

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

**Tran, Tin T., Claimant**

Contested Case No: H02-119

**PROPOSED AND FINAL ORDER**

April 10, 2003

TIN T. TRAN, Petitioner

SAFECO INSURANCE CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Claimant appeals a November 14, 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 February 11, 2003, Administrative Law Judge Paul Vincent conducted a hearing in this matter. Attorney Daniel Snyder represented petitioner Tin T. Tran (claimant). Khanh Bui served as interpreter and was qualified pursuant to ORS 45.275. Attorney Neil Jones represented respondent SAFECO Insurance Corporation (insurer) and its insured, Dieter Franck Incorporated (employer at injury). WCD waived appearance at hearing. Jason O'Ballie, Arnulfo Alvarez, Charles Bland and Tayet Vo testified on claimant's behalf. Joe Vodt, Sergio Ovalle, Jim Hopkins and Ken Mulhair testified on insurer's behalf. The record closed on March 21, 2003 with receipt of a supplementary exhibit.

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 11 and 13 through 23 as well as insurer's Supplementary Exhibit A were admitted into the record without objection. WCD Exhibit 12 was admitted over claimant's hearsay and reliability objections. Insurer's Supplementary Exhibits 6A, 7A, 8A, 8B, 8C, 10A, 24 and 25 were admitted into the record without objection. Insurer's Supplementary Exhibit 7A was admitted into the record over claimant's hearsay objection. Insurer's Supplementary Exhibits 8C, 24 and 25 were admitted into the record over claimant's hearsay, lack of foundation and reliability objections.

## FINDINGS OF FACT

(1) Claimant began working for the employer at injury in 1978. (Ex. 12-6; testimony of claimant.) He worked as a cabinetmaker and supervised a crew of 15 to 60. (Ex. 11-1; testimony of claimant.) Claimant communicated effectively in English with his crew, supervisors and managers. (Testimony of Mulhair, Vodt and Hopkins.)

(2) On September 29, 1999, claimant suffered a finger injury. (Ex. 1; testimony of claimant and Mulhair.) Insurer accepted a disabling claim for 2CM laceration right third finger, tuft fracture right third finger with secondary infection. (Exs. 3-4 and 8-4.)

(3) Claimant returned to modified work ten days after the injury, wearing a finger splint. (Exs. 2-1, 4-1, 12-2, 19-3 and 19-4.) Due to a finger infection, he missed several days of work in October 1999 and then returned to full duty. (Exs. 12-2 and 19-4.) Claimant was released to regular work without restriction on November 25, 1999. (Ex. 12-7.)

(4) On February 11, 2000, attending physician Morris Button, MD declared the condition medically stationary. Claimant continued to work wearing a bandaid over the third finger. (Ex. 2-1.)

(5) Following closure of the initial claim and an aggravation claim, claimant was awarded 84% permanent partial disability (PPD) for loss of use of the right third finger. (Exs. 3, 5, 6, 8, 12-3 and 21.)

(6) On April 25, 2000, Peter A. Nathan, MD conducted a medical arbiter's examination and noted that claimant continued to work and experienced hypersensitivity and cold intolerance in the right third finger. (Ex. 4.)

(7) On June 30, 2000, claimant voluntarily terminated his job with the employer at injury because his manager asked claimant to keep his crew on the job overtime on short notice. (Exs. 12-2 and 16-3.) Claimant had quit his job on other occasions and had been rehired. (Ex. 12-6) Claimant's supervisor, Ken Mulhair spoke with claimant for approximately fifteen minutes and attempted to dissuade claimant from quitting, to no avail. At no time during this discussion did claimant mention hand pain as a factor in his decision to quit his job. (Testimony of Mulhair.)

(8) In August 2000, Dr. Nathan examined claimant and found that claimant was capable of performing his regular work duties without restriction in the use of the right hand. Dr. Nathan identified significant psychological overlay and opined that further curative or palliative treatment of the right third finger would not benefit claimant. (Ex. 6A.)

(9) On August 1, 2001, attending physician James T. Nolan, MD performed denervation of the right third finger in order to provide pain relief. (Exs. 7-1 and 12-9.)

(10) In August 2001, claimant began working as a cabinetmaker for a subsequent employer. (Ex. 12-5; testimony of claimant.)

(11) As of September 5, 2001, Dr. Nolan released claimant to regular work. (Ex. 7-1.) On November 7, 2001, Dr. Nolan examined claimant and noted that claimant complained of terrible pain and tenderness even though the digital nerves had been removed. Dr. Nolan opined that this was a non-anatomic, psychological problem. (*Id.*)

(12) In January 2002, claimant was laid off by the subsequent employer. (Ex. 12-5; testimony of claimant.)

(13) On March 5, 2002, claimant and his wife, Tayet Vo registered the assumed business name “American-Oriental Max Mart Deli” for a business located on East Burnside in Portland, Oregon. (Ex. 7A; testimony of Vo.) On June 21, 2002, claimant filed a Uniform Commercial Code (UCC) Financing Statement for the business. (Ex. 8C.) The Oregon Corporation Division listed claimant as the business debtor. (Exs. 24 and 25.)

(14) On March 12, 2002, Dr. Nolan declared claimant’s condition medically stationary. Claimant reported that he had quit his job. (Ex. 7-4.)

(15) In an affidavit dated April 29, 2002, claimant indicated that he quit the job with the employer at injury upon Dr. Nolan’s recommendation because the work was too heavy and bothered the third right finger. (Ex. 8B)

(16) (16) On June 26, 2002, Gregory J. Landry, MD conducted a medical arbiter’s examination and noted that claimant complained of pain and cold intolerance. Claimant reported that he was unemployed and unable to work as a cabinetmaker due to right third finger pain. (Ex. 9.)

(17) In an affidavit dated April 29, 2002, claimant testified that he continued to experience pain that interfered with his ability to work. (Ex. 8B.)

(18) On July 22, 2002, claimant sold the deli business and released all interest in the lease agreement with the landlord for the American-Oriental Max Mart Deli. (Ex. 10A.)

(19) In August 2002, insurer referred claimant to Larry Malmgren, MS, a vocational consultant with 28 years experience, for a vocational eligibility evaluation. (Ex. 12; testimony of Malmgren.) Claimant’s attorney spoke with Malmgren on the telephone and suggested that claimant might need an interpreter. Malmgren spoke with claimant on the telephone twice, communicating in English. Malmgren met with claimant in person and explained that if either had trouble understanding the other in English, he would arrange for an interpreter. Malmgren and claimant communicated effectively in English and both agreed that an interpreter was unnecessary. (Testimony of Malmgren.) Claimant provided a work history and did not mention that he had owned a deli. Malmgren contacted Jane Popp, the human resources manager for the employer at injury, visited the work site and interviewed Ken Mulhair who was claimant’s supervisor at the time of the work injury. Mulhair said that claimant was one of the finest

employees he had ever worked with and that claimant was an excellent supervisor of his crew. (Ex. 12-3; testimony of Mulhair.)

(20) Malmgren formulated a job analysis and submitted it to attending physician Nolan. (Ex. 11.) The job analysis accurately described claimant's job duties with the employer at injury. (Testimony of Ovalle, Hopkins and Mulhair.) On July 29, 2002, attending physician Nolan approved the job analysis, indicating that claimant was capable of returning to his regular work as a cabinet supervisor. (Ex. 11.) On August 12, 2002, Malmgren recommended that claimant be found ineligible for vocational assistance. (Ex. 12.)

(21) In an affidavit dated September 11, 2002, claimant stated that when he quit working for the employer at injury, he was "dissatisfied" and not "angry" because Mulhair asked his crew to work overtime on short notice. (Ex. 16.)

(22) In September or October 2002, claimant contacted the employer at injury and asked to return to his previous job. Mulhair recommended claimant but he was not rehired. (Testimony of Vodt.)

(23) In an affidavit dated October 17, 2002, claimant stated that he left the job because he was having trouble with his finger as a result of the work injury. (Ex. 19.)

### 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) 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.

OAR 436-120-0320(9) lists the conditions a worker must meet in order to qualify for vocational assistance. OAR 436-120-0320(9) provides:

- (9) A worker who is entitled to an eligibility evaluation is eligible for vocational services if all of the following conditions are met:
  - (a) The worker is authorized to work in the United States.
  - (b) The worker is available in Oregon for vocational assistance. \*\*\*
  - (c) As a result of the limitations caused by the injury or aggravation, the worker:
    - (A) Is not able to return to regular employment<sup>1</sup>.
    - (B) Is not able to return to any other suitable<sup>2</sup> 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.
  - (d) None of the reasons for ineligibility under OAR 436-120-0350 applies under the current opening of the claim.

Finally, OAR 436-120-0350(3) provides:

A worker is ineligible or the worker's ineligibility ends when any of the following conditions apply:

- (3) The worker's lack of suitable employment is not due to the limitations caused by the injury or which existed before the injury.

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<sup>1</sup> OAR 436-120-0005(10) provides:

“Regular employment” means the employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance;

<sup>2</sup> OAR 436-120-0005(12) provides:

“Suitable employment” or “suitable job” means employment or a job:

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

RRU determined that claimant was ineligible for vocational assistance pursuant to OAR 436-120-0350(3). RRU reasoned that Dr. Nolan released claimant to regular work; claimant did return to regular work and later voluntarily terminated his employment. Claimant first contends that he quit his job with the employer at injury due to impairment caused by the work injury and that he is unable to return to regular work as a cabinetmaker supervisor for the same reason. Claimant next contends that RRU violated claimant's procedural due process rights by relying on the eligibility evaluation because claimant does not speak or understand English fluently and the vocational consultant interviewed claimant without an interpreter. Claimant next contends that the job analysis does not accurately reflect his job duties with the employer at injury. In support of his position, claimant argues that Dr. Nolan failed to record his recommendation that claimant avoid heavy lifting and that vocational consultant Malmberg inaccurately recorded his job duties, that information obtained from the employer's human resources director is unreliable because she did not work there when he did and that information obtained from his former manager is unreliable because Mulhair is not credible. Finally, claimant contends that these factors constitute abuse of discretion or errors of law.

In contrast, insurer contends that claimant is not eligible for vocational assistance because he was released to regular work, he returned to regular work and his lack of suitable employment is due his voluntary termination and not to the work injury. In support of its position, insurer argues that claimant communicates effectively in English and claimant's interview with the vocational consultant is reliable. Finally, insurer contends that claimant is ineligible pursuant to OAR 436-120-0350(10) because he misrepresented a material fact to the vocational consultant. Specifically, insurer alleges that when claimant provided his work history, he omitted his earnings from a deli business he owned and operated.<sup>3</sup>

I find claimant's arguments unpersuasive. To begin, there is no question that claimant returned to regular work as a cabinetmaker supervisor with the employer at injury after the work injury. Claimant returned to modified work within 10 days of the work injury and was released to regular work without restriction within two months of the work injury. Claimant returned to regular work and continued performing in his regular capacity for approximately seven months. For this reason alone, claimant is ineligible for vocational assistance pursuant to ORS 656.340(6)(a) and OAR 436-120-0320(9)(c)(A).

Moreover, contrary to claimant's contention, the medical record consistently indicates that claimant was physically capable of returning to his regular work as a cabinetmaker supervisor and that the job was suitable. In November 1999, claimant was released to regular work. In February 2000, Dr. Button declared the compensable condition medically stationary and noted that claimant was performing regular work albeit with some discomfort. In September 2001, attending physician Nolan released claimant to regular work and noted that claimant had earlier quit his job. In July 2002, Dr. Nolan approved the job analysis. Even if, as claimant argues, the job analysis is inaccurate<sup>4</sup>, the weight of medical evidence indicates that claimant was

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<sup>3</sup> For reasons explained below, I do not reach this question.

<sup>4</sup> For example, even if, as claimant contends, the job required heavy lifting, as a supervisor, claimant was in a position to obtain assistance. Similarly, even if, as claimant contends, the temperature in the cabinetmaking plant fluctuated with the outdoor temperature, it was not below 68 degrees in June 2000 when he quit work.

able to perform his regular work as a cabinetmaker supervisor. Also, the fact that claimant did perform this job for a number of months establishes that he was physically capable of doing so and the job was suitable. Additionally, after claimant left the employer at injury, he performed cabinetmaking for a different employer. Moreover, the fact that claimant later returned to the employer at injury and asked to return to work belies his contention that he is physically incapable of performing the job. These facts establish that claimant was capable of performing his regular work as a cabinetmaker supervisor and that the job was suitable. Therefore, claimant is ineligible for vocational assistance pursuant to OAR 436-120-0320(9)(c)(A).

Additionally, I agree with RRU's determination that claimant's lack of suitable employment is not due to the work injury, and therefore, he is ineligible for vocational assistance pursuant to OAR 436-120-0350(3). Claimant told the vocational consultant that he quit his job with the employer at injury due to a dispute concerning working long hours on short notice and safety and did not mention any medical condition as a reason for quitting work. At hearing, claimant took the position that this interview is not reliable because it was conducted without an interpreter and, furthermore, that RRU violated his procedural due process rights by relying on the interview because it was conducted without an interpreter. I find these arguments unpersuasive. First, Malmgren has 28 years experience as a vocational consultant; he found no difficulty communicating with claimant in English and claimant agreed that an interpreter was not necessary. Also, claimant worked for the employer for 22 years, supervising as many as 60 employees in English and carrying on conversations with his supervisors and managers in English. For these reasons, I find that that RRU did not err by relying on the vocational eligibility evaluation. Furthermore, inasmuch claimant voluntarily terminated his job for reasons unrelated to the work injury, he is ineligible for vocational assistance pursuant to OAR 436-120-0350(3).

### Credibility

In three affidavits, claimant has provided conflicting accounts of the reason he left his job with the employer at injury. First, in an affidavit dated April 29, 2002, claimant indicated that he quit the job on Dr. Nolan's recommendation because the work was too heavy and bothered the injured hand. However, this account is not supported by Dr. Nolan's medical records. Next, in an affidavit dated September 11, 2002, claimant did not question that he voluntarily terminated his employment with the employer at injury but stated that he was "dissatisfied" and not "angry" when Mulhair asked his crew to work overtime on short notice. Next, in an affidavit dated October 17, 2002, claimant stated that he left the job because he was having trouble with his finger. The third affidavit carries little weight for several reasons. First, it was prepared in anticipation of litigation and was not subject to cross-examination. Second, it is inconsistent with claimant's earlier statements in affidavits and in the eligibility evaluation. Third it is inconsistent with the medical record and with claimant's employment history. Fourth, it is inconsistent with the testimony of Mulhair who respected claimant and attempted to dissuade him from quitting. For these reasons, I find it more likely than not that on June 30, 2000, claimant quit his job voluntarily following a dispute about overtime work on short notice.

Finally, claimant attacks the credibility of nearly everyone who worked on his case and I find these arguments unpersuasive. First, claimant argues that Malmberg inaccurately listed his

job duties because of a language barrier. For reasons explained above, I find this argument unpersuasive. Second, claimant argues that information obtained from employer's human resource director is unreliable because she worked in a different capacity when he worked there. This is absurd since the human resource director has access to business records. Third, claimant argues that information obtained from his former supervisor is unreliable because Mulhair is not credible. I find that Mulhair is credible as a witness because he expressed respect for claimant and attempted to dissuade him from quitting. Also, Mulhair's account of the circumstances surrounding claimant's voluntary termination are consistent with the claimant's own interview with Malmberg and with claimant's second affidavit. Third, claimant takes the position that Dr. Nolan failed to record his recommendation that claimant avoid heavy lifting. This argument is not persuasive in light of Dr. Nolan's release to regular work and approval of the job analysis. In conclusion, claimant has failed to carry his burden of proving by a preponderance of the evidence that the administrative order is incorrect.

#### ATTORNEY FEES

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

#### ORDER

IT IS HEREBY ORDERED

The Director's Review and Order dated November 14, 2002 is affirmed.

DATED this 10th day of April, 2003.

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Paul Vincent, Administrative Law Judge  
Hearing Officer Panel