

In the Matter of the Vocational Dispute of

**Shorb, Michael R., Claimant**

Contested Case No: H03-029

**PROPOSED AND FINAL ORDER**

July 15, 2003

SAIF CORPORATION, Petitioner

MICHAEL R. SHORB, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Insurer appeals a January 23, 2003 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division, Department of Consumer and Business Services (WCD or the department) which found claimant had a substantial handicap to employment and set aside insurer's decision that claimant was ineligible for vocational assistance. The matter was referred to the Hearing Officer Panel (Panel)<sup>1</sup> for hearing on March 24, 2003.

On May 15, 2003, Administrative Law Judge Ella D. Johnson conducted a telephone hearing in this matter in Salem, Oregon. Trial Counsel Janelle Irving represented the petitioning insurer SAIF Corporation (insurer or SAIF). Attorney Juli Hall represented respondent Michael R. Shorb (claimant). WCD waived appearance at the hearing. Insurer called vocational rehabilitation counselor Bruce McLean as a witness. Claimant called vocational counselor Areta Sterges as a witness. The record closed on following the hearing.

**ISSUE**

Whether RRU abused its discretion in determining that claimant had a substantial handicap to employment and was eligible for vocational assistance.

**EVIDENTIARY RULING**

The record consists of WCD's Exhibits 1 through 15, insurer's Supplemental Exhibit 16, 19-21 and claimant's Supplemental Exhibits 17 and 18, which were admitted into the record without objection.

**FINDINGS OF FACT**

I adopt the Findings of Fact set forth in the January 23, 2003 Director's Review and Order, with the following supplementation:

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<sup>1</sup> The name of the Hearing Officer Panel was changed to the Office of Administrative Hearings by House Bill 2526 and became effective with the Governor's signature on My 22, 2003.

(1) On April 27, 1997, claimant injured his cervical spine when he fell off the roof while working as a permanent, year-round logging/landing chaser. A 1999 surgery revealed a large herniated disk at C6-7. Claimant returned to his regular work and experienced an aggravation of his C6-7 disc condition on January 9, 1999. A July 27, 2001 Opinion and Order by Workers' Compensation Board (the Board) ALJ Terri Myzak found claimant's aggravation claim compensable. (Ex. 3.) Compensability was also affirmed on review by the Board. (Ex. 6.)

(2) Claimant is 38 years old and lives in Myrtle Point, Oregon. Claimant did not complete high school but earned his GED. He has worked as a logger (landing chaser), carpenter, dairy ranch hand, and construction laborer. (Ex. 8)

(3) Claimant's attending physician, Jeffrey Bert, MD (Orthopedic Surgery), limited claimant's lifting to no more than 30 or 40 pounds. In addition, Dr. Bert noted that claimant was unable to perform overhead work or work on uneven ground. On August 12, 2002, claimant underwent a Physical Capacities Evaluation (PCE). In addition to the limitations set by Dr. Bert, the PCE set claimant's limitations as: sit up to two hours at one time and up to four to five hours in a full day; stand up to 8 hours in a full day; lift up to 40 pounds maximum; frequently lift up to 20 pounds; light/medium work range. (*Id.*)

(4) On September 9, 2002, Bruce E. McLean performed a vocational eligibility evaluation on behalf of insurer. Mr. McLean found that claimant's average weekly wage as a permanent year-round employee<sup>2</sup> was \$258.75, 80 percent of which was \$209.80 or \$6.50 per hour. Mr. McLean determined that although claimant had few transferable skills, he was employable at a wide range of entry level jobs at a weekly wage greater than his adjusted average wage at injury. (*Id.*)

(5) Mr. McLean opined that the following jobs were suitable and available to claimant in the Coos Bay, Oregon area: veneer dryer feeder (DOT # 563.686-014), veneer greenchain offbearer (DOT # 663.686-018), woodworking machine offbearer (DOT # 669.686-034), convenience store clerk (DOT 211.462-014), video rental clerk (DOT # 295.567), security gate tender (DOT # 372.667-030), security guard (DOT # 372.667-034), flagger (DOT # 372.667-022), mini service station attendant (DOT # 915.477-10), and light delivery truck driver (DOT # 906.683-022). The mill jobs and the light delivery truck driver are all classified as medium work, but in his opinion based on his experience, the jobs did not require lifting in the medium range. However, he also opined that the convenience store clerk, video rental clerk, security gate tender, security guard, flagger and mini service station attendant are properly classified as light work. The average wages for these jobs ranged from \$6.50 to \$10.46 per hour. Mr. McLean concluded that these jobs would give claimant an earning capacity greater than 80 percent of his adjusted wage at injury without vocational assistance. Mr. McLean noted that the number of Oregon Employment Department (OED) work orders placed for each category of jobs listed in the Coos Bay area was just a small percentage of the jobs actually available. He opined that claimant was ineligible for vocational assistance because he did not have a substantial handicap

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<sup>2</sup> There was some dispute whether claimant was a seasonal or year-round employee. Mr. McLean computed both scenarios. RRU and claimant's vocational counselor found that claimant was a permanent year-round employee.

to employment. Mr. McLean based his opinion primarily on his own observations and experience,<sup>3</sup> with some reference to the Dictionary of Occupational Titles (DOT).<sup>4</sup> He did not analyze whether there was a reasonable opportunity for claimant to be employed in these jobs given his lack of experience and physical limitations because, in his view, it was not required by the rules.<sup>5</sup> (Ex. 8; test. of McLean.)

(6) After claimant's vocational counselor performed a labor market survey, Mr. Mclean performed a sample survey of the jobs in the Coos Bay area that he had listed as suitable employment to determine if the employer filed work orders with OED, if there were jobs available during the period that he performed claimant's eligibility analysis, and whether the employer required experience when considering an applicant for an entry level job. (Ex. 16 at pages 7-11; test. of McLean.) He did not ask or consider whether claimant would be competitive in obtaining these jobs without experience, even if no experience was required by the employer. (Test. of Sturges.)

(7) On September 16, 2002, insurer notified claimant that he was ineligible for vocational assistance and claimant filed a request for review by the department. (Exs. 9, 10.) On November 27, 2002, insurer closed claimant's claim with an award of 19 percent (60.80 degrees) permanent partial unscheduled disability. (Ex. 11.)

(8) On January 9, 2003, RRU Vocational Consultant Andre Allen performed a suitable employment analysis on behalf of the director of the department. Mr. Allen found after reviewing the physical requirements for each job as noted in the DOT and the actual employment opportunities in the Coos Bay area (District 7), that the machine feeder and offbearer jobs were not physically suitable employment for claimant because the jobs were classified as "medium" or jobs that required lifting up to 50 pounds and claimant was limited to 40 pounds. He also found that, although the convenience store clerk job was sedentary or light, most of the job orders were for only 30 hours per week and required cashiering and/or cash handling experience, which claimant did not have. Mr. Allen rejected the flagger job as suitable employment for claimant because there were no current job currently available and those which were previously listed were part-time or on call which would not provide claimant with opportunities for year-round permanent employment. He also rejected the video rental clerk because there were no jobs currently available and the ones previously listed required customer service, cash-handling and computer skills, none of which claimant had. Mr. Allen found the security guard job unsuitable

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<sup>3</sup> Mr. McLean conceded that there was no rule or other legal authority which allowed him to interject his own experience into claimant's eligibility evaluation. He also represented that he had observed all of the jobs he found suitable for claimant but could not recall when he observed the jobs and which ones were observed in the Coos County area. (Test. of McLean.)

<sup>4</sup> The Dictionary of Titles (DOT) and supplements are published by the U.S. Department of Labor. The DOT contains 13,000 job titles which are classified by the physical requirements needed to perform the job. The classifications of physical requirements are light, medium and heavy work. There is no light/medium category. (Test. of McLean and Sturges.)

<sup>5</sup> Mr. McLean stated that there was no requirement in the rules mandating an analysis of whether there was a reasonable opportunity for claimant to be employed in these jobs.

because claimant had no prior security, law enforcement, or casino experience and many, if not most, of the jobs required that experience. Finally, he found the light delivery truck driver job was physically unsuitable because it was a medium category job. He also found that the service station attendant job was not suitable because the job was a medium category job and claimant did not have the required verifiable cash handling and customer service experience. Mr. Allen based his analysis on the DOT, OED's Occupational Program Planning System (OPPS) of the Occupational Projects Handbook 2000-2008, the Oregon Automated Reporting System (OARS) and recent job orders placed OED's branch offices. (Ex. 13.)

(9) On May 14, 2003, vocational counselor Areta Sturges<sup>6</sup> performed a substantial handicap analysis at claimant's request. In performing her analysis, Ms. Sturges reviewed the January 23, 2003 Director's Review and Order, insurer's September 16, 2002 Notice of Ineligibility, Mr. McLean's September 9, 2002 Eligibility Evaluation, and Mr. McLean's May 1, 2003 response to the Director's Review and Order. She used the same analysis as Mr. Allen and found no abuse of discretion or errors in Mr. Allen's analysis.<sup>7</sup> She also performed research using the DOT, OARS District 7 data and the OPPS District 7 data and reviewed the job activities of claimant's previous jobs, identified claimant's transferable job skills and his physical limitations and performed a labor market survey.<sup>8</sup> Ms. Sturges had previously performed job analyses in the Coos County area on many of the jobs listed by Mr. McLean as suitable because most of her vocational work was in District 7. She also considered whether an occupation offered reasonable opportunities for employment. Ms. Sturges noted that in order for an occupation to offer reasonable opportunities for employment in District 7, the occupation statistics should show employment projections of 10 employed with five openings per year, a 10 percent or less unemployment rate, and a growth of 1.67 percent. (Ex. 18; test. Of Sturges.)

(10) Ms. Sturges opined that that the mill jobs listed by Mr. McLean were not suitable because the jobs were classified as medium work, exceeded claimant's lifting limitations and involved overhead reaching. She further found that, because the mill jobs required constant lifting of 10 pounds and up to 35 pounds with the green chain offbearer in a production environment, the jobs were beyond claimant's limitations. She also opined that the convenience store clerk job was likewise unsuitable because it required reaching overhead to stock cigarettes and candy and to restock the shelves with items weighing over 50 pounds, which was also beyond claimant's physical abilities. Ms. Sturges also noted that the convenience store clerk usually required prior cashier experience. She found that there were not a reasonable number of

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<sup>6</sup> Ms. Sturges owns her own vocational consulting firm, Sturges Vocational Consultants, Inc., and supervises several vocational consultants.

<sup>7</sup> The only factual error Ms. Sturges found in Mr. Allen's decision was that the commuting distance from Myrtle Point to Coos Bay was not unreasonable given that many residents make the commute in order to find employment.

<sup>8</sup> Ms. Sturges testified that the DOT is the authority on the level of strength required for a job, unless the job is so different that the DOT does not apply. She also stated that, if she was unable to determine whether a job was within a client's physical limitations, she would send a copy of the job analysis to the client's physician.

convenience store clerk jobs available and that she had never placed anyone in a convenience store clerk job without experience. Ms. Sturges found the flagger job unsuitable because the job was temporary in nature, occasionally required overhead reaching and often required walking on uneven terrain. She also found the security guard/gate tender to be unsuitable for the same reasons. Additionally, she noted that the security guard/gate tender did not meet the criteria for reasonable employment opportunities because the market survey indicated that there was greater than a 10 percent unemployment rate and less than a 1.67 percent growth rate in the job. The light truck delivery driver job was classified as medium work and exceeded claimant's limitations. Ms. Sturges determined that the video rental clerk was unsuitable because it required the ability to type, use a computer and classify movies by type as well as the need to perform overhead reaching. Finally, she noted that automobile self-service attendant job (DOT # 915.447-010) was not available in Oregon and instead used automobile service station attendant (DOT # 915.467-010), which exceeded claimant's physical limitations because it was classified as medium work. She concluded that that jobs that Mr. McLean used to disqualify claimant for vocational assistance were either beyond his physical limitations or did not provide reasonable opportunities for employment. (*Id.*)

### CONCLUSIONS OF LAW

RRU correctly determined that claimant had a substantial handicap to employment and is eligible for vocational assistance.

### OPINION

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). I conclude that SAIF has failed to meet its burden.

Pursuant to ORS 656.340(1), an insurer is required to provide vocational services to workers who are eligible. ORS 656.340(6)(a) states:

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.

A substantial handicap to employment occurs when "the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed at suitable employment." *Former OAR 436-120-00059(11)*. "Suitable employment" means employment for which the worker has the "necessary physical capacity, knowledge, skills and abilities" and which is:

(b) Located where the worker customarily worked or within reasonable commuting distance of a worker's residence. A reasonable commuting distance is no more than 50 miles one-way modified by other factors, including but not limited to:

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(D) Commuting practices of other workers who live in the same geographic area; and

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*Former* OAR 436-120-0005(12).

RRU set aside insurer's notice of ineligibility because it concluded that claimant has a substantial handicap to employment. SAIF contends that RRU's decision reflects an abuse of discretion. Specifically, SAIF argues that RRU abused its discretion by using inadequate information, *i.e.* the job orders filed with OED, as a basis for its analysis when those jobs represent only a small portion of the jobs available in Oregon. SAIF also argues that RRU abused its discretion in concluding that the jobs listed in Coos Bay were not suitable because they were not within a reasonable commuting distance from claimant's residence in Myrtle Point. Finally, SAIF argues that RRU abused its discretion by discounting the automobile service station attendant and the convenience store clerk jobs because RRU determined that those jobs required prior experience.

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).

To begin, I do not find SAIF's argument that RRU abused its discretion by relying on OED's job orders to be persuasive. There is no rule or other authority which requires RRU to use a different data base in determining whether jobs are available, even if one exists. Although I do find that RRU was mistaken in failing to take into consideration the commuting practice of other workers who live in Myrtle Point to commute as far as Coos Bay, I do not find that this rises to the level of abuse of discretion given the facts of this case. Therefore, I likewise do not find SAIF's argument in this regard to be persuasive. Finally, I am not persuaded by SAIF's argument that RRU abused its discretion by discounting the automobile service station attendant and the convenience store clerk jobs because RRU found that those jobs required prior experience. I am, however, persuaded by RRU's analysis of the two jobs, as supported by Ms. Sturges' testimony, that claimant would not be competitive in obtaining those jobs because of the lack skills identified by RRU.

The record contains the opinions of Mr. McLean, RRU and Ms. Sturges. Mr. McLean opined that the jobs of veneer dryer feeder, veneer greenchain offbearer, woodworking machine,

convenience store clerk, video rental clerk, security gate, security, flagger, mini service station attendant, and light delivery truck driver were suitable and available to claimant. However, Mr. McLean based his opinion primarily on his own observations and experience, with some reference to the DOT. Mr. McLean's personal observations and experiences are not verifiable. I also note that Mr. McLean did not send a job analysis to Dr. Bert for a determination of whether the medium jobs he identified as suitable were really within claimant's physical limitations. Therefore, I discount his opinion. I also discount his opinion because he did not analyze whether there was a reasonable opportunity for claimant to be employed in these jobs given his lack of experience and physical limitations. This is a matter of common sense; if claimant does not have a reasonable opportunity to obtain the jobs in question because he can not compete with other applicants due to his lack of skills, then the jobs are not really available to him.<sup>9</sup>

On the other hand, RRU based its analysis on the information found in the DOT, OPSS, OARS District 7 data and recent job orders placed OED's branch offices. RRU found that the machine feeder and offbearer jobs were not physically suitable employment for claimant because the jobs were classified by the DOT as "medium" or jobs that required lifting up to 50 pounds and claimant was limited to 40 pounds. RRU also found that, although the convenience store clerk job was sedentary or light, most of the job orders were for only 30 hours per week and required cashiering and/cash handling experience, which claimant did not have. RRU rejected the flagger job as suitable employment for claimant because there were no jobs and those which were previously listed were part-time or on-call which would not provide claimant with opportunities for year-round permanent employment. RRU also rejected the video rental clerk because there were no jobs currently available and the ones previously listed required customer service, cash-handling and computer skills, none of which claimant had. RRU determined that security guard job was unsuitable because claimant had no prior security, law enforcement, or casino experience and many, if not most, of the jobs required that experience. Finally, RRU found the light delivery truck driver and service station jobs were physically unsuitable because they were classified by the DOT as medium work. Claimant also did not have the required verifiable cash handling and customer service experience needed for the service station attendant, whether it was a mini gas station attendant or a full service station attendant job.

RRU's analysis was identical to the analysis performed by Ms. Sturges. She also performed labor market research using the DOT, OARS District 7 data and the OPSS District 7 data along with a review of the job activities of claimant's previous jobs, transferable job skills, and physical limitations. I note that Ms. Sturges had previously performed job analyses in the Coos County area on many of the jobs listed by Mr. McLean as suitable because most of her vocational work was in District 7. She also considered whether an occupation offered reasonable opportunities for employment. Based on her analysis, Ms. Sturges opined consistent with RRU's decision, that the mill jobs listed by Mr. McLean were not suitable because they exceeded claimant's lifting limitations and involved overhead reaching. She further found that, because the mill jobs required constant lifting of 10 pounds and up to 35 pounds with the green chain offbearer in a production environment, the jobs were beyond claimant's limitations. She also

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<sup>9</sup> Mr. McLean did perform a sample survey of the jobs in the Coos Bay area, but in his survey he did not ask or consider whether claimant would be competitive in obtaining these jobs without experience, even if no experience was required by the employer.

opined that the convenience store clerk job was likewise unsuitable because it required reaching overhead to stock cigarettes and candy and to restock the shelves with items weighing over 50 pounds, which was also beyond claimant's physical abilities. In addition, Ms. Sturges noted that the convenience store clerk usually required prior cashier experience. She found that there were not a reasonable number of convenience store clerk jobs available.<sup>10</sup> Ms. Sturges found the flagger job unsuitable because the job was temporary in nature, occasionally required overhead reaching and often required walking on uneven terrain. She also found the security guard/gate tender to be unsuitable for the same reasons. Additionally, she noted that the security guard/gate tender did not meet the criteria for reasonable employment opportunities. She determined that the light truck delivery driver job was classified as medium work by the DOT, and therefore, exceeded claimant's limitations. Ms. Sturges determined that the video rental clerk was unsuitable because it required the ability to type, use a computer and classify movies by type as well as the need to perform overhead reaching. Finally, she determined that the automobile service station attendant job exceeded claimant's physical limitations because it was classified as medium work.

Because of its thorough substantial handicap analysis, I find the opinion of RRU, which is consistent with Ms. Sturges' opinion, more persuasive and conclude that RRU correctly found that claimant has a substantial handicap to employment and consequently is entitled to vocational assistance. Moreover, I do not find that RRU's decision reflected an abuse of discretion. Accordingly, RRU's order is affirmed.

#### **ATTORNEY FEES**

Claimant has successfully defended RRU's decision that he is entitled to vocational assistance and is therefore entitled to an assessed attorney fee. 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 \$1,235.

#### **ORDER**

*IT HEREBY ORDERED* that RRU's January 23, 2003 Director's Review and Order is affirmed. Insurer shall pay claimant's attorney an assessed fee of \$1,235.

Dated this 15<sup>th</sup> day of July 2003 at Salem, Oregon.

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Ella D. Johnson, Administrative Law Judge  
Office of Administrative Hearings

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<sup>10</sup> Ms. Sturges also noted that she had never placed a worker in a convenience store clerk position without prior experience.