Adjusted weekly wage" is the wage currently paid as calculated under this rule.

(c) "Earned income" means gross wages. Salary, tips, commissions, incentive pay, bonuses and the reasonable value of other consideration (housing, utilities, food, etc.) received from an employer for services performed from all jobs held at the time of injury or aggravation.

In contrast, claimant contends that the work he performed for his father's business did not constitute suitable employment because it was temporary and because the wage was inadequate.

There is no question that claimant cannot return to work with the employer at injury because that business is bankrupt. However, the parties disagree whether claimant obtained "suitable work" with his father's logging business. To begin, the work claimant performed for his father's business does not meet the definition of "suitable work" because it was temporary. Claimant did not fill an existing position; he relieved either the shop supervisor or his father of some of their duties, working flexible hours according to his pain. Moreover, claimant and his father testified that the job was intended only to provide for claimant's family temporarily and I find this testimony credible. Next, the work claimant performed in his father's business does not meet the definition of "suitable work" because the wage was far below 80 percent of the wage at injury. At the time of the work injury, claimant earned \$17.42 per hour or approximately \$696.80 per week or \$2,787.20 per month. In contrast, claimant's father paid him \$350 per week or \$1,400 per month. Claimant testified that the amount his father paid was not based on the value of his services; rather it was based on meeting claimant's family's basic needs temporarily and I find this testimony credible. Based on these factors, I conclude that claimant did not obtain suitable work, and therefore, he had a substantial handicap to employment. Accordingly, he was eligible for vocational assistance.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Applying the factors listed in OAR 436-001-0265(1), I find that \$1,200 is a reasonable fee for claimant's attorney's services in this matter.

ORDER

IT IS HEREBY ORDERED

The Director's Review and Order dated August 2, 2002 is affirmed.

DATED this 20th day of March 2003.

Paul Vincent, Administrative Law Judge
Hearing Officer Panel