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In the Matter of the Vocational Dispute of

**Watterson, Calvin, Claimant**

Contested Case No: H03-035

**PROPOSED AND FINAL ORDER**

November 24, 2003

CALVAN WATTERSON, Petitioner

SAIF CORPORATION AND DOUBLE D LOGGING INC., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Calvan Watterson, petitioner, appeals an February 26, 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 concluded that Mr. Watterson is not eligible for a redetermination of eligibility for vocational assistance. The matter was referred to the Office of Administrative Hearings (formerly, the Hearing Officer Panel) (OAH) on June 26, 2002 to hold a hearing and to issue a proposed and final contested case order.

On June 17, 2003, Administrative Law Judge Paul Vincent conducted a hearing in this matter by telephone in Salem, Oregon. Attorney Michael Fetrow represented respondent SAIF Corporation (SAIF or insurer). Attorney Adian Martin represented Mr. Watterson. WCD waived appearance at the hearing. Mr. Watterson testified on his own behalf. The record closed on the date of hearing.

The OAH assigned the matter to Administrative Law Judge Ray Myers to review the record and to write this order. The record of this proceeding, consisting of tape recordings 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**

Did RRU correctly determine that Mr. Watterson was not entitled to reevaluation for vocational eligibility under OAR 436-120-0360(4)?

**EVIDENTIARY RULING**

Exhibits 1 through 11, as identified in WCD's exhibit list dated April 23, 2003, were admitted into the record without objection. In addition, SAIF offered Exhibits 2A and 2B, which were admitted into the record without objection. Finally, Mr. Watterson offered Exhibits 5A and 12, which were admitted into the record over SAIF's objection.

## FINDINGS OF FACT

I adopt the Findings of Fact set forth in the February 26, 2003 Director Review and Order, with the following supplementation:

1. Mr. Watterson compensably injured his right arm and shoulder on October 13, 1998. SAIF accepted right arm contusion, right shoulder contusion/strain and partial thickness tear of the right rotator cuff. (Ex. 2.) SAIF first closed the claim on June 4, 1999 with an award for 9 percent unscheduled disability to the right shoulder. (Ex. 1.) By stipulation dated March 21, 2002, SAIF accepted right shoulder Bankhart lesion. (Ex. 2.)

2. On July 10, 2002, SAIF again closed the claim with no additional award for permanent disability. (Ex. 3.) On August 2, 2002, SAIF sent Mr. Watterson a Notice of Ineligibility for Vocational Assistance. The Notice contains the bold faced notice that it could be challenged with a request for administrative review by RRU within 60 days. (Ex. 4.) The Notice was returned by the postal service because Mr. Watterson had moved and left no address. (Ex. 5.) The Notice was not challenged. (Conceded by Mr. Watterson.)

3. On November 6, 2002, WCD issued an Order on Reconsideration awarding Mr. Watterson an additional 17 percent unscheduled disability to the right shoulder as a result of the Bankhart lesion. (Ex. 6.) On January 6, 2003, Mr. Watterson requested an evaluation for vocational eligibility. (Ex. 7.) By letter dated January 8, 2003, SAIF's Vocational Coordinator, Margaret Shell, declined to evaluate eligibility on the grounds that Mr. Watterson had not challenged the August 2, 2002 Notice of Ineligibility. (Ex. 8.) Mr. Watterson then requested RRU review. (Ex. 9.)

## CONCLUSIONS OF LAW

RRU correctly determined that Mr. Watterson was not entitled to reevaluation for vocational eligibility under OAR 436-120-0360(4).

## 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 a fact or position. See ORS 183.450(2). As the proponent of the position that MRU's order is incorrect, Mr. Watterson bears the burden of proof.

Mr. Watterson contends that he is entitled to redetermination of vocational eligibility under OAR 436-120-0360(4), which states:

If a worker was previously found ineligible or the worker's eligibility ended for any of the reasons specified below, upon notification of a change of circumstances the insurer shall redetermine eligibility. The insurer shall complete the eligibility evaluation within 35 days of one of the following:

\* \* \* \* \*

(4) The worker was not awarded permanent disability and the worker is later awarded permanent disability.

Mr. Watterson contends that this rule applies because he had not been awarded permanent disability for the Bankhart lesion, a newly accepted condition. He interprets this rule as stating that when a worker is not awarded permanent disability *for a particular condition* and is later awarded permanent disability *for that condition*, redetermination is required. MRU reasoned that this rule did not apply because Mr. Watterson had been awarded permanent disability on this claim. Because the language suggested by Mr. Watterson is not in the regulation, I conclude that MRU's reading of the rule is a reasonable interpretation. Therefore, I find no basis for concluding that its decision constitutes a violation of statute or rule, exceeded its authority, was made upon unlawful procedure or was characterized by an abuse of discretion.

### ORDER

*IT HEREBY ORDERED* that RRU's February 26, 2003 Director's Review and Order is affirmed.

Date: November 24, 2003

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Ray Myers, Administrative Law Judge  
Office of Administrative Hearings