

In the Matter of the Vocational Dispute of

**Ott, Calvin, Claimant**

Contested Case No: HH01-131

**FINAL ORDER**

July 17, 2002

FREIGHTLINER INC., Petitioner

CALVIN OTT, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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The Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD) issued a September 28, 2001 administrative order that set aside petitioner's ineligibility determination. Petitioner appealed RRU's order.

On February 6, 2002, Hearing Officer Catherine P. Coburn conducted an in-person hearing. Attorney Bruce L. Byerly represented petitioner, Freightliner Inc. (employer) and its claims administrator, Cambridge Integrated Services. Respondent, Calvin Ott (claimant), appeared and was represented by attorney Edward J. Hill. The WCD waived appearance. Petitioner called Rosemary Rasmussen, Calvin Ott, Don Collins, Dan Chiaratti, and Jennifer Frank, vocational consultant, as witnesses. Claimant testified on his own behalf.

On April 17, 2002, Hearing Officer Coburn issued a Proposed and Final Contested Case Hearing Order, which reversed RRU's order. Respondent filed exceptions to the Proposed and Final Contested Case Hearing Order on May 16, 2002. Petitioner timely responded. Before the Director, the issue is claimant's eligibility for vocational assistance.

After considering the entire record, including all evidence received, all documents filed, an audio recording of the hearing, and the parties' arguments, the director adopts and affirms Hearing Officer Coburn's Proposed Order with the following supplementation.

#### Motion to Dismiss

Claimant reasserts his Motion to Dismiss on the ground that the February 20, 2001 Order on Reconsideration rendered moot the issues of his job at injury and whether he was released to regular work. Specifically, claimant contends that the doctrine of issue preclusion applies because these issues were previously litigated before the Appellate Review Unit (ARU).

Relying on the Proposed and Final Order in *Kurt E. Vandervort*, 6 WCSR \_\_\_\_ (2002), hearing officer Coburn denied claimant's motion to dismiss. In *Vandervort*, the hearing officer held that the doctrine of issue preclusion did not apply so as to bind RRU to the findings made by ARU. The hearing officer reasoned that ARU and RRU had separate and distinct functions, thus neither's jurisdiction was superior to the other. Moreover, determining a worker's "regular employment" for purposes of evaluating the extent of disability could require consideration of different facts and factors than those applied for purposes of evaluating eligibility for vocational assistance. *Id.*

Subsequent to the hearing officer's order in *Vandervort*, the parties entered into a Claims Disposition Agreement (CDA) in which the claimant relinquished all further rights to vocational services. As a result, the hearing officer's order was vacated. *Kurt E. Vandervort*, 6 WCSR \_\_\_\_ (2002). Thus, the *Vandervort* decision has no precedential effect. However, the analysis and reasoning in *Vandervort* is persuasive and illustrates that the two separate units may evaluate the issue of a worker's regular employment differently. Here, ARU determined that claimant was working at a medium physical capacity position as "Painter, Transportation Equipment" (DOT 845.381-014) at the time of injury. If RRU were bound by ARU's finding, then RRU would have been required to conclude that claimant was physically able to return to regular employment. RRU, however, determined that claimant's regular employment was as a "Production Worker" (DOT 806.684-010) in the pre-paint cab area. Based on the job analysis for production worker, this position required heavy lifting and carrying. RRU, thus, concluded that claimant was physically unable to return to regular employment.

Because issue preclusion does not apply, RRU was not bound by ARU's findings regarding claimant's regular employment. Thus, the issues regarding claimant's release for work and his regular employment are not moot. Claimant's motion to dismiss is denied.

#### Evidentiary Ruling

Claimant argues that Exhibit 6A was not admitted at hearing and that the hearing officer erroneously relied upon it. He, therefore, asserts that those portions of the hearing officer's order which relied on that exhibit should be reversed.

During the testimony of Rosemary Rasmussen, the employer submitted Exhibit 6A, which was an April 3, 2000 Work Status Form signed by Dr. Wong that released claimant for heavy work. The hearing officer admitted the exhibit over claimant's objection.

The admissibility of documentary or other evidence at hearing is generally a matter within the discretion of the hearing officer. Thus, the director reviews the hearing officer's evidentiary ruling for abuse of discretion. *Bonneville Auto. Ins. Co. v. Insurance Division*, 53 Or App 440 (1981); *Brown v. SAIF*, 51 Or App 389, 394 (1981).

Other reports from Dr. Wong establish that he had released claimant for heavy work. For example, in his April 3, 2000 closing examination, Dr. Wong referred to a March 2000 Work Capacity Evaluation (WCE), (Ex. 5), which placed claimant in the heavy category of work. Dr. Wong also released claimant to heavy category of work. (Ex. 6). Again, in an April 30, 2000 letter to the employer and a May 30, 2000 chart note, Dr. Wong cited the WCE and reiterated that claimant was able work in the heavy category of work. (Exs. 7, 8). Based on the medical evidence in the record, the hearing officer's admission of Exhibit 6A was not prejudicial. Thus, substantial evidence supports the hearing officer's finding that claimant was released for, and was capable of, heavy work.

**IT IS HEREBY ORDERED THAT** the April 17, 2002 Proposed and Final Contested Case Hearing Order is affirmed.

Dated this \_\_\_\_ day of July, 2002.

**MARY NEIDIG, DIRECTOR  
DEPARTMENT OF CONSUMER  
AND BUSINESS SERVICES**

By: \_\_\_\_\_  
John Shilts, Administrator  
Workers' Compensation Division