
In the Matter of the Vocational Dispute of

Mark B. Hardman, Claimant

Contested Case No: H01-030

AMENDED FINAL ORDER

May 8, 2003

OVERNITE TRANSPORTATION COMPANY, Petitioner

BARK B. HARDMAN, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On March 21, 2003, the director issued a Final Order on Reconsideration affirming the March 25, 2002 Proposed and Final Contested Case Hearing Order. The Final Order inadvertently omitted the attorney fee awarded claimant's attorney. This Amended Final Order includes the attorney fee award and corrects two clerical errors made on page 12 of the Final Order. It otherwise republishes the Final Order without change.

The Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD) issued a February 12, 2001 administrative order, which found that claimant had a substantial handicap to employment and, therefore, was eligible for vocational assistance. Petitioner appealed RRU's order.

On November 9, 2001, Hearing Officer Catherine P. Coburn conducted a telephone hearing. Attorney Thomas P. Busch represented petitioner, Overnite Transportation Company (employer) and its claims administrator, Gallagher Bassett Services. Respondent, Mark B. Hardman (claimant), appeared and was represented by attorney Gayle A. Shields. The WCD waived appearance. The employer called Bradley Simpson, vocational rehabilitation counselor, as a witnesses. Claimant and Kathy Wallace, vocational rehabilitation counselor, testified on claimant's behalf.

By Proposed and Final Order dated March 25, 2002, Hearing Officer Coburn affirmed RRU's order. On April 24, 2002, the employer petitioned for judicial review in the Court of Appeals. After the parties filed their briefs in the Court of Appeals, the director withdrew the hearing officer's order for reconsideration. ORS 183.482(6); *see Boydston v. Liberty Northwest Ins. Corp.*, 166 Or App 336 (2000). The entire record, consisting of a tape recording of the hearing, all evidence received, all documents filed, and the parties' arguments, has been considered.

FINDINGS OF FACT

Claimant sustained a compensable injury on February 1, 1999 when he was involved in a motor vehicle accident. He worked as a truck driver making local deliveries. (Ex. 13-5). The employer accepted the claim for "left rib contusion, left shoulder ACL sprain, right eyelid laceration, left rotator cuff and bicipital tendonitis." (Ex. 12).¹ On April 8, 1999, claimant was

¹ The employer subsequently accepted "left biceps tear" on January 25, 2001. (Ex. 25A)

released for light duty work and, for about three months, performed office duties for the employer. (Exs. 13-2, 23-2).

Claimant began treating with Dr. Edelson in October 1999. (Ex. 19-2). Dr. Edelson performed surgery on the left shoulder and biceps in January 2000. Dr. Edelson declared claimant medically stationary on June 15, 2000. He placed permanent restrictions of no lifting over 50 pounds, no overhead work, and no repetitive lifting. Dr. Edelson also expected claimant to experience waxing and waning of symptoms. (Ex. 10).

A June 30, 2000 Notice of Closure (NOC) awarded 19 percent unscheduled permanent partial disability. (Ex. 11).

In his initial vocational report, dated July 13, 2000, Bradley Simpson reported that contact with the employer at injury revealed that there were no truck driver positions available, but there was a possible office position for claimant. A Transferable Skills Assessment Report indicated claimant had transferable skills to return to work in up to 21 highly transferable occupations, but that research was required to determine whether any of those positions were suitable. (Ex. 13; tr. 34)

On August 1, 2000, claimant saw Dr. Edelson for worsening of his left shoulder pain. However, examination findings were essentially unchanged from the June 2000 closing evaluation. Dr. Edelson adjusted claimant's existing restrictions to no lifting over 25 pounds, to power steering driving only, and to no lifting away from the body. (Ex. 14). These further restrictions helped to return claimant's left shoulder to post-injury baseline. Accordingly, on September 12, 2000, Dr. Edelson made these restrictions permanent. (Ex. 15A).

On September 19, 2000, Mr. Simpson prepared a labor market survey to document claimant's employability as a truck driver and dispatcher. Based on the information from the survey, claimant was employable as a truck driver or a dispatcher, based on his qualifications, work experience, and physical capacities. (Exs. 16, 17-2). Mr. Simpson also prepared a job analysis (JA) for long-haul truck driver, based on his contact with Dan Ruffing Trucking Company, which had such a job opening. He listed the Dictionary of Occupational Titles (DOT) rating as medium and the job offered by Ruffing Trucking as light. Dr. Edelson approved the JA on August 29, 2000. (Ex. 15). Mr. Simpson informed claimant of the JA on September 14, 2000. (Ex. 17). For personal reasons, claimant did not want to drive long-haul. In addition, if bad weather necessitated chaining up, the chains weighed 50 pounds or more and there were several sets of chains for a truck. (Tr. 45-46).

On September 22, 2000, the employer sent claimant a Notice of Ineligibility for Vocational Assistance. A labor market survey for Vehicle Equipment Manager and Bakery Manager was not required, because standard reference materials were sufficient and show that there would be a significant demand for both of those occupations. (Ex. 17-3). Because claimant was employable as a Dispatcher, Truck Driver, Vehicle Leasing Manager, and Bakery Manager, he did not have a substantial handicap to employment. (Ex. 17-3). Claimant has not worked as a dispatcher nor has he worked in vehicle leasing. (See footnote 7; ex. 23).

In response to inquiries from claimant's attorney, on September 28, 2000, Dr. Edelson reported that claimant fit into the "light" work category—lift 20 pounds occasionally and 10 pounds frequently. (Exs. 17A, 29). In August 2001, Dr. Edelson further restricted claimant from long-haul truck driving due to his elbow and shoulder problems. (Ex. 32).

Dr. Bald performed a medical arbiter examination on October 25, 2000. He opined that claimant had limitations regarding overhead use, and regarding repetitive and heavy lifting as a result of his left shoulder condition. Dr. Bald further opined that claimant was capable of working within the medium job capacity, with occasional lifting or carrying up to 50 pounds and frequent lifting and carrying up to 35 pounds. He placed no limitations on the number of hours spent sitting, standing or walking. (Ex. 19-6).

The Appellate Review Unit (ARU) of the Workers' Compensation Division issued an Order on Reconsideration on November 17, 2000, which awarded additional permanent disability. ARU did not consider medical records from Dr. Edelson dated August 1 and September 12, 2000, because they were post-claim closure information. However, ARU did consider the job analysis and Dr. Edelson's September 28, 2000 report. Using the DOT, ARU determined claimant's Base Functional Capacity (BFC) as medium strength level work. Relying on Dr. Bald's medical arbiter report, ARU found claimant was capable of medium strength work with further restrictions which placed him at the medium/light strength level. Thus, his Residual Functional Capacity (RFC) was for medium/light strength duties. (Ex. 20).

Claimant has not returned to work as a truck driver. (Tr. 47). Since May 1999, he worked approximately one day per week as a longshoreman, driving a forklift or driving automobiles off of ships. Mr. Simpson testified that the DOT description for forklift driver was medium work, and he believed most forklifts do not have power steering. (Tr. 39). In rebuttal, claimant testified that the forklift he drove as a longshoreman had power steering; that it was not the typical warehouse kind, but rather he sat in a cabin 10-15 feet up and did not get off of it except for breaks. (Tr. 43).

CONCLUSIONS OF LAW AND OPINION

The director may modify the Rehabilitation Review Unit's order regarding vocational assistance only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). The hearing officer may admit evidence and make independent findings of fact to determine whether any of the factors identified in ORS 656.283(2)(c) were violated. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The hearing officer has the responsibility to ensure that the record is fully developed so that it is sufficient for judicial review. ORS 183.415(10). The director reviews pursuant to ORS 656.283(2) under the record developed before the hearing officer. *Colclasure, supra*.

RRU gave greater weight to the attending physician's opinion regarding claimant's physical capacities/work restrictions. Dr. Edelson restricted claimant to lifting up to 25 pounds, to power steering driving, from overhead work, and from away from the body lifting. The

medical arbiter, Dr. Bald, restricted claimant to medium work with occasional lifting up to 50 pounds and frequent lifting up to 35 pounds. Because Dr. Edelson had not released claimant for regular work, RRU found that claimant was unable to return to regular work. Also because of claimant's physical restrictions and wage requirements, RRU found that claimant was unable to return to truck driving. RRU also determined that the employer's labor market analysis was unnecessary and not credible. Lastly, RRU concluded that claimant had a substantial handicap to employment because he was unable to return to occupations that would provide suitable employment in his local area. Accordingly, RRU concluded that claimant was eligible for vocational assistance.

The hearing officer found that claimant was not employable as a truck driver. Relying on *Kurt Vandervort*, 7 WCSR 148 (2002), the hearing officer next determined that the "law of the case" doctrine did not apply between Appellate Review Unit and Rehabilitation Review Unit decisions regarding a worker's physical restrictions. Thus, ARU's determination that claimant was restricted to medium work category was not binding on RRU. Lastly, the hearing officer found that claimant's work as a longshoreman approximately one day a week failed to demonstrate that claimant did not have a substantial handicap to employment. Accordingly, the hearing officer affirmed RRU's order.

Claimant is Unable to Return to Regular Work as a Truck Driver

The employer based claimant's ineligibility, in part, on an August 2000 job analysis (JA)² for a long-haul truck driver, which had been approved by Dr. Edelson, claimant's attending physician. The JA listed the physical requirements for lifting and carrying as rarely to occasionally up to 25 pounds. (Ex. 15). Relying on the Dictionary of Occupational Titles's (DOT) definitions of "light" and "medium" work, the hearing officer agreed with RRU's finding that the JA was misleading and unreliable. Because the JA was for a truck driving position which exceeded claimant's physical restrictions, the hearing officer concluded that the job did not constitute suitable employment.

At the time of injury, claimant worked as a truck driver making local deliveries. Claimant was unable to return to work with the employer because no truck driver jobs were available and because the driver job required the ability to move 100 pounds. (Ex. 23-2; tr. 23). Both Mr. Simpson and Ms. Wallace testified that there were different categories of truck drivers, such as heavy and light. Based on the employer's statement, its truck driver jobs fall into the heavy category. Based on Dr. Edelson's work restrictions, claimant would be limited to truck driver jobs in the light category. Dr. Edelson also restricted claimant from long-haul trucking based on his elbow and shoulder problems. (Ex. 32). Based on Dr. Bald's restrictions, claimant would be capable of returning to truck driver jobs in the medium work category. However, Dr. Bald did not have the benefit of reviewing Dr. Edelson's August 1 and September 12, 2000 reports, in which Dr. Edelson further restricted claimant's work capacities. Additionally, Dr. Bald did not address claimant's subsequently accepted left biceps tear condition. RRU correctly relied on Dr. Edelson's opinion, because his restrictions were based on claimant's condition at the time of the employer's Notice of Ineligibility and because they were more complete. Dr.

² A job analysis is "a detailed description of the physical and other demands of a job or job goal based on direct observation of the job." OAR 436-120-0410(5).

Edelson's restrictions to light category work and restrictions from long-haul truck driving render claimant unable to return to work with the employer at injury and unable to perform the long-haul trucking job outlined in the job analysis. Consequently, RRU correctly rejected the employer's JA and reasonably concluded that claimant was unable to return to regular employment as a truck driver.

The "Law of the Case" Doctrine is Inapplicable

The employer contends that ARU's determination, that claimant was capable of performing medium to medium/light strength level work, is the "law of the case." Further, because the November 17, 2000 Order on Reconsideration was final, RRU was bound by that determination.

The "law of the case" doctrine "is a general principle of law ... that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review." *State v. Pratt*, 316 Or 561, *cert den* 510 US 969, 114, SCt 45, 126 LEd 2d 384 (1993). The director agrees with the hearing officer that the "law of the case" doctrine is inapplicable in this case. However, the director bases her conclusion on the following reasoning.

The employer argued that the Order on Reconsideration was final and, therefore, binding on RRU. Although the employer uses the term "law of the case," its apparent intent is to raise the issue of whether the doctrine of issue preclusion applies. Thus, the question is whether ARU's decision, that claimant had the capacity to perform work in the medium/light category, precludes RRU from finding that claimant was limited to work in the light category.

The doctrine of *res judicata* precludes litigation of claims and issues previously adjudicated. *North Clackamas School District v. White*, 305 Or 38, 50, *modified* 305 Or 468 (1988). *Res judicata* comprises two doctrines, claim preclusion and issue preclusion. Both issue and claim preclusion apply to worker's compensation proceedings. *Drews v. EBI Companies*, 310 Or 134 (1990). Under the rule of claim preclusion, if a claim is litigated to final judgment, the judgment precludes a subsequent action between the same parties on the same cause of action or any part thereof. *Carr v. Allied Plating Co.*, 81 Or App 306, 309 (1986); *See also* Restatement (Second) of Judgments, Secs. 17-19, 24 (1982). The rule of issue preclusion is that if "a claim is litigated to final judgment, the decision on a particular issue or determinative fact is conclusive in a later or different action between the same parties if the determination was essential to the judgment." *White*, 305 Or at 53 (citing *State Farm Fire & Cas. v. Reuter*, 299 Or 155, 158 (1985)).

Claim preclusion does not apply here because the question of extent of permanent disability is not the same claim as the question of entitlement to vocational assistance.

The requirements of issue preclusion include: "1. The issue in the two proceedings is identical. 2. The issue was actually litigated and was essential to a final decision on the merits in

the prior proceeding. 3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue. 4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding. 5. The prior proceeding was the type of proceeding to which [the] court will give preclusive effect.” *Nelson v. Emerald People’s Utility Dist.*, 318 Or 99, 104 (1993) (citations omitted).

The employer, as the party asserting issue preclusion, bears the burden of proof on all five requirements. However, claimant, as the party against whom issue preclusion is sought, has the burden of proving that he did not have a full and fair opportunity to litigate. *Stanich v. Precision Body and Paint, Inc.*, 151 Or App 446, 452 (1997).

The issues are not identical.

A worker is eligible for vocational assistance if he: (1) is unable to return to regular employment as a result of limitations caused by the injury; (2) is unable to return to any other suitable and available work with the employer at injury; and (3) has a substantial handicap to employment. OAR 436-120-0320(8)(c). The vocational assistance rules define “regular employment” as “the employment the worker held at the time of the injury.” OAR 436-120-0005(7). “Suitable employment” means a job for which the worker has the necessary “physical capacities, knowledge, skills and abilities;” is located within a reasonable commuting distance; pays a suitable wage; and is permanent. OAR 436-120-0005(9).

At issue before RRU was whether claimant was able to return to regular or other suitable work. This issue involved determining claimant’s physical capacities to work as a truck driver. Relying on the opinion of claimant’s attending physician over the opinion of the medical arbiter, RRU found that claimant was not released for medium work³ and was not able to return to regular work. The hearing officer found that claimant could not return to regular work with the employer at injury because he could not lift the required 100 pounds.

ARU addressed the issues of premature claim closure, medically stationary date, temporary disability, and extent of permanent partial disability. The extent of disability is calculated based on impairment as modified by factors of age, education and adaptability to perform a job. If the worker is released to or returns to regular work at the job held at the time of injury, then the factors for age, education and adaptability are not considered. ORS 656.214(5); 656.726(4)(f)(A), (D). The disability rating standards define “regular work” as “the job the worker held at the time of injury or employment substantially similar in nature, duties, responsibilities, knowledge, skills and abilities.” OAR 436-035-0005(17).

Adaptability to perform a job is determined by comparing claimant’s base functional capacity (BFC)—his physical capacity before the injury, with his residual function capacity (RFC)—his remaining ability to perform work-related activities. Determining the BFC is made by reference to the Dictionary of Occupational Titles (DOT) for the most physically demanding job that the worker performed within the last five years prior to claim closure. OAR 436-035-0310.

³ RRU relied on the DOT and OED classifications for long-haul truck driver based on the job analysis submitted by the employer. At the time of injury, however, claimant worked as a local delivery truck driver.

Implicit in the Order on Reconsideration was a determination that claimant did not return to regular work.⁴ ARU determined that claimant was “working at a medium physical capacity position as a truck driver (DOT 905.663-014) at the time of injury. *** Therefore, his Base Functional Capacity (BFC) was medium strength level work. The worker is currently capable of medium strength level work with further restrictions which would place him at the medium/light strength level. Therefore, his Residual Functional Capacity (RFC) is for medium/light strength duties. Medium to medium/light equals a value of 2.” (Ex. 20-4). ARU ordered an increased permanent partial disability (PPD) award to 22 percent unscheduled PPD.

The statutes⁵ and rules for determining the extent of disability and those for determining eligibility for vocational assistance are different. Because of these differences, the factual and legal issue in extent of disability cases regarding a worker’s adaptability to perform a given job is not identical to the factual and legal issue in vocational assistance disputes regarding a worker’s ability to return to regular or other suitable employment. There are similarities in that both require a comparison of claimant’s physical capacities before and after the injury. However, the issue in determining adaptability is determining BFC, which does not necessarily entail determining claimant’s regular employment, but rather his highest strength category within the last five years prior to claim closure. Determining claimant’s ability to return to regular work for purposes of vocational assistance focuses on claimant’s specific employment at the time of injury. These issues are not sufficiently similar for purposes of applying issue preclusion.

Issue not actually litigated.

In *Chavez v. Boise Cascade Corporation*, 307 Or 632 (1989), the claimant received a permanent partial disability award. The employer refused to reinstate the claimant to his former position, contending that he was disabled from performing the duties of the position in light of his PPD award. The claimant then brought an unfair employment practice suit in civil court. The court determined that the board’s findings regarding whether the claimant was disabled from performing his previous work was not necessary to the extent of disability decision. Thus, those findings were not essential and did not squarely establish the claimant’s inability to perform his previous work. *Id.* at 637.

Here, claimant’s functional capacity (as determined by BFC and RFC), for the purpose of determining his adaptability in the extent of disability issue, did not directly establish claimant’s inability to perform his regular work. ARU determined claimant’s BFC by reference to the DOT for truck driver. The appropriate DOT was not at issue or litigated. The Order on Reconsideration did not state, other than reference to the DOT, how claimant was found to have worked in a medium capacity work position at the time of injury. Moreover, ARU did not decide whether claimant was able to return to regular work; it only needed to determine that he

⁴ The Notice of Closure stated that claimant had returned to modified work. The medical arbiter noted that claimant had not returned to work as a truck driver.

⁵ The Notice of Closure issued on June 30, 2000, the Order on Reconsideration issued on November 17, 2000, and the Notice of Ineligibility for Vocational Assistance issued on September 22, 2000. The statutes and rules in effect in 2000 apply.

had not returned to regular work. Thus, the issue of claimant's inability to return to his regular work was not actually litigated.

No full and fair opportunity to be heard.

The reconsideration process is mandatory to challenge the employer's Notice of Closure. The reconsideration process is conducted entirely on a written record. The parties must submit all evidence of the extent of disability at reconsideration. *Koskela v. Willamette Industries, Inc.*, (2000) (ORS 656.287(1) and ORS 656.310(2) are inapplicable to hearings on orders on reconsideration). A party that is dissatisfied with the order on reconsideration may request a hearing before a board ALJ under ORS 656.283. ORS 656.268; 656.283. The parties are not permitted to introduce any new evidence, such as oral testimony, cross-examining adverse witnesses, or presenting rebuttal evidence. *Koskela, supra*; *Trujillo v. Pacific Safety Supply*, 181 Or App 302 (2002) (the worker did not have a constitutional right to testify at an oral hearing concerning the rating of his base functional capacity).

In the extent of disability dispute, the Order on Reconsideration was not appealed. Thus, only the written submissions made part of the reconsideration record were considered. There was no oral testimony or vocational evidence regarding claimant's return to work. ARU relied on the opinion of the medical arbiter to determine that claimant was restricted to performing work in the medium/light category. ARU did not consider medical evidence or the job analysis that were generated after claim closure.

Here, the validity and accuracy of the employer's job analysis was disputed. Also disputed was claimant's ability to return to work as a truck driver. This dispute involved weighing the medical and lay evidence. Determining claimant's physical restrictions was based on different facts not before ARU. For example, RRU considered Dr. Edelson's August 1, August 28, and September 28, 2000 reports. ARU did not consider the August 1 or the September 12 reports. These reports, however, placed additional work restrictions on claimant. Claimant testified regarding his inability to return to work as a truck driver, including his inability to do heavy lifting, to lift overhead, and to climb. (Tr. 23, 26-27). Mr. Simpson relied on Dr. Bald's work restrictions, which placed claimant in the medium work category. (Tr. 36) Mr. Simpson testified that claimant was capable of returning to work as a truck driver and that Dr. Bald's restrictions would not preclude driving heavy trucks or long haul trucks. (Tr. 37, 38). In contrast, Ms. Wallace testified that reliance on Dr. Edelson's work restrictions to light duty work was appropriate. In addition to claimant's physical limitations, the vocational dispute also raised questions of whether a specific job would fall in medium or light work category or meet other requirements such as suitable wage. These issues were not litigated in the extent of disability dispute.

Considering the limitations to the record on reconsideration and in light of the testimonial and vocational evidence presented at the hearing on the vocational dispute, the parties did not have a full and fair opportunity to litigate before ARU the issue of whether claimant's work restrictions were in the light category or whether those work restrictions precluded claimant from returning to regular or other suitable work.

The parties are the same.

The fourth element of issue preclusion is not in dispute. The same parties are involved.

The prior proceeding was not the type to which court will give preclusive effect.

In *Nelson, supra*, the court stated:

“Whether an administrative decision has a preclusive effect depends on: (1) whether the administrative forum maintains procedures that are ‘sufficiently formal and comprehensive,’ (2) whether the proceedings are ‘trustworthy’; (3) whether the application of issue preclusion would ‘facilitate prompt, orderly and fair problem resolution’; and (4) whether the ‘same quality of proceedings and the opportunity to litigate is present in both proceedings’.” 318 Or at 104 (citations omitted).

Both the administrative review before RRU and ARU are an informal process. Appeals of the administrative review decisions are to contested case hearings. Administrative Law Judges of the Workers’ Compensation Board (board) hear cases regarding extent of disability, followed by board review and judicial review. ORS 656.283(7); 656.295(5). Hearings on vocational disputes are held by Hearing Officers with the Hearing Officer Panel, followed by an optional exceptions process to the Director of the Department of Consumer and Business Services, followed by judicial review. ORS 656.283(2); OAR 137-003. At the contested case level, the employer is required to be represented by an attorney; a worker may appear *pro se*. The type of proceedings, however, are different. As indicated in the third requirement, the opportunity to litigate is not present in both proceedings. The extent of disability proceeding is more restricted, particular in view of the evidentiary limitations.

The statutory authority for resolving vocational disputes is provided in ORS 656.283. The administrative review before RRU is an informal process, in part, based on RRU’s charge to resolve vocational disputes through nonadversarial procedures to the greatest extent possible. ORS 656.283(2). The proceeding to resolve vocational assistance disputes, however, is also a “classic contested case.” *Colclasure, supra*. Because administrative rules and/or policy were applied to a specific individual interest in vocational eligibility, a substantial hearing and decisional process is required. *Id.* Under ORS 656.283, that process requires an informal investigation and order by RRU;⁶ a hearing officer conducts a hearing at which the parties develop a record, including oral testimony and cross-examination of adverse witness; on the basis of the record developed at hearing, the hearing officer makes independent findings of fact to determine whether any of the factors identified in ORS 656.283(2)(c) were violated. *Id.* at 537. The hearing officer has the responsibility to ensure that the record is fully developed so that it is sufficient for judicial review. ORS 183.415(10). The director reviews pursuant to ORS 656.283(2) under the record developed before the hearing officer. *Id.*

The reconsideration process is outlined in ORS 656.268 and OAR 436-030-0115 through –0185. The reconsideration proceeding before ARU is an informal proceeding and is “the

⁶ A worker need not be represented at the administrative review process. OAR 436-120-0008(1).

procedure established to reconsider a Notice of Closure ... and does not include personal appearances by any of the parties to the claim or their representatives, unless requested by the department.” Former OAR 436-030-0115(3) (WCD Admin. Order No. 97-065). The reconsideration process is mandatory. See *Venetucci v. Metro*, 155 Or 559 (1998). The parties have the responsibility of developing the record on reconsideration. The appellate reviewer determines the extent of claimant’s disability based on the written record, which may consist of medical evidence, written arguments, and sworn affidavits. OAR 436-030-0115, 436-030-0155. ARU has statutory time lines in which to issue its order, to insure an expedited process. ORS 656.268(6); OAR 436-030-0145; *Benzinger v. Oregon Dept. of Ins. and Finance*, 107 Or App 449 (1991) (the time line for completing reconsideration is mandatory). Either party may request a hearing on the order on reconsideration. The hearing is a contested case and is conducted by a board ALJ. Evidence and issues are limited to the record developed at the reconsideration proceeding. ORS 656.283(7); see e.g., *Trujillo, supra*; *Koitzsch v. Liberty Northwest Insurance Corporation*, 125 Or App 666 (1994) (Impairment findings are limited to those from the attending physician, or other physicians with whom the attending physician concurs, or from the medical arbiter.); OAR 436-035-007(14). The board evaluates the worker’s disability as of the date of issuance of the order on reconsideration. ORS 656.295(5).

Given the evidentiary limitations at the reconsideration process and at a subsequent extent of disability hearing, the same quality of proceedings and the opportunity to litigate is not present as in the proceedings to resolve vocational assistance disputes. Considering the evidentiary limitations in challenging the adaptability factor, as discussed in *Trujillo, supra*, claimant’s failure to challenge ARU’s order on reconsideration should not preclude him from challenging the employer’s determination that he was not eligible for vocational assistance on the ground he was able to perform work in the medium work category and thus able to return to his regular work as a truck driver. The hearing officer in this vocational dispute would not be limited by the evidentiary standards imposed on a board ALJ in an extent hearing. The reconsideration process before ARU should not be given preclusive effect in a vocational dispute proceeding.

This conclusion is supported by the legislative intent in creating separate procedural requirements and separate forums for resolving the different disputes. Legislative intent may be another factor in determining whether the proceeding provides an adequate basis to warrant giving preclusive effect. See *State v. Radliff*, 304 Or 254, 260 (1987) (informal DMV license suspension hearing under implied consent law not given preclusive effect). The legislature created the reconsideration process to provide a less formalized level of review, by ARU, of a claim closure in an attempt to reduce the number of hearings and appeals relating to extent of disability. *Jackson v. Tuality Community Hospital*, 132 Or App 182, 186 (1994) *rev den* 321 Or 246 (1995). Reducing litigation was also accomplished by limiting the evidentiary record to the record developed during the reconsideration process. The parties are not permitted to introduce any new evidence, such as oral testimony, cross-examining adverse witnesses, or presenting rebuttal evidence at a hearing on the reconsideration order.

The legislature did not place the same restrictions on vocational dispute proceedings. The court issued its *Colclasure* decision in 1993. In 1995, the legislature amended ORS 656.283(2) to grant the director sole jurisdiction to resolve vocational assistance disputes. See

Michael K. Quinn, 1 WCSR 203, 204 (1996). The contested case procedures were amended to comply with the process and requirements noted in the *Colclasure* decision, including admitting relevant evidence that went to determining the historic facts in the case and making independent findings of fact. *Id.* The different jurisdictional issues and purposes indicate that the legislature intended to require different procedures and that issue preclusion should not apply to vocational dispute proceedings because of the impact on that proceeding.

In sum, although similar, the issues in the two proceedings are not identical; the opportunity and incentive to litigate claimant's adaptability in the reconsideration proceeding is not the same as the issue of claimant's ability to return to regular work for the purpose of determining eligibility for vocational assistance; claimant would have received an award of permanent disability regardless of his adaptability factor; the quality of the proceeding and the opportunity to litigate were not the same in both proceedings; and the reconsideration process was not the type of procedure that should be accorded preclusive effect. Therefore, ARU's determination that claimant was capable of performing work in the medium/light strength category does not preclude claimant from asserting that, for purposes of establishing eligibility for vocational assistance, that he is unable to return to his regular work.

Substantial Handicap

OAR 436-120-0005(8) defines "substantial handicap to employment" as "the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment." Included in a substantial handicap evaluation is an "analysis of the worker's labor market utilizing standard labor market reference materials including but not limited to Employment Department (OED) information ***." OAR 436-120-0340(2)(g).

RRU found that the employer's labor market survey was unnecessary and not credible. Rather, standard reference materials, such as the DOT and the OED, were sufficient to show that the occupation of long haul truck driver was medium work. If standard labor market reference materials are insufficient to make a decision about substantial handicap, then individual labor market surveys can be performed. OAR 436-120-0340(g); 436-120-0410(6). The employer contends RRU erred and abused its discretion by ignoring its labor market survey, which demonstrated claimant was employable as a truck driver.

In response to questions submitted by the agency, RRU explained that the OED data was generally considered sufficient in larger areas to establish whether a reasonable labor market exists. RRU further explained that "[g]iven the statistical unreliability of very small samples, a labor market survey alone is not an adequate substitute for OED data and would serve as a 'rebuttal' to OED data only in the rarest of circumstances. Rather, the labor market survey is useful when the OED data is overly broad." (Ex. 38). Here, the employer's labor market survey consisted of eight positions. Of these, three were dispatching positions, which claimant has no experience.⁷ The dump truck positions exceeded claimant's physical restrictions. Although Dr.

⁷ The labor market survey noted that claimant had several months of experience as a dispatcher. However, based on the record, claimant had no such experience. Mr. Simpson noted that following claimant's injury, he did office work and dispatching for three months. (Ex. 13-2) Claimant told RRU that he never did dispatching; rather, he

Edelson had approved a JA for a long-haul truck driver position, he subsequently restricted claimant from that work. RRU's reliance on the rule, rather on the employer's labor market survey, was not an abuse of discretion.

ATTORNEY FEES

The director adopts and affirms the hearing officer's attorney fee award, as follows:

“Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant's attorney submitted a statement of services listing 27.25 hours at \$200 per hour. Insurer objects to the amount and argues that the fee should be discounted for time claimant's attorney devoted to WCD's transmitted questions. However, I overruled insurer's Motion to Strike claimant's response to the transmitted questions. Therefore, claimant is entitled to a fee for these services. Insurer further argues that claimant's claimed rate of \$200 per hour is excessive. I find that \$200 per hour for an experienced workers' compensation attorney is not unreasonable. Accordingly, considering the factors listed in OAR 438-015-0010(4), I find that \$5,450 is a reasonable fee for claimant's attorney's services in this matter.”

IT IS HEREBY ORDERED THAT the March 25, 2002 Proposed and Final Contested Case Order finding claimant eligible for vocational assistance and awarding an attorney fee is affirmed.

DATED this 8th day of May, 2003.

**CORY STREISINGER, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division