

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

**Aiken, Theodore T., Claimant**

Contested Case No: H03-098

**PROPOSED AND FINAL ORDER**

September 30, 2003

THEODORE T. AIKEN, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Claimant appeals a July 22, 2003 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On September 15, 2003, Administrative Law Judge Catherine P. Coburn conducted a telephone hearing in Salem, Oregon. Attorney James Dodge represented petitioner Theodore T. Aiken (claimant). Attorney Michael G. Fetrow represented respondent, SAIF Corporation (insurer). WCD waived appearance at hearing. No witnesses testified and the record closed on the date of hearing.

**ISSUE**

Whether RRU correctly determined that claimant is ineligible for vocational services.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 20 as were admitted into the record without objection. Claimant withdrew proposed Supplementary Exhibit 6A. Claimant's Supplementary Exhibits 5A, 5B, 6A, 16A, 19, 20, and 21 were received into the record over insurer's relevance objections pursuant to *Colclasure v. Washington County School District*, 317 Or 526 (1993) (Within statutory scope of review, administrative law judge may admit evidence that was not before the department and make independent findings of fact).

**FINDINGS OF FACT**

(1) On January 28, 2001, claimant struck his head on the top of a door frame while performing maintenance work. (Ex. 1.) Claimant sought treatment from attending physician Richard Fox, MD. Cervical films revealed degenerative disc disease at C3-4 and C6-7. An MRI dated March 15, 2001 showed a disc bulge at C3-4 and right sided disc bulge at C6-7 with encroachment on the C6-7 neural foramin. (Ex. 8-2.)

(2) Insurer initially accepted a cervical strain and later accepted "cervical radiculopathies with nerve injuries (contusions and swelling) and nerve impingements at C4-5, C5-6 and C6-7". (Exs. 3-2, 5 and 6.)

(3) On June 7, 2001, Thomas J. Rosenbaum, MD performed micro posterior cervical foraminotomy, C4-5 right, C5-6, right and C6-7, right. (Ex. 2.) On August 13, 2002, Dr. Rosenbaum declared the compensable conditions medically stationary and opined that claimant was capable of working in a sedentary, light and moderate capacity. He attributed claimant's loss of cervical range of motion 75 percent to degenerative changes and 25% to the work injury. (Ex. 5A.) Dr. Fox deferred to Dr. Rosenbaum's opinion. (5B.)

(4) On September 19, 2001, Bradley Bergquist, MD conducted an insurer's medical examination. He opined that any diminished cervical range of motion was 100 percent due to preexisting degenerative changes. (Ex. 8-3.)

(5) By Notice of Closure dated November 22, 2002, insurer awarded 19 percent permanent partial disability (PPD). (Ex. 6.)

(6) On January 31, 2003, insurer's vocational coordinator recommended that claimant be found eligible for vocational assistance. (Ex. 7.)

(7) On February 20, 2003, medical arbiter William J. Gallagher, MD examined claimant and stated, "It is my opinion that the objective abnormal findings of limitation of cervical motion are due 100% to unrelated conditions and not due to the accepted conditions." (Ex. 8-4.)

(8) By Order on Reconsideration dated March 3, 2003, the Appellate Review Unit (ARU) reduced the PPD award to 13 percent. (Ex. 9-3.)

(9) On March 19, 2003, Zhen "Jane" Xu, MD examined claimant and opined, "Degenerative cervical disc disease is a preexisting condition, which is the major contributing cause of the disability and need for treatment of the combined condition. Compensable, or accepted condition, is considered to no longer be the major cause of the current disability or need for treatment." (Ex. 10-3.) Dr. Rosenbaum concurred. (Ex. 17.)

(10) On April 11, 2003, insurer denied compensability of the current condition and pain disorder. (Exs. 12, 13 and 14.)

(11) On April 15, 2003, insurer issued a notice of ineligibility for vocational assistance. (Ex. 15.)

(12) In an Opinion and Order dated July 15, 2003, the Workers' Compensation Board, Hearings Division (WCB) increased the PPD award to 16 percent. (Ex. 21-4.)

### **CONCLUSION OF LAW**

RRU correctly determined that claimant is ineligible for vocational assistance.

## OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if it: (1) violates a statute or rule; (2) exceeds the agency's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283; OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence that was not before the department and make independent findings of fact. *Colclasure v. Washington County School District*, 317 Or 526 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proving any fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant 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) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of the evidence).

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(6)(a) and (b)(A) provide:

(6)(a) 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.

(b) As used in this subsection:

(A) 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.

(Emphasis added.)

OAR 436-120-0330(5) lists the 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.

(Emphasis added.)

RRU determined that claimant was ineligible for vocational assistance because claimant's limitations are caused by his preexisting degenerative cervical disc disease, not by the work injury, and considering only the accepted conditions, claimant can return to regular work. RRU relied on the opinions of Dr. Bergquist, Dr. Gallagher, Dr. Xu and Dr. Rosenbaum. Also, RRU noted that attending physician Fox deferred to Dr. Rosenbaum's closing report.

Claimant contends that RRU abused its discretion by ignoring the law of the case. In support of his position, claimant argues that he is eligible for vocational assistance by virtue of the PPD award. In contrast, insurer contends that the doctrine of the law of the case does not apply to claimant's previous PPD award. Insurer further contends that the medical evidence fails to establish a causal link between the work injury and claimant's impairment.

### Law of the Case

Claimant argues that because he was awarded permanent partial disability for loss of use of the cervical spine arising from the work injury, the law of the case establishes the causal link between the work injury and claimant's left wrist impairment. The doctrine of "law of the case" applies to former decisions with the same set of facts. *Public Market Co. v. Portland*, 179 Or 367 (1946). If the issues are triable to different factfinders and neither's findings bind the other, then the doctrine does not apply. *Westwood Corporation v. Bowen*, 108 Or App 310 (1991).

The director has previously held that the legal doctrine "law of the case" does not bind the Rehabilitation Review Unit to the findings of the Appellate Review Unit. *Calvin Ott*, 7 WCSR 80 (2992); *Kurt Vandervort*, 7 WCSR 148 (2002); *Mark Hardman*, 7 WCSR 22 (2002). Therefore, ARU and WCB may award PPD but RRU may determine independently that the injured worker is ineligible for vocational assistance.

Here, ARU awarded 13 percent PPD and the award was increased to 16 percent by Opinion and Order. Contrary to claimant's argument, the law of the case does not bind RRU to find claimant eligible for vocational assistance. Furthermore, a PPD award does not render a claimant automatically eligible for vocational assistance. In order to establish eligibility, claimant must satisfy each administrative requirement. RRU is free to evaluate the medical evidence presented and to determine whether claimant is eligible for vocational assistance.

### Causation

ORS 656.340(6)(b) requires establishment of a causal link between the compensable work injury and claimant's eligibility for vocational assistance. Furthermore, OAR 436-120-0330(5) lists the conditions of eligibility including the inability to return to regular work as a result of the limitations caused by the work injury.

Here, attending physician Fox deferred to Dr. Rosenbaum's opinion that 75 percent of the loss of range of motion was secondary to degenerative changes and 25 percent was due to the

work injury. Moreover, medical arbiter Dr. Gallagher opined that the cervical limitations were 100 percent due to conditions unrelated to the work injury. Furthermore, Dr. Bergquist and Dr. Xu expressed similar opinions. Based on the medical record, I agree with RRU's conclusion that claimant's cervical impairment was not caused by the work injury. Finding no grounds to modify the administrative order, I affirm.

### **ATTORNEY FEES**

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

### **ORDER**

IT IS HEREBY ORDERED

The Director's Review and Order dated July 22, 2003, is affirmed.

DATED this 30th day of September 2003.

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Catherine P. Coburn, Administrative Law Judge  
Office of Administrative Hearings