

In the Vocational Assistance Dispute of

Rick E. Spitzer, Claimant

Contested Case No: H02-124

FINAL ORDER

July 14, 2003

RICK E. SPITZER, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On April 30, 2003, Petitioner filed a Petition for Judicial Review of the February 18, 2003 Proposed and Final Contested Case Hearing Order. Petitioner filed an amended petition on May 12, 2003. On May 29, 2003, the Workers' Compensation Division withdrew the proposed order for purposes of reconsideration. Upon reconsideration, the only modification made to the proposed order is the analysis regarding "Law of the Case" (proposed order, page 5). The issue is re-framed as one of issue preclusion, but the conclusion remains unchanged. The February 18, 2003 Proposed and Final Contested Case Hearing Order is otherwise adopted and re-published here in its entirety.

Some legal text

HISTORY OF THE CASE

Claimant appeals a November 18, 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 January 23, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Attorney Michael A. Gilbertson represented petitioner Rick E. Spitzer (claimant). Attorney Michael G. Fetrow represented respondent, SAIF Corporation (insurer). WCD waived appearance at hearing. Claimant testified on his own behalf 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 is ineligible for vocational services.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 15 as well as insurer's Supplementary Exhibit A were admitted into the record without objection. Also, the parties stipulated that the Opinion and Order dated September 11, 2002 is currently pending on appeal before the Workers' Compensation Board. Finally, insurer objected to claimant's testimony, arguing that it was not relevant within the limited scope of review specified by ORS 656.283(2)(c). I overruled the objection pursuant to *Colclasure v. Washington County School District*, 317 Or 526 (1993) (Within statutory scope of review, administrative law judge may admit evidence that was not before the department and make independent findings of fact). Finally, the parties stipulated that the September 11, 2002

Opinion and Order (Ex. A) is currently on appeal.

FINDINGS OF FACT

(1) Claimant has a high school education and has worked in heavy construction and demolition. (Testimony of claimant.) On December 21, 2000, claimant suffered a compensable injury while performing heavy demolition work in a lifting basket on a three-story roof. (Exs. A and 1; testimony of claimant.) Insurer accepted the following as compensable conditions: left wrist contusion and sprain, left shoulder sprain and SLAP lesion, and chest wall contusion. (Exs. 6 and 11-4.)

(2) On March 12, 2001, Mark J. Buehler, MD diagnosed claimant's left wrist condition as a malunion of the left distal radius secondary to the fracture many years earlier. Dr. Buehler opined that the work December 2000 work injury may have exacerbated the pre-arthritis problem of the left wrist. (Ex. 3.)

(3) On July 30, 2001, Robert E. Tennant, MD treated claimant for left wrist pain secondary to post traumatic arthritis. Dr. Tennant wrote, "I told him that the trouble he is having with his wrist extends from the injury 15 years ago when he fell from a cliff and not from the injury where he hurt his shoulder in December of 2000." (Ex. 5-1.)

(4) On September 12, 2001, Stephen L. Brenneke, MD released claimant to full duty without restrictions. (Ex. 7.) Dr. Brenneke opined,

He has not returned to his previous form of employment and this is related to a right wrist fracture, which was nonindustrial, and a left wrist injury which is *presumed to be treated with fusion of the left wrist*. At the present time the patient could do his job based upon this left shoulder problem. I find no evidence of restriction based upon the left shoulder problem. His claim can be closed without evidence of permanent partial impairment to the left shoulder related to his industrial injury. No further treatment is indicated. (Ex. 8.)

(5) On September 14, 2001, Dr. Brenneke stated that claimant could return to work as a demolition worker. (Ex. 6.)

(6) On September 19, 2001, insurer issued a Notice of Ineligibility for Vocational Assistance; claimant appealed (Exs. 9 and 10.)

(7) On November 14, 2001, insurer issued a Notice of Closure listing the medically stationary date as September 12, 2001 and awarding zero permanent partial disability (PPD). (Ex. 11.)

(8) On January 9, 2002, James Harris, MD examined claimant at WCD's request. (Ex. 12.) He opined that no restriction was appropriate for the left shoulder. He further opined that a restriction for repetitive use of the left wrist was appropriate but he attributed the left wrist

restriction in major part to a nonindustrial injury claimant suffered fifteen years ago. Dr. Harris stated:

It is my opinion that the current status of the left wrist is due to both the fracture 15 years ago and the injury of 12/21/00. It is my opinion that any findings of impairment are mostly (75%) due to the earlier fracture and resultant healing. This opinion is based on the fact that the earlier left wrist injury was much more severe, being a fracture involving the wrist joint. Furthermore, both Dr. Tennant and Dr. Buehler make mention that his current symptoms are due mostly to the old injury and resultant degenerative changes. (Ex. 12-4.)

(9) In an Order on Reconsideration dated February 22, 2002, WCD affirmed the medically stationary date and awarded 5 percent unscheduled permanent partial disability for the left shoulder and 3 percent scheduled permanent partial disability for the left wrist. (Ex. 13-4.)

(10) On September 11, 2002, Workers' Compensation Board Administrative Law Judge Abigail Herman issued an Opinion and Order affirming insurer's compensability denial of a left wrist scapholunate ligament tear. (Ex. A-6.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible 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) and (b)(A) provide:

(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.

(b) As used in this subsection:

(A) 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.

(Emphasis added.)

OAR 436-120-0330(5) lists the conditions for eligibility and provides:

(5) **As a result of the limitations caused by the injury or aggravation, the worker:**

(a) **Is not able to return to regular employment;**

(b) Is not able to return to any other suitable and available work with the employer at injury or aggravation; and

(c) Has a substantial handicap to employment and requires assistance to overcome that handicap.

(Emphasis added.)

RRU determined that claimant was ineligible for vocational assistance because attending physician Brenneke released him to regular demolition work. RRU relied on the opinions of Dr. Brenneke, Dr. Buehler and Dr. Tennant attributing claimant’s left wrist problems to a nonindustrial injury that occurred many years before the work injury. Also, RRU noted that medical arbiter Harris apportioned the cause of claimant’s left wrist impairment 25 percent to the work injury and 75 percent to the old, nonindustrial injury.

Claimant first contends that RRU abused its discretion by ignoring the law of the case. Claimant next contends that the administrative order reflects a legal error because ORS 656.340 does not contain a major contributing cause requirement for establishing vocational assistance eligibility. In contrast, insurer contends that the doctrine of the law of the case does not apply to claimant’s previous permanent partial disability award. Insurer further contends that the medical evidence fails to establish a causal link between the work injury and claimant’s impairment.

Law of the Case / Issue Preclusion

The Appellate Review Unit's February 12, 2002 Order on Reconsideration, awarding claimant 3% scheduled permanent partial disability for loss of use or function of the left wrist, was not appealed and is therefore final. Claimant argues that the law of the case, then, is that claimant is limited in his ability to repetitively use his left wrist, and that limitation entitles him to vocational assistance (Hearing Transcript 6, 26). The hearing officer, after discussing the law of the case doctrine, held that it does not apply to bind the Rehabilitation Review Unit to the findings of the Appellate Review Unit. The hearing officer cites previous director's orders of *Calvin Ott*, 7 WCSR 80 (2002),¹ *Kurt Vandervort*, 7 WCSR 148 (2002),² and *Mark Hardman*, 7 WCSR 22 (2002).³

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 "law of the case" does not apply to bind the Rehabilitation Review Unit to the findings of the Appellate Review Unit, and vice versa. One unit is not inferior or superior to the other. Although claimant and the hearing officer use the phrase "law of the case" here, the underlying issue is whether the Appellate Review Unit's order and award preclude the Rehabilitation Review Unit from making an independent finding regarding claimant's eligibility for vocational assistance under the doctrine of issue preclusion.

Relitigation of an issue in a subsequent proceeding may be precluded if five elements are met: "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). Applying these five elements here, issue preclusion does not apply between the Appellate Review Unit and the Rehabilitation Review Unit.

The issues are not identical.

A worker is eligible for vocational assistance if, as a result of limitations caused by the injury: (1) the worker is unable to return to regular employment; (2) the worker is unable to

¹ The director subsequently issued a Final Order affirming the proposed order. *Calvin Ott*, 7 WCSR 307 (2002). The director agreed that issue preclusion does not bind the Rehabilitation Review Unit to the findings of the Appellate Review Unit regarding the worker's regular employment.

² The director subsequently issued an Order of Dismissal following the parties' settlement of all issues. *Kurt E. Vandervort*, 7 WCSR 333 (2002).

³ The director subsequently issued a Final Order on Reconsideration, agreeing that law of the case does not apply but analyzing the issue as one of issue preclusion. (*Amended Order on Reconsideration*, May 8, 2003.)

return to any other suitable and available work with the employer at injury; and (3) the worker has a substantial handicap to employment.⁴ ORS 656.340(6)(a); OAR 436-120-0320(9)(c). “Regular employment” is the employment the worker held at the time of the injury. ORS 656.340(5); OAR 436-120-0005(10). A “substantial handicap to employment” means the worker, because of the injury, lacks the necessary physical capacities, knowledge, skills, and abilities to be employed in suitable employment. ORS 656.340(6)(b); OAR 436-120-0005(11). The Rehabilitation Review Unit upheld the insurer’s denial of vocational assistance eligibility concluding that because the attending physician released claimant to regular work without limitations, the claimant was able to return to regular work and therefore is ineligible under the rules.

Claimant’s eligibility for vocational assistance, if any, arises from the injury to his left wrist. A worker is entitled to scheduled permanent partial disability for the wrist if the worker has a loss of use or function of the injured wrist. ORS 656.214(2); OAR 436-035-0010(2). The worker’s work status or ability to return to work is not considered as a factor. *Cf.* ORS 656.214(5); OAR 436-035-0270(3). The Appellate Review Unit, after applying the standards and considering the medical arbiter report, awarded claimant 5% impairment for significant limitation in repetitive use of his left wrist. OAR 436-035-0010(5). This award was based on the arbiter’s report that a restriction in repetitive use of the left wrist is appropriate. (Ex. 12-4.) After considering impairment for range of motion (7%), loss of sensation (0%), and loss of strength (0%), the final impairment value was calculated at 12%. (Ex. 13-2.) The total was apportioned based on the arbiter’s finding that only 25% of the impairment was attributable to the worker’s accepted condition, for a final award of 3% scheduled permanent partial disability for loss of use or function of the left wrist. (Ex. 13-3.) The claimant’s return to work status or ability to work was not considered as to his scheduled award.⁵

The statutes and rules for determining eligibility for vocational assistance and those for determining the extent of disability are different. The factual and legal issues before the Rehabilitation Review Unit were not identical to the factual and legal issues before the Appellate Review Unit.

Issue not actually litigated nor essential.

The issue of whether claimant was able to return to regular work was not actually litigated before the Appellate Review Unit. As noted above, claimant’s return-to-work status and ability to work were not factors in determining the extent of his scheduled permanent partial disability. Claimant argues that he is not able to return to regular work because of the limitation on repetitive use of his left wrist. While the Appellate Review Unit awarded 5% impairment (before apportionment) for significant restriction in repetitive activities, the issue of whether this restriction prevented claimant from returning to regular employment was not addressed and was not essential to a final decision regarding the extent of scheduled disability.

⁴ The worker must also be authorized to work in the United States and available in Oregon. OAR 436-120-0320(9)(a), (b).

⁵ His return to work status and work history were considered as to his unscheduled award for his left shoulder. However, his left shoulder condition is not at issue in the vocational dispute.

While claimant's return to work status was relevant in determining the extent of unscheduled permanent partial disability related to his left shoulder, the Order on Reconsideration did not make an explicit finding that claimant was unable to return to work. Rather, the order states, "there is no evidence in the record that the worker has returned to his regular work, accordingly, the social factors are assessed." (Ex. 13-3). In this case, the Appellate Review Unit merely referred to the evidence in the record in deciding which factors to apply in determining the extent of his unscheduled permanent disability. Whether claimant actually could return to work was not an issue that was litigated or decided before determining the extent of claimant's disability.

The parties are the same.

The same parties are involved in the vocational assistance eligibility dispute before the Rehabilitation Review Unit as were involved in the reconsideration proceeding before the Appellate Review Unit.

The prior proceeding was not the type to which court should give preclusive effect. No full and fair opportunity to be heard.

If a worker objects to a Notice of Closure, the worker must first request reconsideration by the director. ORS 656.268(5)(c). Only one reconsideration proceeding may be held on each Notice of Closure. ORS 656.268(6)(a). The reconsideration record consists primarily of written submissions. The worker may submit a deposition of the worker about the worker's condition at the time of claim closure, which shall become part of the reconsideration record. ORS 656.268(6)(a)(A). The worker or the insurer may correct information in the record that is erroneous and may submit any medical evidence that should have been but was not submitted by the attending physician at the time of claim closure. ORS 656.268(6)(a)(B). The reconsideration record may also contain a medical arbiter's report, if impairment is at issue. ORS 656.268(6)(f), (7)(a). The insurer may fully participate in the reconsideration proceeding. ORS 656.268(6)(e).

The reconsideration proceeding is to be completed within 18 working days from the date it begins, or within an additional 60 calendar days if a medical arbiter review is conducted or if additional information is required. ORS 656.268(6)(b), (d). One additional postponement is authorized if the worker fails to attend or to cooperate with the arbiter examination. ORS 656.268(7)(e)(B).

If any party objects to the reconsideration order, the party may request a hearing under ORS 656.283 within 30 days of the order. ORS 656.268(6)(g). But after reconsideration, no subsequent medical evidence of the worker's impairment is admissible in any subsequent proceeding, for purposes of making findings of impairment. ORS 656.268(7)(h). In addition, no hearing shall be held on any issue that was not raised in the reconsideration proceeding, unless the issue arises out of the reconsideration order itself. ORS 656.268(8).

In a vocational eligibility dispute, the insurer makes the initial determination of the worker's eligibility for vocational assistance, based on the report of a vocational consultant certified by the director. ORS 656.340(4), OAR 436-120-0320(6). If the insurer decides that the

worker is ineligible, the worker may apply to the director for review within 60 days. ORS 656.283(2)(b), 656.340(4), OAR 436-120-0008(1). All parties must provide the director with information as requested, and the director may require the insurer to schedule and pay for “any medical or vocational tests, consultations, or reports required by the director.” OAR 436-120-0008(1)(a), (b). The parties have the opportunity to present evidence to the director. OAR 436-120-0008(1)(f). A certified vocational counselor shall perform a substantial handicap evaluation as part of the eligibility determination, addressing factors enumerated in the rules. OAR 436-120-0340(1), (2). If requested by the worker or by the insurer, a physical capacities evaluation must be performed by the attending physician “in conjunction with vocational assistance or determination of eligibility for such assistance.” ORS 656.340(15).

The director shall complete the review “within a reasonable time.” ORS 656.283(2)(b). Unless the parties reach an agreement, the director must issue a written order containing findings of fact and conclusions of law, “based on a record sufficient to permit review” at a contested case hearing by the director. ORS 656.283(2)(b).

The parties have 60 days from the issuance of the order to request a contested case hearing before the director. ORS 656.283(2)(d), OAR 436-120-0008(1)(f). The director’s review of the administrative order is a “classic” contested case. ORS 656.283(2)(c), OAR 436-120-0008(2)(c). *See Colclasure v. Wash. County School Dist. No. 48-J*, 317 Or 526 (1993). At that hearing, additional evidence may be adduced and additional findings of fact may be made. *Colclasure*, 317 Or at 537; *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or App 37 (1999). The director’s contested case order is subject to judicial review. ORS 656.283(2)(d).

The reconsideration proceeding is informal and expedited compared to the more formal and comprehensive vocational assistance dispute proceeding. As such, the reconsideration proceeding is not the type that should be given preclusive effect. The evidentiary record is primarily written, and closes before hearing. In contrast, the vocational assistance review may be challenged in a contested case hearing where an evidentiary record is developed. The nature of the reconsideration proceeding also does not afford the parties a full and fair opportunity to be heard on the issues presented in a subsequent vocational-eligibility proceeding.

In sum, the Appellate Review Unit’s award of 5% (before apportionment) scheduled permanent partial disability for restrictions on repetitive use of the left wrist does not preclude the Rehabilitation Review Unit from finding that claimant is able to return to regular work. The issues in the two proceedings were not identical and were not actually litigated nor essential to the determination of the extent of his permanent disability; there was not an opportunity to be fully and fairly heard on his ability to return to regular work in the reconsideration proceeding; the parties to the two proceedings are the same; and the reconsideration proceeding is not the type which should be given preclusive effect. The doctrine of issue preclusion does not apply here.

Causation

Claimant correctly points out that ORS 656.340 does not require claimant to establish that the work injury was the major contributing cause of his physical impairment or work

restrictions. However, ORS 656.340(6)(b) requires establishment of a causal link between the compensable work injury and claimant's eligibility for vocational assistance. Furthermore, in enacting ORS 656.726(4)(a)⁶, the legislature authorized the director to promulgate administrative rules to govern the provision of vocational assistance to injured workers. The plain meaning of OAR 436-120-0330(5) lists the conditions of eligibility including the inability to return to regular work as a result of the limitations caused by the work injury.

Here, attending physician Brenneke released claimant to regular work. Furthermore, the weight of medical evidence, including the opinions of attending physician Brenneke, Dr. Buehler and Dr. Tennant establishes that claimant's left wrist impairment was not caused by the work injury. Only Dr. Harris apportioned causation of the left wrist impairment between the industrial and nonindustrial injuries. On the other hand, the only medical evidence contained in the record that supports a causal link between the work injury and the impairment is Dr. Harris' opinion which attributed 25 percent causation to the work injury. Based on the record, I find that claimant has failed to establish a causal link between the work injury and his left wrist impairment, and therefore, is ineligible for vocational assistance.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

The February 18, 2003 Proposed and Final Contested Case Hearing Order, affirming the November 18, 2002 Director's Review and Order, is adopted except that portion discussing "Law of the Case," which is modified as discussed above.

⁶ ORS 656.726(4)(a) provides:

(4) The director hereby is charged with the duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may:

(a) make and declare all rules and issue orders which are reasonably necessary in the performance of the director's duties.