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In the ORS 656.340 Vocational Assistance of

**Judith A. Jorgens, Claimant**

Contested Case No: 06-185H

**FINAL ORDER**

May 31, 2007

JUDITH A. JORGENS, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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Claimant, through her attorney George J. Wall, timely filed exceptions to Workers' Compensation Board Administrative Law Judge Emerson Fisher's March 6, 2007 Proposed and Final Order. Insurer, through its attorney Roy W. Miller, responded to the exceptions. This matter comes before the director for a final order. The issues are eligibility for vocational assistance and whether OAR 436-120-0350(6) is unconstitutionally vague. I affirm.

I adopt the ALJ's findings of fact.

On December 2, 2005, insurer determined claimant ineligible for vocational assistance because she refused or failed to make a reasonable effort in available light-duty work intended to result in suitable employment. The Rehabilitation Review Unit (RRU), by March 17, 2006 Director's Review and Order, did not reach the issue of whether claimant refused an offer of light duty by her employer-at-injury, rather found that claimant was released for regular work thus ineligible for vocational assistance. An August 16, 2006 Remand Order found there were legal issues that needed to be determined. On October 19, 2006, RRU issued a Director's Review and Order finding claimant ineligible for vocational assistance because she refused or failed to make a reasonable effort in light-duty work intended for suitable employment. Claimant requested a hearing. ALJ Fisher affirmed RRU's October 19, 2006 order, finding there were no statutory grounds to modify the order.

RRU's order may be modified only if it violates a statute or rule, exceeds the director's statutory authority, is characterized by abuse of discretion, or was made upon unlawful procedures. ORS 656.283(2)(c).

Claimant does not dispute that she refused the sales expeditor job with her employer-at-injury, but rather that the work offered was not suitable employment within her permanent restrictions. She contends that her employer is too small to hire a full time person as a sales expeditor and that she would wind up doing sales work, which is outside her restrictions. Claimant argues the best way to assess an employer's intentions is to look at what the employer actually did. Claimant also argues that OAR 436-120-0350(6) is unconstitutionally vague on its face because the rule requires the fact finder to determine if the offered employment is intended to result in suitable employment that is permanent, which cannot be determined until the future.

SAIF responded that denial of eligibility should be affirmed and that the rule is not unconstitutionally vague because the rule sufficiently states what the fact finder must consider.

RRU determined that claimant was not eligible for vocational assistance when she refused an offer of light duty employment intended to result in suitable employment. ALJ Fisher affirmed the Order and found that under ORS 656.340(6)(a)<sup>1</sup>, claimant was not eligible for vocational assistance. As ALJ Fisher found, the statute requires that for a worker to be eligible for vocational assistance, the worker must not be able to return to the previous employment or to any other available and suitable employment with the employer-at-injury. “Suitable employment” is employment for which the worker has the necessary physical capacities or abilities and is “permanent.” OAR 436-120-0005(12)(a) and (d). “‘Permanent employment’ is a job with no projected end date or a job which had no projected end date at time of hire.” OAR 436-120-0005(6).

I agree with ALJ Fisher that RRU did not violate the rules or abuse its discretion in interpreting and applying the rules. There is no dispute that claimant refused the sales expeditor job and as offered the job fit within the physical restrictions prescribed by her attending physician, Dr. McWeeney. The job of sales expeditor involves answering telephones, greeting customers, determining the types of products, assigning sales representatives to customers, “pricing” the purchase, and facilitating pick-up/delivery. The sales expeditor job does not require the worker to do overhead lifting or climbing ladders. However, claimant argues that the sales expeditor job is not “suitable employment” because of the actual performance of other workers in that position and claimant’s own experience with the employer’s work culture.

Mr. Bussard, the employer’s Sales & Marketing Manager acknowledged that the sales expeditor job as actually performed involves doing sales work and being in the showroom part of the time. The actual duties of a prior and current sales expeditor include 20-25 percent and 50 percent of their time, respectively, working as a sales associate. Although, Mr. Bussard explained that he prefers that sales expeditors not leave the front office. ALJ Fisher concluded that the employer would not have required claimant to perform work in the showroom. Therefore, in offering claimant the sales expeditor job, the employer was willing to accommodate claimant’s work restrictions. Additionally, there was nothing presented to establish that the sales expeditor job was not “permanent.” There was no evidence showing that offered job had a projected end date. As ALJ Fisher concluded, the sales expeditor job accommodates claimant’s work restrictions and is permanent, therefore the offered job was “suitable employment” and claimant failed to establish she is eligible for vocational assistance.

Claimant’s second argument asserts that OAR 436-120-0350(6) is unconstitutionally vague. She contends there is a difference between using the credibility of a witness to determine a present fact than to determine future actions. Claimant relies on the Oregon Court of Appeals decision in *Pre-Hospital Medical Services v. Malheur County*, which requires that in order for legislation authorizing administrative decision-making to withstand a vagueness challenge, it “must contain sufficient guidelines for the exercise of the administrative decision-making authority.” 134 Or. App. 481, 492 (1995). In *Pre-Hospital Medical Services*, the Court of Appeals found that the legislation was not unconstitutionally vague because the ordinance established policies and procedures to promote those policies. *Id.*

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<sup>1</sup> “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.” ORS 656.340(6)(a).

For OAR 436-120-0350(6) to be enforced (finding that the worker is not eligible for vocational assistance), there must be a finding that the offered job will result in suitable employment. One of the requirements for suitable employment is that the work is “permanent.” OAR 436-120-0005(12). “Permanent employment” is defined as “a job with no projected end date or a job which had no projected end date at time of hire.” OAR 436-120-0005(6). Claimant asserts that to determine if the job is “permanent employment” a fact finder would have to make a finding of the employer’s future intent that cannot be determined until the future, thus having “to look into a crystal ball” to make the determination. Claimant argues this future determination contains no guidelines for the fact finder to determine if the rule was followed. However, this rule does not contain a forward-looking or future-predicting requirement, but requires the fact finder to assess if the job has a projected end date or had a projected end date at time of hire. If there is no projected end date, the job is permanent under the definition in the rule. As in *Pre-Hospital Medical Services*, where the ordinance provided guidance, this rule aids the fact finder in determining if the job is “permanent employment.” Therefore, the rule contains sufficient guidelines that can be followed and is not unconstitutionally vague.

**IT IS HEREBY ORDERED** the March 6, 2007 Proposed and Final Order is affirmed.