
In the Matter of the ORS 656.340 Vocational Services Dispute of

Hardman, Mark B., Claimant

Contested Case No: HH10-130

PROPOSED & FINAL ORDER

March 25, 2002

OVERNITE TRANSPORT, Petitioner

MARK B. HARDMAN , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

PROCEDURAL HISTORY

Insurer appeals a Director's Review and Order issued on February 12, 2001 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On November 9, 2001, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioning self-insured employer Overnite Transport and its claims administrator, Gallagher Bassett Services (insurer) were represented by attorney Thomas P. Busch. Respondent Mark B. Hardman (claimant) was represented by attorney Gayle A. Shields. Insurer called Bradley Simpson as a witness. Claimant testified on his own behalf and called Kathy Wallace as a witness.

On November 27, 2001, WCD requested the Hearing Officer Panel to transmit two questions pursuant to OAR 137-003-0635(2). Pursuant to OAR 137-003-0635(6), the ALJ stayed the proceeding pending the transmitted questions. On December 8, 2001, the Hearing Officer Panel received WCD's answers to the transmitted questions. Following receipt of the parties written arguments, the record closed on January 29, 2001

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. Pursuant to OAR 137-003-0635, WCD's transmitted questions (Ex. 38) have also been considered. The findings of fact set out below are based upon the entire record.

ISSUE

The issue is whether RRU correctly determined that claimant is eligible for vocational services.

EVIDENTIARY RULINGS

Insurer's Master Exhibit List including 1 through 28 was received without objection. The parties stipulated that Exhibit 9 was correctly dated September 3, 1999. Insurer's Supplementary Exhibit 29 was renumbered 32A and received without objection. Claimant's Supplementary Exhibits 15A through 32 were received over insurer's timeliness objection. Claimant's Supplementary Exhibits 33 through 36 were received without objection. Pursuant to OAR 137-003-0635(7), the following documents are numbered consecutively and included in the record:

- Exhibit 37: 11-27-01 Request to Transmit Question 1 p.
- Exhibit 38: 12-6-01 Agency Response to Transmitted Question 4 p.
- Exhibit 39: 12-14-01 Letter from Hearing Officer Panel to Parties 1 p.
- Exhibit 40: 1-3-02 Letter from Insurer to ALJ 1 p.
- Exhibit 41: 1-11-02 Claimant's Reply to Agency Response 11 pp.
- Exhibit 42: 1-17-02 Insurer/Defendant's Motion to Strike 6 pp.
- Exhibit 43: 1-18-02 Claimant's Response to Defendant's Motion to Strike 3 pp.
- Exhibit 44: 1-22-02 Insurer's Reply 2 pp.
- Exhibit 45: 1-24-02 Claimant's Reply 2 pp.
- Exhibit 46: 1-29-02 Letter from Insurer 1 p.

MOTION TO STRIKE

Insurer filed a Motion to Strike claimant's Response to the Transmitted Questions. Insurer cites several Workers' Compensation Board cases and argues that if the petitioner declines to submit a brief, then the respondent is barred from replying. However, the cited cases pertain to appellate briefs and not to agency transmitted questions. Here, claimant does not respond to insurer's appellate brief; rather, claimant responds to the agency's transmitted questions. Therefore, claimant is not barred from responding even if insurer chooses not to respond to the agency's transmitted questions. Accordingly, insurer's Motion to Strike is denied.

FINDINGS OF FACT

On February 1, 1999, claimant was injured in a work-related motor vehicle accident while working in a full-time, permanent, medium strength position as a local truck driver. (Ex. 1). Insurer accepted a disabling claim for the following compensable medical conditions: "Left rib contusion, left shoulder ACL sprain, right eyelid laceration, left rotator cuff and bicipital tendonitis". (Ex. 12-1). For approximately three months after the date of injury, claimant worked for the employer at injury performing light duty office duties. (Exs. 13-2 and 23-2). In June 2000, the employer at injury terminated claimant's employment because he was unable to lift 100 pounds as listed in the truck driver's job description. (Testimony of claimant).

On June 15, 2000, attending physician Richard H. Edelson declared the left shoulder and elbow conditions medically stationary. Dr. Edelson listed claimant's permanent physical restrictions as "no lifting more than 50 pounds, no overhead work, no repetitive lifting with the

left upper extremity.” (Ex. 10).

On June 19, 2000 claimant met with Bradley Simpson, Vocational Case Manager. (Ex. 13-2). Claimant reported to Simpson that his lifting restriction was fifty pounds and that to his knowledge, no work was available for him with the employer at injury. (Ex. 13). Simpson contacted the employer to inquire about an available job and eventually was instructed to proceed with the vocational evaluation. (Ex. 13-3).

A Notice of Closure dated June 30, 2000 awarded 19 percent unscheduled permanent partial disability. (Ex. 11).

On August 1, 2000, claimant sought treatment for a worsening of left shoulder pain. (Ex. 14). Dr. Edelson permanently restricted claimant’s lifting to 25 pounds and imposed “power steering driving only, and no lifting away from the body” as new permanent restrictions. (Exs. 14, 15A and 17A).

On September 19, 2000, Bradley R. Simpson Vocational Case Manager conducted a labor market survey “to document Mr. Hardman’s employability as a truck driver *** and dispatcher *** based on his five years of truck driving experience and several months of experience as a dispatcher.” (Ex. 16-2). Simpson contacted three employers who were accepting applications for dispatcher positions. (Ex. 16-4). Simpson contacted several trucking companies and located a job opening for a long-haul truck driving position with Ruffing Trucking Company. (Ex. 16-4). Simpson drafted a long-haul truck driver job analysis (JA) listing the Dictionary of Occupational Titles rating of “medium” and the job offered by Dan Ruffing Trucking as “light”. (Exs. 15 and 16-4). The job offered by Ruffing Trucking Company required lifting up to 50 pounds rarely to occasionally. (Ex. 15-2). On August 29, 2000, Dr. Edelson approved the JA, indicating that claimant was capable of performing the required job duties. (Ex. 15-3). On September 14, 2000, Simpson informed claimant by telephone that Dr. Edelson had approved the job analysis for the truck driving position available with Don Ruffing Company. (Ex. 17-1). Claimant refused the job because he preferred not to work in a long-haul capacity for personal reasons. (Testimony of Simpson).

On September 20, 2000, insurer notified claimant that he was ineligible for vocational services. (Ex. 17).

On October 25, 2000, Douglas Bald, MD conducted a medical arbiter’s report. (Ex. 19). He opined that claimant was capable of working in the medium job capacity with occasional lifting or carrying of up to 50 pounds and frequent lifting or carrying up to 35 pounds. (Ex. 19-6). Dr. Bald further opined that claimant was permanently precluded from frequently pushing, pulling, climbing, and reaching overhead. (Ex. 19-7).

An Order on Reconsideration dated November 17, 2000 affirmed the medically stationary date, increased the UPPD award to 22 percent and awarded 5 percent scheduled PPD for loss of use of the left arm. WCD’s Appellate Review Unit (ARU) relied on the opinion of the medical arbiter, Dr. Bald, and determined that claimant was capable of working in the medium/light strength level. (Ex. 20-4).

In January 2001, RRU conducted an investigation pertaining to claimant's appeal of the vocational services denial. (Ex. 23). The employer at injury confirmed to RRU that claimant could not return to regular work with their company because he could not lift 100 pounds. (Ex. 23-2). The employer at injury did not offer claimant a permanent job in any capacity. (*Id.*). Claimant had never worked as a dispatcher or as a vehicle leasing manager. (Ex. 23).

On February 1, 1999, RRU conducted a suitable employment analysis. (Ex. 24-1). Claimant's suitable wage was \$532.80 per week. (Ex. 24-1). 14 out of 17 Occupational Employment Statistics (OES) codes for truck driving require lifting up to 50 pounds occasionally which exceeds claimant's physical limitations. The median (Q2) wage for truck driving is not suitable. Claimant does not have transferable skills necessary to work as a dispatcher or a vehicle leasing manager. Reasonable employment opportunities for a bakery manager do not exist in the area where claimant resides. (Ex. 24). Five out of eight bakeries contacted required a bakery manager to lift more than 25 pounds. (Ex. 32A).

On January 25, 2001, insurer expanded the scope of acceptance to include "left biceps tear". (Ex. 25A).

In March 2001, Dr. Edelson reiterated that claimant was permanently restricted to light category work lifting no more than 25 pounds. (Ex. 29). On August 14, 2001, Dr. Edelson opined, "I do not believe he is a candidate for long-haul trucking, considering his elbow and shoulder problems." (Ex. 32).

Since May 1999, claimant has worked approximately one day per week as a longshoreman, primarily driving a forklift or driving automobiles off of ships. (Testimony of claimant).

CONCLUSIONS OF LAW AND REASONING

Vocational assistance disputes arising under ORS 656.340 are reviewed pursuant to the limited scope of review specified by ORS 656.283. I may modify the administrative order 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. OAR 436-001-0225(5). In determining whether one of those criteria exist, I may admit evidence which was not before the Rehabilitation Review Unit (RRU) and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996). The burden of proof rests upon the proponent of that fact or position. ORS 183.450(2). As petitioner, insurer 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).

Under ORS 656.340(1), an insurer is obligated to provide vocational services to a claimant who is eligible. ORS 656.340(6)(a) provides:

"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 the injury or the aggravation, and the worker has a substantial handicap to employment.”

ORS 656.340(6)(b)(A) defines “substantial handicap”.

“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.”

OAR 436-120-0330(5) lists 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.”

In the September 22, 2000 denial (Ex. 17), insurer found that claimant was ineligible for vocational services because he lacked a substantial handicap to employment. Insurer relied on the attending physician’s approval of a job analysis (JA) for the position of truck driver in the light category and labor market research indicating that truck driving jobs paying a suitable wage were available. Insurer also relied on transferable skills analysis indicating that claimant was capable of performing several forms of suitable employment, and therefore, lacked a substantial handicap to employment. (*Id.*)

In the administrative order, RRU set aside insurer’s denial of vocational services. RRU determined that claimant was unable to return to his regular work as a truck driver because the job duties exceeded his physical restrictions. In this vein, RRU specifically found that the JA approved by the attending physician was misleading and unreliable. RRU also found that the median (Q2) wage for truck driving was unsuitable. RRU further determined that claimant was unable to return to any suitable work with the employer at injury because the employer offered claimant only temporary work and offered no permanent work accommodating claimant’s physical restrictions. RRU found that claimant lacked transferable skills to work as a dispatcher or vehicle leasing manager. RRU also found that although claimant had transferable skills to work as a bakery manager, there was no reasonable labor market for that job in the Portland area where claimant resided. Based on these findings, RRU concluded that claimant had a substantial handicap to employment, and therefore, was eligible for vocational services.

At hearing, insurer contends that the administrative order contains three reversible errors. Insurer first contends that RRU erred by finding that claimant was not employable in his regular work as a truck driver. Insurer next contends that the law of the case dictates that claimant was

released to medium category work and not light work as RRU found, and therefore, he lacks a substantial handicap. Insurer also contends that claimant is ineligible for vocational services because he refused a suitable and available job as a truck driver that was offered by Ruffing Trucking Company. Finally, based on claimant's testimony at hearing, insurer contends that claimant's current longshore employment demonstrates that he lacks a substantial handicap.

In contrast, claimant contends that claimant was not employable in his regular work as a truck driver with the employer at injury or with any other employer because he was not capable of performing medium level work. Also, claimant challenges insurer's "law of the case" theory. Additionally, claimant contends that even if one truck driving job in the light category were offered, that fact does not satisfy the administrative requirement of "suitable and available" employment. Finally, claimant contends this his part-time work as a longshoreman does not establish that he lacks a substantial handicap.

Employability: Insurer contends that claimant was employable as a truck driver with the employer at injury. However, the employer at injury confirmed to RRU that claimant could not return to regular work with their company because he could not lift 100 pounds. Furthermore, the evidence establishes that for three months following the injury, claimant worked in a light duty office job for the employer at injury; the employer at injury offered and then withdrew a long-haul truck driving job and later terminated claimant's employment because he was unable to lift 100 pounds as listed in the truck driver's job description. Claimant's account is corroborated by vocational consultant Simpson's contacts as well as RRU's contacts with the employer at injury. Also, in August 2000, Dr. Edelson approved a truck driving JA but the employer at injury failed to offer claimant a truck driving job. Finally, insurer offered no evidence that the employer at injury offered a permanent job in any capacity to claimant. For these reasons, insurer's argument in this regard is unpersuasive.

Law of the Case: Insurer contends that because the Order on Reconsideration listing claimant's restrictions in the medium category is final, RRU erred in finding that claimant is unable to return to medium level truck driving. The "law of the case" doctrine "is a general principle of law (providing) 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, 569, 853 P2d 827, cert. den. 510 US 969, 114 SCt 452, 126 LEd 2d 384 (1993) (Emphasis added). In *Ronald Ross*, 2 WCSR 444 (1997), the director held that the doctrine applies to contested cases heard by the director where there has been a former case "with the same set of facts.*** If the issues are triable to different fact finders, and neither's findings bind the other, then the law of the case rule does not apply." *Id* at 447.

In *Kurt Vandevort*, 7 WCSR ___, (2002), the director held that the "law of the case" doctrine does not apply to the decisions of ARU and RRU because they address separate issues governed by different standards and because each branch of the agency does not review the decisions of the other on appeal. ARU rates the extent of an injured worker's permanent disability while RRU considers the injured worker's eligibility for vocational services. While these determinations are related, they are separate issues. Also, ARU usually relies on the

opinion of the medical arbiter while RRU usually relies on the opinion of the attending physician regarding the injured worker's physical restrictions. Compare OAR 436-035-0007(14) with *Weiland v. SAIF*, 64 Or App 810 (1983). Furthermore, ARU and RRU decisions are not binding on one another. ARU's decisions fall within the jurisdiction of the Workers' Compensation Board on appeal while RRU decisions are appealed to the Workers' Compensation Division. For these reasons, the law of the case doctrine is inapplicable.

Ruffing Trucking Job: Insurer contends that suitable work was available but that claimant refused the job for personal reasons, and therefore, he is ineligible for vocational services. Insurer points to the long-haul truck driving JA listing the Ruffing job in the light category which was approved by Dr. Edelson.

For the purpose of determining what strength category an injured worker can perform, OAR 436-120-0340(d) and Bulletin 124 refer to the Dictionary of Occupational Titles (DOT). The DOT defines "light" work as "Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently***." The DOT defines "medium" work as "Exerting 20 to 50 pounds of force occasionally***". I agree with RRU's finding that the JA was misleading and unreliable. Even though the job required lifting up to 50 pounds rarely to occasionally, Simpson listed the job as "light" on the JA. Six weeks before Simpson submitted the JA to Dr. Edelson, the doctor had imposed a permanent lifting restriction of 25 pounds. Because the Ruffing Trucking position exceeded claimant's lifting restriction, it did not constitute "suitable" employment.

Substantial Handicap

Insurer also contends that claimant's current employment a longshoreman shows that he lacks a substantial handicap and that RRU erred in determining that he requires assistance to overcome a handicap. The evidence establishes that since May 1999, claimant has worked approximately one day per week as a longshoreman, primarily driving a forklift or driving automobiles off of ships. I find that working one day per week in this capacity does not establish that claimant lacks a substantial handicap.

In conclusion, I find that the insurer has failed to carry its burden of proving by a preponderance of the evidence that the administrative order is incorrect. Therefore, I affirm.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant's attorney submitted a statement of services listing 27.25 hours at \$200 per hour. Insurer objects to the amount and argues that the fee should be discounted for time claimant's attorney devoted to WCD's transmitted questions. However, I overruled insurer's Motion to Strike claimant's response to the transmitted questions. Therefore, claimant is entitled to a fee for these services. Insurer further argues that claimant's claimed rate of \$200 per hour is excessive. I find that \$200 per hour for an experienced workers' compensation attorney is not unreasonable. Accordingly, considering the factors listed in OAR 438-015-0010(4), I find that \$5,450 is a reasonable fee for claimant's attorney's services in this

matter.

ORDER

IT IS HEREBY ORDERED that:

The Directors Review and Order dated February 12, 2001 is affirmed.

Insurer shall pay a fee of \$5,450 to claimant's attorney.

DATED this _____ day of March 2002.

Catherine P. Coburn, Administrative Law Judge
Hearing Officer Panel