

In the Compensation of  
**James E. Rice, Claimant**

Contested Case No: 07-068H

**PROPOSED & FINAL ORDER**

April 25, 2008

SENECA SAWMILL COMPANY, Petitioner

JAMES E. RICE, Respondent

Before Jill M. Riechers, Administrative Law Judge

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Employer, Seneca Sawmill Company (“Seneca”), and its insurer processing agent, Comp Source, requested a hearing in regard to the April 26, 2007 Director’s Review and Order, No. VO 07-107, which determined that claimant was not able to return to regular work and remanded the matter to Seneca/Comp Source to redetermine claimant’s eligibility for vocational assistance.

On June 5, 2007, the Workers’ Compensation Division (“WCD”) referred the request for hearing to the Workers’ Compensation Board, Hearings Division, pursuant to ORS 656.704(2)(a) and OAR 436-001-0019. A hearing was scheduled for February 13, 2008. Seneca/Comp Source are represented by Brian L. Pocock. Claimant is represented by Christine Jensen. The parties agreed to submit this matter in writing, in lieu of hearing. The record closed on March 26, 2008, when employer/Comp Source’s reply argument was received.

The WCD submitted Exhibits 1 through 23. Seneca/Comp Source offered Exhibits 24 and 25. Claimant offered Exhibit 26. Seneca/Comp Source objected to admission of proposed Exhibit 26, a January 30, 2008 WCB Order on Review, on the grounds that they have requested review of that Order by the Court of Appeals. I do not find that to be sufficient grounds to exclude the document.<sup>1</sup> Exhibits 1 through 26 are hereby admitted.

**ISSUE**

Seneca/Comp Source contests the April 26, 2007 Director’s Review and Order, No. VO 07-107. (Ex 22).

**PRELIMINARY MATTERS**

Claimant first contends that Seneca/Comp Source’s request for hearing should be dismissed, on the alleged basis that Seneca/Comp Source did not indicate any basis under ORS 656.283(2)(c)(A) through (D) for setting aside the Director’s Review and Order. Seneca/Comp Source responded that the Director’s Order was characterized by abuse of discretion or clearly unwarranted exercise of discretion. Claimant’s argument goes to the substantive merits of Seneca/Comp Source’s position; accordingly, it is appropriate to consider the merits of that position in this Opinion and Order. Claimant’s motion to dismiss is hereby denied.

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<sup>1</sup> In vocational assistance disputes, new evidence may be admitted and considered. See OAR 436-001-0225(3). OAR 436-001-0240 does not place any limitations on the type of new evidence that may be offered and received.

## FINDINGS OF FACT

Claimant sustained a compensable injury on November 2, 2005, which was accepted as a lumbar strain combined with pre-existing L5-S1 degenerative disc disease producing herniated nucleus pulposus at L5-S1. (Exs 1, 2, 10).

On September 21, 2006, Don Remschel, P.T. performed a physical capacities evaluation ("PCE"). (Ex 4). Mr. Remschel noted that during the evaluation, claimant demonstrated inconsistent body mechanics for materials handling, not always keeping loads ideally close in. (Ex 4-1). Claimant showed variable, unconventional and occasionally risky techniques for materials handling, and claimant was at times impulsive and unpredictable. Mr. Remschel recommended that claimant use good body mechanics for materials handling. (Ex 4-1).

After performing the evaluation, Mr. Remschel concluded that claimant was capable of performing medium level work. (Ex 4-1, -7). Mr. Remschel noted that the discrepancy between job/occupational demands and claimant's abilities was significant. (Ex 4-7). Job demands far exceeded demonstrated abilities. There were no inconsistencies noted during testing, and self-limiting behavior did not affect the outcome of the test. Mr. Remschel recommended that claimant limit loads and forces at work to 50 pounds on an occasional basis, and that claimant avoid twisting and stooping. (Ex 4-7).

On September 28, 2006, claimant's attending physician, Richard Abraham, M.D. concurred with the physical findings and conclusions of the PCE. (Ex 5).

On October 2, 2006, Dr. Abraham examined claimant. (Ex 7). He noted possible functional overlay during the examination. Dr. Abraham stated that he had released claimant to work, avoiding lifting over 50 pounds, and that claimant was able to work at the medium level, per his PCE. On the same day, October 2, 2006, Dr. Abraham completed a form, indicating that claimant was medically stationary. (Ex 6). Two work status classifications are shown on the form, consisting of "A. Patient may return to work without restrictions," and "B. Patient may return to modified work." Dr. Abraham circled "B." on the form, and wrote in spaces provided below, "per PCE."

On October 24, 2006, Charlotte Maloney, OTR/L, performed an on-site visit to employer, recording physical demands for the three jobs claimant had performed at Seneca, tray chaser, planer chain and clean up/block puller. (Ex 8).

In the tray chaser job, there were no lifting requirements, but the job required pushing and pulling of lumber weighing from 10 to 150 pounds, but requiring 50 to 55 pounds of force. (Ex 8).

Ms. Maloney's description of the planer chain job states that there is constant lifting, from 10 pounds to a maximum of 150 pounds, very briefly. Pushing/pulling requirements of this job involved a maximum of 50 to 55 pounds of force, pulling, then, while twisting, rotating and stepping, pushing boards of varying sizes downward onto a stack. (Ex 8).

The clean up/block puller job required occasional to frequent lifting of shovel with 10 pounds of material from ground to a maximum of 48 inches height, and 50-pound blocks from ground to 36 inches height, and holding handles of wheelbarrow containing a maximum of 100 pounds to prepare to push. (Ex 8). There was occasional pushing and pulling of these wheelbarrows.

On November 6, 2006, Ken Alberts of Comp Source wrote a letter to Dr. Abraham, providing spaces for his response. (Ex 9). Mr. Alberts stated in the letter that claimant was “hired for, and his job at injury was, Tray Chaser. It is also true that the three jobs on the Physical Demands Assessment commonly rotate but it is not necessary.” (Ex 9). Mr. Alberts asked Dr. Abraham, based on the physical demands assessment prepared by Ms. Maloney and the PCE performed by Mr. Remschel, whether claimant was capable of performing the tray chaser, clean up/block puller and planer chain jobs. On November 9, 2006, Dr. Abraham responded, “Yes,” to each job.

On November 17, 2006, claimant’s claim was closed by Notice of Closure (“NOC”) with an award of four percent “whole person impairment.” (Ex 11). Claimant did not receive an award of “work disability.” The Form 1503 submitted at the time of closure indicated that claimant had been released to his job at injury without restrictions. (Ex 11-2). Claimant was noted to be medically stationary on October 2, 2006.

On November 22, 2006, Larry Malmgren, M.S., a vocational counselor, performed a vocational eligibility evaluation. (Ex 12). Mr. Malmgren said that claimant’s job was a combined job, rotating between tray chaser, planer chain and clean up/block puller. (Ex 12-4). Based on Dr. Abraham’s response to Mr. Alberts’ letter, Mr. Malmgren decided that claimant was capable of returning to his job at injury. (Ex 12-4, -12). Mr. Malmgren concluded, “Under OAR 436-120-0320(10)(c)(A), as a result of the limitations caused by the injury or aggravation, Mr. Rice is able to return to regular employment,” and consequently, that claimant was ineligible for vocational assistance. (Exs 12-13, 13).

On December 21, 2006, claimant’s counsel requested review of the notice of ineligibility for vocational assistance. (Ex 14).

Nancy Cummings of the WCD’s Rehabilitation Review Unit (“RRU”) reviewed the issue of eligibility, and conducted an investigation. (Ex 15). On January 24, 2007, RRU deferred the administrative review, because claimant had a pending medical arbiter examination, and an Order on Reconsideration addressing the Notice of Closure was expected to issue in March 2007. (Ex 16).

Claimant underwent a medical arbiter examination performed by William Gallagher, M.D. on February 1, 2007. (Ex17). Dr. Gallagher stated that he agreed with the PCE’s conclusion that claimant was capable of working in the medium range.

On February 20, 2007, the Appellate Review Unit (“ARU”) of WCD issued an Order on Reconsideration, addressing the November 17, 2006 Notice of Closure. (Ex 18). Based on the findings of the medical arbiter, Dr. Gallagher, claimant was awarded five percent whole person

impairment. The appellate reviewer determined that claimant was not entitled to an award of work disability:

The record shows the worker was released to regular work at the job at injury as a Tray Chaser, and according to the Eligibility Evaluation from Verk Consultants dated November 22, 2006, the worker voluntarily terminated his employment with the employer at injury. Pursuant to OAR 436-035-0009(3), the worker is not entitled to factoring for work disability. (Ex 18-3).

On March 19, 2007, Ms. Cummings at WCD/RRU advised that administrative review of the non-eligibility determination was reinstated. (Ex 19).

On April 26, 2007, the Director's Review and Order that is the subject of this case was issued. (Ex 22). Ms. Cummings reviewed the findings of Mr. Remschel's September 21, 2006 PCE, Dr. Abraham's concurrence with those findings and release of claimant to work at medium level per his PCE, Ms. Maloney's job analyses, Dr. Abraham's November 9, 2006 approval of the three job components of claimant's position, and Mr. Malmgren's eligibility evaluation. Ms. Cummings also made reference to a telephone conference she held with counsel and the other parties, and follow-up communications with Mr. Alberts and another Seneca worker. Ms. Cummings also reviewed the medical arbiter's examination and the Order on Reconsideration.

After reviewing this information, Ms. Cummings concluded, "... Comp Source erred when it determined Mr. Rice ineligible for vocational assistance because he could return to regular work." (Ex 22-4). She found, based on the statements of claimant and the other Seneca worker, that claimant's regular employment was the combined job of tray chaser, planer chain and clean up/block puller. (Ex 22-4). This job required constant lifting of 10 to 150 pounds and occasional to frequent pushing/pulling of 100 pounds, based on the job analyses.

Dr. Abraham and Dr. Gallagher concurred with the findings of the PCE, which limited claimant to occasional lifting of 50 pounds, as well as pushing of 54 pounds and pulling of 52 pounds. (Ex 22-5). This was the only statement of claimant's permanent restrictions in the medical information in the file. Dr. Abraham's release of claimant to regular work was in contradiction to Dr. Abraham's concurrence with the findings of the physical capacities evaluation. Because the permanent restrictions were those outlined in the PCE, and the duties of the regular position clearly exceeded those duties, Ms. Cummings concluded that claimant was not able to return to regular employment.

Ms. Cummings could not determine whether claimant had a substantial handicap to employment, and therefore, decided that Comp Source was required to perform a substantial handicap evaluation. (Ex 22-5).

Claimant's counsel was awarded an attorney fee of \$750, pursuant to ORS 656.385 and OAR 436-120-0008, based on counsel's time of five hours devoted to the eligibility dispute, and on the \$1,185 value of the substantial handicap analysis. (Ex 22-5).

Dr. Abraham signed a concurrence letter prepared by employer's counsel on June 25, 2007, in which he agreed that he had consulted with Mr. Remschel and Ms. Maloney regarding the PCE and the job analyses, and together came to the conclusion that claimant was physically able to perform the jobs of planer chain, tray chaser and clean up/block puller. To date, Dr. Abraham had not been contacted by the workers' compensation dispute resolution office regarding claimant's work release, or the decision making process that resulted in that release. (Ex 24).

On January 23, 2008, Dr. Abraham responded to a letter from employer's counsel. (Ex 25). In this letter, Dr. Abraham stated that on November 6, 2006, he reviewed various job descriptions with Mr. Remschel and Ms. Maloney. Dr. Abraham further stated:

Mr. Rice had previously been limited to 50 pounds of lifting because of unconventional risky lifting technique demonstrated by the patient during his PCE. Proper body mechanics and lifting techniques were discussed with patient subsequently during the exam. In light of this and after reviewing the job descriptions of a Tray Chaser, Clean up/Block Puller and Planer Chain, discussing and reviewing these with the above therapists ... [Mr. Remschel and Ms. Maloney], it was our collective opinion that Mr. Rice could perform the jobs as described. Proper lifting technique and body mechanics were recommended and taught during the PCE. (Ex 25).

The Workers' Compensation Board ("Board") issued an Order on Review on January 30, 2008. (Ex 26). In this Order on Review, the Board affirmed an Opinion and Order that awarded 17 percent work disability for claimant's back condition. The Board noted that the ALJ had reasoned that neither *former* ORS 656.726(4)(f)(D)(i) or (ii) (2003) precluded claimant from receiving a work disability award. This was because claimant had returned to light duty, according to the arbiter, which was not claimant's regular work, and because although the ARU found claimant was released to regular work, there was no evidence that the job was available and claimant failed to return to that job. (Ex 26-2).

On review, employer argued that the record established that claimant was either terminated or quit his employment and therefore, that *former* ORS 656.726(4)(f)(D)(iii) (2003) applied. The Board noted that *former* ORS 656.726(4)(f)(D)(iii) provided that only impairment, and not work disability, was to be considered in the evaluation of permanent disability if the attending physician released claimant for regular work, but the worker's employment was terminated for cause unrelated to the injury. The Board was unable to determine from the record whether claimant's employment was terminated for cause unrelated to the injury.

The Board agreed with claimant that there was no statutory basis for limiting claimant's disability to impairment, and that social/vocational factors must be considered. The Board did not decide in its Order on Review whether claimant had been released to return to regular work or not.

### **CONCLUSIONS OF LAW AND OPINION**

ORS 656.283(2)(c) provides that at a contested case hearing regarding a director's order

concerning vocational services, the decision of the director's review shall be modified only if it:

- (A) Violates a statute or rule;
- (B) Exceeds the statutory authority of the agency;
- (C) Was made upon unlawful procedure; or
- (D) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.<sup>2</sup>

Seneca/Comp Source (hereinafter, collectively referred to as "Seneca") contend that RRU reached its decision based on an erroneous understanding of the job requirements and a misunderstanding of the basis for Dr. Abraham's change of mind, as explained in Exhibits 24 and 25, and that Ms. Cummings did not know what was in Dr. Abraham's mind on November 9, 2006. Employer noted that pushing and pulling was not included in the definition of medium work, and that the forces evaluated by Ms. Maloney were in the 50-pound "ballpark." Seneca asserted that, factoring in the reasons for the limitation in the first place based on technique, Dr. Abraham's re-assessment made perfect sense. (Employer's opening argument, p. 2).

The reviewer, Ms. Cummings, did not have Exhibits 24 and 25 available to her at the time she reviewed the matter and issued the decision on behalf of the Director. Nothing about her decision, based upon the record as it existed at the time, shows any indication of a violation of a statute or rule, of exceeding the director's authority, or of being made upon unlawful procedure. See ORS 656.283(2)(c)(A) through (C). Further, employer does not contend that the Director's Review and Order should be set aside on any of these bases.

Even assuming for the sake of discussion that the Director's Review and Order must be evaluated as if the subsequent exhibits had been part of the record before the Director, there is insufficient evidence of any basis to set aside the order pursuant to ORS 656.283(2)(c)(A) through (C). Dr. Abraham stated that he decided after reviewing the PCE and job analyses with Mr. Remschel and Ms. Maloney that claimant could perform the jobs. He explained that this decision was based on the lifting technique shown by claimant in the PCE, and the correction of that technique taught in the PCE by Mr. Remschel.

It is true that Mr. Remschel documented improper and risky techniques used by claimant at the time of the PCE, and that he recommended that claimant use proper body mechanics in materials handling. Nowhere in his report, however, did Mr. Remschel ever state or imply that if claimant used proper body mechanics, claimant's lifting capability could be increased to such a significant extent, to 150 pounds. Further, the planer chain element of claimant's position involved twisting, a motion Mr. Remschel recommended against in his PCE. Dr. Abraham's subsequent statements in Exhibits 24 and 25 do not provide discussion of why he, Mr. Remschel and Ms. Maloney concluded claimant was capable of performing his regular work, including the planer chain position, in light of the PCE's recommendation against twisting.

In summary, Seneca has not demonstrated grounds for modification of the Director's Review and Order pursuant to ORS 656.283(2)(c)(A) through (C).

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<sup>2</sup> See also OAR 436-001-0225(3)(a) through (d), WCD Admin. Order 06-050, which sets forth the same requirements as contained in the statute.

Seneca, in its reply argument, asserted in essence that the Director's Review and Order was characterized by abuse of discretion or clearly unwarranted exercise of discretion, in that the RRU "arbitrarily chose to disregard Exhibit 9." See ORS 656.283(2)(c)(D). Review of the Director's order does not substantiate that assertion, however. Ms. Cummings did not ignore Exhibit 9, Dr. Abraham's November 9, 2006 concurrence letter that approves the three components of claimant's at-injury job. Ms. Cummings reviewed the November 9, 2006 concurrence letter, but rejected its conclusions in light of the disparity between the PCE findings and conclusions, limiting claimant to medium-level work with no twisting, and the requirements of claimant's regular work, as described in job analyses performed by Ms. Maloney. The job analyses documented that claimant's regular work jobs required lifting up to 150 pounds, and twisting, as well as pushing and pulling weights over 50 pounds.

It is apparent from the actual contents of the PCE vis-à-vis the job analyses that the demands of the regular work exceeded the claimant's physical capacities. Under the circumstances, Seneca has not established that the Director's order was characterized by abuse of discretion or clearly unwarranted exercise of discretion pursuant to ORS 656.283(2)(c)(D).

Further, the conclusory nature of the reasoning in Exhibits 24 and 25 with respect to lifting ability, lack of stated basis for that reasoning in the PCE report itself, and lack of discussion of the PCE's recommendation against twisting, as discussed above, all lead me to conclude that even if I must evaluate the Director's decision as if those exhibits had been in the record before the Director, the Director could not be considered to have engaged in abuse of discretion or clearly unwarranted exercise of discretion in discounting their persuasiveness.

In conclusion, there is no basis under ORS 656.283(2)(c)(A) through (D) to modify the Director's Review and Order. The Director's Review and Order will be affirmed.

In his response argument, claimant states that he is seeking an attorney fee of \$3,500 for work on the vocational issue. In reply, Seneca contends that if it is required to redetermine eligibility, there is no guarantee that claimant will be found eligible.

Entitlement to an attorney fee is governed by ORS 656.385(1). That statute provides that the Director shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to ORS 656.385(1) may not exceed \$2,000, absent a showing of extraordinary circumstances.

OAR 436-120-0008(2) sets forth a matrix to be applied in assessing fees. At the level before the Director, claimant's counsel devoted five hours of work. The Director concluded that the substantial handicap analysis was valued at \$1,185. Claimant has not provided a statement establishing how many additional hours were spent on the vocational issue after issuance of the Director's order to the present. There was no hearing held. A total of 26 exhibits are in evidence, and claimant's counsel offered one of those exhibits. Claimant submitted a written closing argument to this forum just over three pages in length. Based on the foregoing, I conclude that counsel most likely spent at least three additional hours reviewing the evidence, Seneca's argument and drafting the argument.

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The matrix contained in OAR 436-120-0008(2) indicates a fee of \$800 to \$1,250 where the estimated benefit achieved is in the range of \$1 to \$2,000, and time spent by counsel is over eight hours. Taking into account the total time spent, including estimated additional time after the Director's order issued and the value of the services obtained as a result of the Director's decision, in this case, \$1,185, I conclude that a reasonable total attorney fee is \$1,250.

### **ORDER**

IT IS THEREFORE ORDERED that the April 26, 2007 Director's Review and Order is affirmed. In addition to the attorney fee granted in the Director's Review and Order of \$750, claimant's counsel is hereby awarded an additional \$500, for a total attorney fee of \$1,250, pursuant to ORS 656.385(1) and OAR 436-120-0008(2). Said fee shall be paid in addition to, and not out of, compensation. The claim is remanded to Seneca/Comp Source for further processing according to law.