

In the Matter of the Vocational Assistance Dispute of  
**Vandervort, Kurt E., Claimant**

Contested Case No: H00-099

**AMMENDED PROPOSED & FINAL ORDER**

March 8, 2002

KURT E. VANDERVORT, Petitioner  
PRECISION CAST PARTS, C/O SEDGWICK OF OREGON, Respondent  
Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge Paul Vincent conducted a hearing in this matter on March 20, 2001. Petitioner self-insured employer Precision Cast Parts (employer) appeared through attorney Krishna Balasubramani. Respondent Kurt Vandervort (claimant) appeared through and with attorney Ron Fontana. The Workers' Compensation Division (WCD) appeared through attorney Carol Parks. The petitioner appeals an administrative order by the Workers' Compensation Division, Rehabilitation Review Unit (RRU) finding claimant ineligible for vocational assistance.

The record of this proceeding, consisting of a tape recording 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**

The issue is whether claimant's compensable injury prevents him from returning to his job at injury.

**EVIDENTIARY RULINGS**

**WCD Exhibits 1 – 60 were admitted into the record without objection. Exhibits 2, 9, 38**

and 61 were objected to by claimant's attorney on the grounds of relevance; they were entered into the record conditionally as part of the record reviewed by the Workers Compensation Division, but I agreed that the substance of the documents was not relevant to the issues in this case and would not be used for my fact finding at the contested case level. Employer's Exhibits 10B, 16A, 16B, 16C, 18A and 62 were entered into the record over claimant's relevance objections to Exhibits 16B, 16C and 18A. Claimant's Exhibits 2A, 3A, 4A-4F, 6A-6B, 7A- 7B, 8A, 10A, 14A-14C, 29A and 29B were entered into the record without objection. WCD Exhibit 62 was entered into the record without objection. The Transcript of the September 22, 1999 Hearing was entered into the record as amended.

**MOTION TO QUASH**

WCD moved to quash the subpoenas issued by employer for Teddy Forester and Allan Britton. Forester is the manager of the Rehabilitation Review Unit (RRU) of the Dispute Resolution Section (DRS) of WCD. In addition to managing RRU, Forester reviews and assigns disputes and reviews and assigns remands and reconsiderations regarding vocational assistance.

She also resolves issues and matters of dispute regarding vocational assistance matters. (Ex. 62). It was Forester who issued the Director's Review and Order on Remand on September 5, 2000 and the Withdrawal and Revision of Director's Review and Order on Remand on September 20, 2000. (Testimony of Teddy Forester). Britton is a vocational consultant in RRU and, as such, resolves vocational assistance disputes, performs fact-finding and investigation into such matters and assists in the preparation and issuance of orders of the director regarding an injured worker's eligibility for and extent of vocational assistance services. (Testimony of Allan Britton).

WCD argued that the subpoenas should be quashed because it is inappropriate to examine collaterally an administrative decision-maker's determinations. This inquiry, argued WCD, could only serve "as an inquiry into the mental processes of the witnesses in their exercise of their administrative quasi-judicial decisional functions and duties." *In the Matter of Compensation of Albert W. Vanslyke*, O&O, WCB Case No. 98-24456 (March 30, 1990). Such an inquiry is inappropriate. *Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 422, 91 SCt 814, 28 LEd2d (1971).

In response, employer argued that the scope of my review under ORS 656.283(2)(c) is to determine whether the order under review violates a statute or rule; exceeds the statutory authority of the agency; was made upon unlawful procedure; or was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Employer argued that the processes used by WCD to make its decision were prejudicial and unlawful; specifically, employer alleged that upon remand the case was transferred from the reviewer who wrote the first order in this matter (Britton) to a different reviewer (Forester) in order to influence a specific outcome in the case.

At hearing, I determined that employer had articulated an intent to inquire into subject matter that *would* be permissible under the statutory scope of review. In particular, the employer indicated an intention to inquire as to the specific actions undertaken by these witnesses in their investigation of this matter in order to prove that the decision was made upon an unlawful procedure or abuse of discretion, rather than simply inquiring into the thought processes underlying the witnesses' decision making. Accordingly, while I cautioned the parties that no impermissible inquiry into the mental processes leading to the decisions under review would be allowed, I ruled that a permissible scope of inquiry existed under ORS 656.283(2)(c) and the Motion to Quash was denied.

### **FINDINGS OF FACT**

I adopt the findings of the Order On Remand, September 20, 2000. I also make the following supplemental findings:

Claimant suffered a cervical injury while working as a dimensional straightener for employer. The straightener job requires lifting and carrying objects weighing more than 50 pounds without assistance. (Testimony of claimant).

Claimant underwent surgery for an anterior cervical discectomy at C6-7 with attending physician Lawrence Franks, MD, on December 17, 1996. On February 17, 1997, Dr. Franks

issued a letter stating in part “Mr. Vandervort was evaluated by me today and is recovering well from cervical surgery on 12/17/96 with no residual limitations limiting his work endeavors. Due to inflammation in his lumbar spine due to prior lumbar surgery, he should not lift over 50#, nor perform any repetitive lifting, bending or stooping.” (Ex. 4).

A Notice of Closure on July 25, 1997 found that claimant had been released to modified work and was entitled to 21 percent permanent partial disability for the injury to his neck. (Ex. 8). An Updated Notice of Closure dated October 14, 1997 listed the accepted conditions as cervical strain and winging of the left scapula. (Ex. 10). On October 15, 1997, an Order on Reconsideration addressed the issues of unscheduled permanent partial disability (impairment and social factors) and permanent total disability. (Ex. 10). The order noted that a closing IME had been performed by William Platt, MD and William Duff, MD. The order found that the employer’s submitted DOT code 617.482-026 Straightening Press Operator II with a medium strength requirement did not accurately describe claimant’s job. The order instead accepted the claimant’s submitted DOT code 617.260-010, Press Operator Heavy Duty with a heavy strength requirement and found that this job code established claimant’s base functional capacity. The order also found that claimant was left after claim closure with a residual strength capacity of Medium/Light Strength work, lower than that required by his job at injury. The impairment and social/vocational factor findings were then assembled for a finding of 26% unscheduled permanent disability. (Ex. 10).

Claimant appealed the reconsideration order to a hearing before the Workers’ Compensation Board, Hearings Division (WCB). He sought an increased award of unscheduled permanent disability. At hearing, the employer contended that the appellate reviewer incorrectly determined that claimant’s base functional capacity was heavy, not medium. On April 1, 1998, Administrative Law Judge Herman addressed the issue in her order on the matter and affirmed the reconsideration’s findings on strength capacity, noting that the file supported the reviewer’s finding that claimant was lifting 80 pounds when injured. The Opinion and Order also increased the disability award to 30 percent unscheduled permanent disability. (Ex. 15).

On November 14, 1997, claimant filed a complaint in Multnomah County Circuit Court alleging unlawful employment practices. In a letter opinion written on December 15, 1998, Multnomah County Circuit Court Judge Pro Tem Richard Maizels found that “after reviewing all of the evidence [I find] that there is no evidence which convinces me that there is a question of fact whether plaintiff’s inability to work was caused by his compensable injury.” (Ex. 52). On December 15, 1998, Judge Maizels entered an order granting the defendant employer’s motion to dismiss with prejudice based on his earlier ruling. (Ex. 18A).

On March 3, 1998, claimant requested review of a vocational dispute by the director in regard to a February 27, 1998 finding of ineligibility for vocational assistance. (Ex. 14). On December 2, 1998, claimant’s attorney sent a letter to the division notifying it that the worker disputed job descriptions that had been sent to it by employer’s attorney. The letter contains commentary on the job descriptions provided by employer, but does not include the original descriptions. The commentary indicates that the weight lifting and carrying descriptions provided by the employer are inaccurate. (Ex. 17).

On January 9, 1999, vocational consultants Janet Wilcox and Anthony Pfannenstiel prepared a job analysis for employer. The analysis used DOT code 617.482-026/709.484-014 (Straightening Press Operator II / Straightener, Hand) with a strength rating of medium. (Ex. 19-1). Dr. Franks signed a physician's release at the end of the analysis releasing the worker to the described position, but added a handwritten note stating "advise hoist for greater than 50 #" to the section describing the jobs lifting requirements. (Exs. 19-4, 19-6).

On January 15, 1999, Dr. Franks signed a letter prepared by employer agreeing that with regard to the accepted conditions claimant has recovered with no residual work restrictions. (Ex. 21). Dr. Franks released claimant to the job as described in the JA and the claimant's response, but recommended that he limit lifting to 50 lbs. (Exs. 20, 21). Dr. Franks stated that he would "approve" after reading Mr. Schneider's letter of December 2, 1998, but added he would modify "as stated." He "would advise not lifting over 50# & liberally use hoist even if it slows work pace." (Ex. 21). On January 19, 1999, employer provided the concurrences from Dr. Franks to RRU. (Ex. 22).

On March 11, 1999, RRU issued an order that determined that that claimant was able to return to regular work and affirmed the employer's denial of vocational assistance. Claimant appealed the order. (Ex. 24). On September 22, 1999, a contested case hearing was held on the matter. On April 26, 2000, I issued an order remanding the case to RRU because I believed that the claimant had correctly argued that the "law of the case" bound RRU to specific findings made by the Appellate Review Unit when it issued the Order on Reconsideration. (Ex. 52).

On January 19, 2000, Eric Long, MD, became claimant's attending physician. (Ex. 41). Dr. Long referred claimant to Roy Slack, MD, for a diagnostic cervical discography, which was performed on February 1, 2000. Dr. Slack diagnosed abnormal, painful disks at C4-5 and C5-6. (Ex. 44). In a report dated February 9, 2000, Dr. Long limited claimant to modified work effective February 1, 2000 and continuing through May 4, 2000. He indicated that claimant's work would probably be restricted to light duty. (Ex. 46).

William Smith, MD, performed an IM on April 25, 2000. He opined that claimant's complaints were not caused by the compensable injury. (Ex. 51).

On September 5, 2000, RRU issued its order. RRU found that the "law of the case doctrine did not apply to the processes between RRU and ARU." That order also set aside the denial of vocational assistance, and gave the employer ten days to determine whether claimant had a substantial handicap to employment. (Ex. 56-5). Employer appeals from that order. (Ex. 57).

### **ULTIMATE FACTS**

Following claimant's industrial injury, he has been left with a residual strength capacity of medium/light strength work, lower than that required by his job at injury.

The claimant's job at injury requires claimant to lift and carry objects weighing from 75 to 100 pounds on a frequent basis and without assistance. Due to claimant's accepted injury, he is unable to lift objects heavier than 50 pounds.

## OPINION AND CONCLUSIONS OF LAW

### Standard of Review

I may modify the director's order only if it: violates a statute or rule; exceeds the statutory authority of the agency; was made upon unlawful procedure; or was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). In determining whether one of those criteria exists, I may admit evidence, which was not before 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); see also *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proof rests on the proponent of that fact or position. ORS 183.450(2).

### Law of the Case

This case returns to me following a remand to RRU with instructions to examine the law of the case. Upon review, RRU determined that the law of the case did not apply to this matter, but reconsidered the merits of the case and found that claimant was eligible for vocational assistance, reversing its initial determination in this matter. (Ex. 56). WCD has filed an appearance to contest the application of law of the case to this matter. Employer agrees with WCD that law of the case should not apply between the decisions of ARU and RRU in this matter, but urges me to apply the doctrine to the summary judgment decision of the circuit court.

WCD argues persuasively that law of the case should not apply so as to bind RRU to the findings of ARU. The “law of the case” doctrine “is a general principle of law \*\*\* 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 determined 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.

Applying the doctrine to WCD cases, the director has determined that it extends to cases where the former decision was made in regard to compensability by the WCB or Hearings Division in a case on the same claim with the same set of facts, thereby binding WCD to “the compensability portion of the former decision” when making further decisions on the same claim. *Id.*

Similarly, the director has previously determined the doctrine of preclusion by former adjudication is applicable to WCD contested cases:

“Preclusion by former adjudication applies to administrative proceedings, including workers’ compensation cases. *Drews v. EBI Companies*, 310 Or 134, 142 (1990). It is applicable when an administrative agency is faced with a second

proceeding involving the same parties and the same claim. *North Clackamas School Dist. v. White*, 305 Or. 48, 51, *modified* 305 Or. 468 (1988). Preclusion by former adjudication is divided into claim preclusion and issue preclusion. *Id.* at 50. This is a case of issue preclusion. *C.f.*, *North Clackamas School Dist. v. White*, *supra*. Issue preclusion bars relitigation of an issue if that issue were “actually litigated and determined” in a setting where “its determination was essential to” the final decision reached. *Id.* at 53.” *Marilyn Mrensko*, 4 WCSR 116 (1999)

In my Interim Order Remanding, I found that the issue of the physical requirements of the job at injury has been previously litigated by these parties on this claim, and therefore the law of the case should apply. However, I recognized that upon remand RRU might find that the law of the case should not apply, in which case RRU’s order should identify how the set of facts regarding claimant’s current disability differ from the matter previously litigated and prevent the doctrine from applying. Having reviewed RRU’s Order on Remand, I am now persuaded by the argument of WCD and employer that the law of the case should not apply.

In *Ross*, *supra*, the law of the case doctrine was applicable because there was one set of facts, and WCD was statutorily bound by the compensability decision of the Workers’ Compensation Board (WCB). WCD has no jurisdiction over matters of compensability. *See* ORS 656.704. Here, however, ARU and RRU have separate and distinct functions within the Workers’ Compensation Division. ARU has the authority to issue orders resolving disputes over permanent disability and RRU has the authority to issue orders involving disputes over entitlement to vocational assistance. Neither jurisdiction is superior to or bound by the decisions of the other.

Further, while ARU made a finding on claimant’s “regular employment,” there are differences between the definition of “regular employment” as used between ARU and RRU. ARU is limited to evaluating the job at injury or employment that is substantially the same using the DOT code information. OAR 436-035-0005(17)(C). RRU, on the other hand, evaluates the actual job performed at injury, focusing on any deviations from the DOT. If the eligibility arises under a claim of aggravation, instead of using the job at injury, RRU may be required to determine the worker’s eligibility using either the job at aggravation or, if the worker was not employed at the time of aggravation, the worker’s employment on the last day prior to the aggravation. ORS 656.340(5). The DOT code, which is critical in ARU’s determinations, is not a controlling factor in determinations made by RRU. Moreover, RRU could determine that a different job than that required by ARU constitutes the worker’s regular employment for the purposes of determining eligibility for vocational assistance. As a result, the strength category of the jobs could be different.

Based on these factors and arguments, I agree with WCD and employer that application of issue preclusion or “law of the case” is not applicable between ARU and RRU in resolving these issues.

Employer reiterates its argument from the previous contested case hearing that the decision of the Multnomah County Circuit Court is binding on the issue of whether claimant is able to return to work. However, I am not persuaded that the Circuit Court ruling should be

binding on RRU. The ruling of the circuit court was contrary to the findings of the Order on Reconsideration and the later Order and Opinion from the Hearings Division. Given the conflict between the summary judgment decision and the disability determination on the issue of claimant's ability to return to work, there was no error when RRU did not give a preclusive effect to the circuit court's ruling.

### Abuse of Discretion

Employer argues that it was an abuse of discretion for the director to reverse its findings on remand, in direct contradiction to the prior Director's Order (which found that claimant's limitations were not attributable to the compensable injury), despite the director's finding that the law of the case did not apply. Employer also argues that the Order on Remand should be reversed because it did not adequately consider whether the claimant's limitations are the result of his compensable injury. Claimant argues that the Order on Remand is supported by the record and should be affirmed. WCD takes no position on this argument by employer. An abuse of discretion occurs when an administrative agency exercises its discretion "to an end or purpose not justified by, and clearly against, reason and evidence." *Casciato v. Oregon Liquor Control Commission*, 181 Or 707, 717 (1947).

The Order on Remand is not in error for failing to adopt the factual findings of the previous administrative order. OAR 436-0120-0008(1) provides the director with authority to reconsider or withdraw any order that has not become final by operation of law. That rule states in relevant part:

“(g) The director may on the director's own motion reconsider or withdraw any order that has not become final by operation of law. A party also may request reconsideration of an administrative order upon an allegation of error, omission, misapplication of law, incomplete record, or the discovery of new material evidence which could not reasonably have been discovered and produced during the review. The director may grant or deny a request for reconsideration at the director's sole discretion. A request for reconsideration must be mailed before the administrative order becomes final, or if appealed, before the contested case order is issued.

(h) During any reconsideration of the administrative review order, the parties may submit new material evidence consistent with this subsection and may respond to such evidence submitted by others.”

Because the rule explicitly authorizes the director's reconsideration of any order that is not yet final, I find no merit to employer's argument that it was an abuse of discretion for RRU to reconsider its previous findings.

The employer also argues that the Revised Order did not adequately consider whether

claimant's limitations were the result of his compensable injury and ignored evidence to the contrary. I disagree. RRU specifically noted that Dr. Franks had in fact stated that claimant's physical restrictions were not due to his compensable injury. RRU's finding notwithstanding that statement is explained well in its order:

“Dr. Franks has consistently said [claimant] should avoid lifting more than 50 pounds, as the IME has also found. However, Dr. Franks has vacillated in his pinion as to whether or not the restrictions were due to the current injury. Although Dr. Franks most recently stated [claimant]'s physical restrictions were not due to his current injury and released him to return to his job with [employer], he also concurred with an IME indicating [claimant's] physical restrictions were due to his current injury. In addition, the Opinion and Order dated April 1, 1998 confirms that [claimant] has a permanent disability based on the neck injury and increased his PPD to 30%. Thus, I am more persuaded by the IME, Dr. Frank's concurrence with the IME and the Opinion and Order that [claimant's] restriction to occasional lifting of no more than 50 pounds and avoiding any prolonged or repetitive work above chest height is due to his current injury.” (Ex. 56 at 6-7).

Further, after review of the entire record in this contested case, including documents not before RRU, I remain in agreement with RRU's finding of fact that claimant is unable to return to work due to his compensable injury. Accordingly, I find that RRU's Order on Remand should not be modified.

#### **ATTORNEY FEE**

Claimant has “finally prevailed” at a contested case hearing and is entitled to an attorney fee upon submission of a statement of services. ORS 656.385(1).

#### **ORDER**

IT IS HEREBY ORDERED that the RRU's order in this matter, dated September 20, 2000, is affirmed.

DATED this \_\_\_\_ day of January, 2002.