
In the Matter of the Vocational Dispute of

Brooke, Teresa, Claimant

Contested Case No: H02-084

PROPOSED AND FINAL ORDER

March 11, 2003

TERESA BROOKE, Petitioner

TRAVELERS INDEMNITY COMPANY, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a August 2, 2002 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division, Department of Consumer and Business Services (WCD or the department) which affirmed the insurer's decision that claimant was ineligible for vocational assistance. The matter was referred to the Hearing Officer Panel (Panel) for hearing on August 16, 2002.

On February 5, 2003, Administrative Law Judge Ella D. Johnson conducted a hearing in this matter by telephone in Salem, Oregon. Attorney Daniel Snyder represented the petitioner Teresa Brooke (claimant). Attorney Joy Dougherty represented the respondent Travelers Indemnity Company (insurer) and its insured Hill-Rom Sales – Long Term Care (employer or Hill-Rom). WCD waived appearance at the hearing. Claimant appeared and testified on her own behalf. Insurer called employer's human resources director Joyce Maffett and vocational rehabilitation counselor Lisa Broten as witnesses. The record closed on following the hearing.

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

Whether RRU correctly determined that claimant was not entitled to vocational services because she was allegedly able to perform her regular work.

EVIDENTIARY RULING

The record consists of WCD Exhibits 1 through 37 and claimant's Exhibit 33A, which were admitted into the record without objection.

FINDINGS OF FACT

(1) Ms. Brooke is 46 years old and a registered nurse who holds a B.S. degree in nursing. (Ex. 37; test. of Brooke.) In August 1997, she was hired by Hill-Rom as a clinical consultant. Hill-Rom is an international corporation which is engaged in the business of selling and renting

durable medical equipment, such as beds and chairs, to long term care facilities.¹ Its home office for long term care equipment is located in Charleston, South Carolina. (Ex. 1; test. of Brooke and Maffett.) As a clinical consultant, she made recommendations about the patient's needs to the long term care facility, filled out forms, identified funding sources and sold the appropriate equipment to the facilities for use with the patient. She also provided in-service training to care givers, maintained and repaired the equipment, lifted patients on to the equipment and consulted with the facilities on wound care. (Ex. 15; test. of Brooke.)

(2) When the sales manager for the territory resigned due to the heavy workload and the high stress, Ms. Brooke was promoted to the position of territorial sales manager in Oregon and Southwest Washington. Hill-Rom did not hire someone else to assume her nurse consultant duties because of a hiring freeze. She was required to do both jobs and typically worked from 7 a.m. to 8 p.m., 60 to 70 hours per week to meet performance and production goals, which she met.² Although the number of hours and days worked varied, Ms. Brooke typically worked six to seven days per week. She also worked on the weekends. Her job involved a considerable amount of driving, talking on the cell phone, taking notes, filling out forms and filing, both by hand in her car and at her home, and on the computer at night. She wrote daily, weekly, monthly and quarterly reports. The computer data entry took between two to four hours per night.³ All of her sales calls and interactions with the facilities had to be double logged, by hand in the car and by computer at home. She experienced significant job stress. Most of the other territories had three or four employees. The Seattle, Washington area had three employees and had the same number of long term care beds as Ms. Brooke. (Exs. 1, 6, 25, 30; test. of Brooke.)

(3) The employer's description of essential functions of the Long Term Care Sales Manager position included the ability to: safely drive a company car; communicate orally; respond to pager for on-call accounts; perform product in-service demonstrations; conduct patient rounds; complete planning forms and business reports; assist nursing and clinical staff in transferring patients and moving specialty beds; and make adjustments to specific patient requirements. The employer estimated that the job would require 40 to 50 hours per week, including on-call time and working 8 a.m. to 5 p.m. The employer also estimated that the time needed to complete the required paperwork was 10 hours per week. (Ex. 36; test. Maffett.) The primary difference between the employer's description and claimant's description of the job, was that claimant's description included more hours worked because she was performing two jobs. (Test. of Brooke and Broten.)

(4) As territorial sales manager Ms. Brooke worked 10 to 12 hours a day. She was required to submit reports and other documents, which she spent from two to twelve hours per day typing. (Ex. 3; test. of Brooke.) Eighty to ninety percent of her job involved driving, typing and writing. In January 1998, Ms. Brooke began experiencing problems with her hands and reported this to her supervisor. Her supervisor instructed her to "keep going" and that "help

¹ Rom-Hill is also engaged in the business of providing funeral services and sells caskets. (Test. of Maffett.)

² Insurer disputes that claimant worked the number of hours and days that she claimed to have worked. (Ex. 27.)

³ Insurer disputes that claimant was required to perform data entry as an essential function of her job. (Ex. 27.) However, claimant provided proof of data entry training and requirements to RRU. (Ex. 30.)

would arrive soon.” Help never arrived due to the hiring freeze. (Ex. 6; test. of Brooke.) As a result of these activities, Ms. Brooke’s problems with her hands and arms worsened. She experienced numbness and tingling in her hands and arms. (Ex. 6; test. of Brooke.) She had developed carpal tunnel syndrome (CTS)⁴ in both arms and on July 27, 1998 filed a workers’ compensation claim with an injury date of April 15, 1998. (Exs. 1; test of Brooke.)

(5) In the Spring of 1998, Hill-Rom provided Ms. Brooke with a registered nurse, Deidre Costigan, to assist her for two days, four separate times. By that time, Ms. Brooke’s hands were in substantial pain. She subsequently told her supervisor about her condition. Hill-Rom purchased supports to wear on her wrists. (Ex. 25 at page 3; test. of Brooke.)

(6) In July 1998, she approached her supervisor about taking time off to have surgery on her right hand. He denied her request and gave her an ultimatum to either delay her surgery or resign. (Exs. 6, 25; test. of Brooke.) On July 24, 1998, Paul M. Puziss, MD (Surgery) successfully performed a left carpal tunnel release. (Exs. 2, 3.) Insurer subsequently denied her claim for bilateral CTS. (Ex. 4.) On November 2, 1998, insurer changed the status of the claim from denied to accepted after being ordered to do so by the Workers’ Compensation Board. (Ex. 5; test. of Brooke.)

(7) In April 1999, Stephen J. Morrissey, PhD, CPE, PE (Ergonomist) reviewed Ms. Brooke’s medical records and interviewed her. Dr. Morrissey opined that her bilateral CTS and thoracic outlet syndrome were caused by the “excessive and prolonged work demands.” He identified ergonomic risk factors of the job, which included poor hand postures, use of pinch grip, often with force, job stress, highly repetitive motion of her work, driving as she used the cell phone for extended periods of time and very long work hours in poor ergonomic positions which did not allow for proper recovery of her musculoskeletal system. (Ex. 6 at pages 3, 5.) Dr. Morrissey ruled out the presence of nonoccupational and preexisting factors. (Ex. 6 at pages 4, 7.)

(8) On July 20, 2000, insurer required Ms. Brooke to change attending physicians from her non-managed care physician, Dr. Puziss, to managed care physician, Clifford S. Canepa, MD (Surgery). (Ex. 7.) On August 20, 2000, Dr Canepa performed a right carpal tunnel release on claimant. (Ex. 8.) On January 22, 2001, Dr. Canepa declared Ms. Brooke to be medically stationary even though he did not see her postoperatively. Someone else took her stitches out and examined her after her right hand surgery. (Ex. 9; test. of Brooke.)

(9) On February 9, 2001, insurer closed Ms. Brooke’s claim without awarding permanent disability. (Ex. 10.) Ms. Brooke appealed the closure. On appeal, WCD’s Appellate Review Unit awarded 1 percent (1.5 degrees) for each forearm (wrist). (Ex. 13.)

(10) On September 14, 2001, vocational rehabilitation counselor Lisa Broten with Jack Davis & Associates performed a job analysis based on information provided by Ms. Brooke and Hill-Rom’s human resources contact in Indiana, Tammy Wiegand. (Ex. 15.) The Indiana office

⁴ CTS is a cumulative trauma condition which is the result of the compression of the medial nerve at the wrist.

is the casket production division of Hill-Rom. (Test. of Broten.) The job description provided by the employer addressed only the territorial sales manager job; it did not address the clinical consultant's duties. Ms. Broten limited her interview with Ms. Brooke to the sales manager position because it was the last position she held with Hill-Rom. (Test. of Brooke.) The job analysis stated that she worked a 40 hour work week from 8 a.m. to 5:00 p.m., and that the job entailed continuous finger and hand manipulation, frequent sitting, note taking, and/or keyboarding activity while on the telephone or while driving, and frequent driving with hands gripped on the steering wheel. It did not note the excess hours Ms. Brooke worked or the fact that she was required to perform both the nurse consultant and territorial sales manager job. Ms. Brooke agreed with the job analysis but expressed concerns about her ability to do the job because she continued to experience tingling and numbness in her hands when performing keyboarding, writing and driving and the hours involved in performing the dual job. (Test. of Brooke.)

(11) On October 3, 2001, Dr. Canepa reviewed the Ms. Brooke's file, the job analysis and released her to regular work as described in the job analysis. (Ex. 14.) Ms. Broten did not know and did not tell Dr. Canepa that Ms. Brooke was performing both the sales manager job and the clinical consultant job. He had not seen claimant for over a year. Ms. Broten asked him to see Ms. Brooke to evaluate her before determining whether she could return to the work described in the job analysis and he refused to do so because of a "conflict of interest."⁵ Dr. Canepa did not feel a Functional Capacities Evaluation (FCE) was needed. Ms. Broten issued a denial of vocational assistance on October 13, 2001 because Ms. Brooke's attending physician released her to regular work. Insurer requested Hill-Rom reinstate Ms. Brooke but the employer declined to do so because it stated that the job had been eliminated, even though Hill-Rom had already hired two employees to do Ms. Brooke's job. (Exs. 15, 16; test. of Broten and Brooke.)

(12) After examining Ms. Brooke, Dr. Puziss subsequently opined that she could not return to her regular work because it required too much writing and/or typing. Dr. Puziss ordered a FCE, which Ms. Brooke paid for herself. (Ex. 18; test. of Ms. Brooke.) On November 13, 2001, Tyler Bohnet, MPT with Healthsouth performed a FCE. Mr. Bohnet concluded that Ms. Brooke was able to perform full-time medium work, including tasks which involved grasping and fine motor coordination. (Ex. 20.)

(13) After RRU provided Dr. Canepa with the FCE and the hours Ms. Brooke worked during the time she was performing the job, he opined that the job analysis was within her physical capabilities. (Ex. 31.) Mr. Bohnet concurred that Ms. Brooke was capable of performing the work set forth in the job analysis but because of the limited time spent in the FCE, there was not enough information to determine whether she was able to perform the work for 60 to 70 per week. (Ex. 29.)

(14) Since 1998, Ms. Brooke has worked only briefly as a part-time temporary employee for the U.S. Post Office reviewing medical files. She has applied to the Department of Human Services, Vocational Rehabilitation Division (VRD) for services. Although Ms. Brooke

⁵ Based on his refusal to see claimant prior to rendering his opinion on her ability to return to regular work, his refusal to order an FCE, and the "conflict of interest" identified by Dr. Canepa, I find that his allegiance is to the insurer and he is not an unbiased source with respect to claimant's ability to return to regular work.

qualified for vocational services because VRD's evaluating physician found that she had functional limitations, VRD provides only vocational counseling. VRD does not provide vocational assistance training or temporary disability payments. (Ex. 33A; test. of Brooke.)

CONCLUSIONS OF LAW

RRU incorrectly determined that claimant was not entitled to vocational services because she was able to perform her regular work.

OPINION

I may modify the department's vocational assistance order if it: (1) violates a statute or rule; (2) exceeds the statutory authority of the agency; (3) was made upon unlawful procedure; or (4) was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c); OAR 436-001-0225(5). In determining whether one or more of those criteria exist, I may admit evidence, which was not before the department, and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or at 537; *Joseph A. Richard*, 1 WCSR 3 (1996). The burden rests on the proponent of that fact or position. See 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). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I find that claimant has met her burden.

RRU affirmed the insurer's denial of vocational assistance because it concluded that claimant was able to perform her regular work. At hearing, claimant argued that RRU's order should be modified because it reflects an abuse of discretion or clearly unwarranted exercise of discretion. Abuse of discretion exists when an agency "exercises its discretion to an end or purpose not justified by, and clearly against, reason and evidence." *Far West Landscaping v. Modern Merchandising*, 287 Or. 653, 664 (1979); *Casciato v. Oregon Liquor Control Commission*, 181 Or. 707, 717 (1947). An agency abuses its discretion if it fails to fully investigate the facts and allegations of the parties. *Liberty Northwest Insurance Corp. v. Jacobson*, 164 Or App 37 (1999). On this record, I find that RRU abused its discretion by failing to fully investigate the nature of claimant's job at injury to determine whether she could return to her regular job.

Under ORS 656.340(1), an insurer is required to provide vocational services to workers who are eligible. ORS 656.340(6)(a) states:

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. See also OAR 436-120-0320(9)

In addition, OAR 436-120-0320(9) provides in relevant part the conditions that the worker must meet to be eligible for vocational assistance:

- (c) 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 * * *; and
 - (C) Has a substantial handicap to employment and requires assistance to overcome that handicap.

Furthermore, OAR 436-120-0005 defines “regular employment” as “the employment the worker held at the time of injury.” I find that the preponderance of the evidence establishes that claimant’s regular employment at the time of injury was that of the dual role of territorial sales manager and clinical consultant.

To begin, I find that the job analysis performed by Ms. Broten, which RRU relied upon, was based on inaccurate information which was provided by the employer. Ms. Broten contacted Tammy Wiegand in Indiana at the casket division of Hill-Rom about claimant’s job duties instead of the long term care durable equipment division located in Charleston, South Carolina. Additionally, Ms. Broten’s discussion with claimant focused on the duties of the territorial sales management job because, in Ms. Broten’s opinion, that was claimant’s job at injury. The job analysis did not note the excess hours Ms. Brooke worked or the fact that she was required to perform both the clinical consultant and territorial sales manager job. Mr. Bohnet, who performed the FCE, concurred that Ms. Brooke was capable of performing the work set forth in the job analysis but because of the limited time spent in the FCE, he could not render an opinion concerning whether she was able to perform the work for 60 to 70 per week.

Additionally, the medical opinions concerning whether or not claimant is able to perform her regular work are divided. When medical evidence in workers’ compensation cases is divided, the evidence must be evaluated. Depending on the record in each case, the opinion of the treating physician may or may not be properly given greater weight and the court will affirm the finding if it is supported by substantial evidence in the record. *Dillon v. Whirlpool Corp.*, 172 Or App 484 , 487- 489 (2001).

In that regard, I do not find Dr. Canepa’s opinion to be persuasive because, unlike Dr. Puziss, he spent very little time with claimant. Claimant did not choose Dr. Canepa as her attending physician, but rather was forced to accept him as her attending physician when she was enrolled in insurer’s MCO. Claimant credibly testified that someone else took her stitches out and examined her after her right hand surgery and that Dr. Canepa had not seen her post operatively for over a year. Ms. Broten asked him to see claimant to evaluate her before determining whether she could return to the work described in the job analysis and he declined to do so because of a “conflict of interest.” In addition, I also find that Dr. Canepa did not have accurate information from Ms. Broten concerning the actual nature of claimant’s job at injury.

Ms. Broten did not tell Dr. Canepa that claimant had been performing both the sales manager job and the clinical consultant job.

Dr. Puziss, on the other hand, spent a considerable amount of time with claimant after performing surgery on her left hand. He was aware of the nature of claimant's work. Unlike Dr. Canepa, Dr. Puziss also examined her prior to rendering an opinion concerning whether she could return to her regular work. Dr. Puziss opinion is also supported by the opinions of Ergonomist Stephen Morrissey, the VRD evaluator and the fact that she was awarded permanent disability upon appeal of the closure of her claim. For these reasons, I find Dr. Puziss's opinion to be more persuasive.

Accordingly, RRU's order is modified to find claimant was not able to return to her regular work and the matter is remanded to insurer to determine whether she has a substantial handicap to employment. *See Richard M. Brown* _____WCSR _____(H02-087, Proposed and Final Contested Case Order, February 5, 2003) (Based on claimant's, not employer's, description of his regular work, he was eligible for vocational assistance because he was not able to return to his work at injury.)

ATTORNEY FEES

Claimant has prevailed in this matter and is therefore entitled to attorney fees. ORS 656.385(1). Applying the factors set forth in OAR 436-001-0265, I find that claimant's counsel is entitled to an assessed fee in the amount of \$3,100.

ORDER

IT HEREBY ORDERED that RRU's August 2, 2002 Director's Review and Order is modified as set forth above and the matter is remanded to insurer for further processing. Insurer shall pay to claimant's attorney an assessed fee of \$3,100.

Dated this 11th day of March 2003 at Salem, Oregon.

Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel