

In the Matter of the Vocational Dispute of

Brown, Richard M., Claimant

Contested Case No: H02-087

PROPOSED AND FINAL ORDER

March 18, 2003

FREIGHTLINER, LLC AND GALLAGHER BASSETT SERVICES, INC., Petitioner

RICHARD M. BROWN Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

The self-insured employer appeals a June 18, 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 set aside the self-insured employer's decision that claimant was ineligible for vocational assistance. The matter was referred to the Hearing Officer Panel (Panel) for hearing on August 22, 2002.

On December 4, 2002, Administrative Law Judge Ella D. Johnson conducted a hearing in this matter by telephone in Salem, Oregon. Attorney Bruce Byerly represented the petitioner, Freightliner, LLC and its claims processing agent, Gallagher Bassett Services, Inc. (employer). Attorney Ernest M. Jenks represented the respondent Richard M. Brown (claimant). WCD waived appearance at the hearing. The employer called Certified Rehabilitation Counselor Jennifer O. Frank. Claimant testified on his own behalf. 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 incorrectly determined that claimant was entitled to vocational services because he was unable to perform his regular job.

EVIDENTIARY RULING

The record consists of Exhibits 1 through 22, which were admitted into the record without objection.

FINDINGS OF FACT

I adopt the Findings of Fact set forth in the June 18, 2002 Director Review and Order, with the following supplementation:

- (1) On August 2, 2000, claimant compensably injured his neck while working for the

employer as a materials handler. (Exs. 1, 2.) The employer subsequently accepted claimant's cervical strain but issued a partial denial of his C4-5, C5-6, and C6-7 disc bulges/protrusions, herniation claim (Exs. 2, 3.) Claimant worked for the employer as a materials handler for a year and a half before injury, beginning on January 18, 1990. Prior to working for the employer, claimant worked for over 11 years as an accessory installer at TLS Toyota in Portland, Oregon. (Ex. 11; test. of claimant.)

(2) A December 15, 2000 physical capacities evaluation (PCE) found that claimant was able to perform medium work and was not to able lift in excess of 40 pounds. The PCE also noted neck pain complaints during sustained activities. (Ex. 4.) On January 5, 2001, claimant's attending physician, Oisín R. O'Neill, MD (Neurosurgery) concurred with the PCE and released claimant to work "per the physical capacities evaluation" on January 8, 2001. (Ex. 5.) On July 23, 2001, Dr. O'Neill found claimant to be medically stationary. (Ex. 6.) On June 29, 2001, the employer accepted claimant's C5-6 and C6-7 conditions as a combined condition. (Ex. 8.) On August 3, 2001, the employer closed claimant's claim awarding 14 percent (44.8 degrees) unscheduled permanent partial disability (PPD) for his accepted neck conditions. (Ex. 7.)

(3) An October 2, 2001 job analysis for materials handler stated that claimant's job entailed lifting and carrying in the light to medium range (11 to 40 pounds) and, if lifting and carrying in the heavy range was required, claimant was "encouraged to ask for assistance." Dr. O'Neill found the job analysis to be within claimant's physical capacities. (Ex. 10.)

(4) A vocational eligibility evaluation done on October 12, 2001 by Ms. Franks at the request of the employer recommended that claimant be found ineligible for vocational assistance because he was released to perform his regular work. Ms. Frank understood from the employer that claimant would not be required to lift heavy objects. She did not perform a transferable skills analysis or a substantial handicap to employment analysis because she thought claimant was able to return to his regular work as a material handler. (Ex. 11.) On October 15, 2001, Ms. Franks notified claimant that he was ineligible for vocational assistance. (Ex. 12.)

(5) Ms. Frank developed a job analysis based on how the employer thought the job was performed. The employer's job analysis described the essential job duties of a material handler as: operating the forklift to pull materials from storage shelves; checking the forklift's oil and water and filling it with gasoline; and reading pick up tickets to determine the area and part to be obtained. The employer's job analysis stated that material handlers were required to lift and carry in the light to heavy category and would on a daily basis for 20 to 30 minutes lift brakes that weigh between 44 and 78 pounds 10" to 55" off the floor and stack them on pallets. The employer's job analysis also required material handlers to push and pull up to 78 pounds and occasionally in excess of 100 pounds. (Ex. 17.)

(6) Claimant disagreed with the employer's description of the material handler's job because the material handlers were required to manually carry and lift heavy objects such as brakes, and roll and lift heavy objects such as drums and axles. No lifting devices or other employees designated to assist claimant were available. (Test. of claimant.) Depending on how the previous shift left the work area, material handlers lifted and stacked front and rear brakes for approximately 30 minutes during an eight-hour shift. The front brakes weighed 44.50 pounds

each and the rear brakes weighing 77.50 each. Material handlers were required to re-arrange the work area and stack brakes on pallets. They used a forklift to move axles and pallets of front brakes which were stacked four to eight brakes on each pallet and pallets of rear brakes stacked two to a pallet. Material handlers also rolled, lifted and stacked drums one or two high onto pallets, with the cast drums with no hubs weighing 84 pounds, steel drums with no hubs weighing 64 pounds, and pre-built drums with hubs weighing 162 pounds. Material handlers could not use the forklift to lift the hubs, which weighed approximately 64 pounds because, if the hubs were scratched, they would need to be resurfaced. Material handlers were also required to re-stack the heavy wooden pallets. The work involved in lifting, and stacking brakes, drums, and pallets exceeded claimant's physical capacity. (Ex. 16; test. of claimant.)

(7) Ms. Franks met with RRU Vocational Consultant Allen Britton at the employer's job site, and they observed the material handler job being performed. Mr. Britton talked to the workers performing the job and took notes. (Test. of Frank.) Ms. Frank revised the job analysis at Mr. Britton's request to reclassify the work as heavy consistent with claimant's description of how the job was performed. Ms. Frank disagreed with the revisions because her job analysis was based on the employer's representation that the job was a light to medium job and there were lifting devices or other employees available to assist claimant with the heavy lifting. (*Id.*)

(8) The employer has a mini-crane, which is used to lift brakes. The mini-crane is in constant use by another department. The only time the mini-crane was available for use by claimant's department was when everyone, including claimant, was taking their scheduled breaks. During his year and a half on the job, claimant never used and was never trained in the use of the mini-crane. (Test. of claimant.) Without the use of the mini-crane, claimant would be required to manually lift over 77 pounds which was beyond his physical capacity. (Test. of Ms. Frank.)

(9) Claimant appealed his impairment findings and the department requested a medical arbiter examination, which was performed on October 29, 2001. The medical arbiter report determined that due to his compensable injury and its sequelae, claimant was permanently limited to 10 pounds constant lifting, 25 pounds frequent lifting, and 35 pounds occasional lifting. (Ex. 13 at page 5.) The report also limited claimant to 10 pounds constant carrying, 20 pounds frequent carrying and 30 pounds occasional carrying. He was also precluded from above shoulder height reaching and above shoulder height pushing/pulling. (*Id.*) Dr. O'Neill subsequently concurred with the medical arbiter's findings, including the restrictions on claimant's ability to lift and carry objects. (Ex. 15.)

(10) As a result of the medical arbiter's findings, WCD increased claimant's award to 27 percent (51.84 degrees) PPD for loss of use of his left arm. (Ex. 14.)

(11) Dr. O'Neill did not release claimant to regular work, did not believe claimant could lift more than 50 pounds and did not think he would be able to return to his regular work as a material handler. (Ex. 19.)

(12) RRU Vocational Consultant Britton investigated claimant's request for vocational

assistance and RRU Vocational Consultant Rebecca Foltz wrote the Director's Review and Order finding claimant eligible for vocational assistance. (Ex. 21; test. of Frank.)

CONCLUSIONS OF LAW

RRU correctly determined that claimant was entitled to vocational services because he was unable to perform his regular job.

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).

RRU set aside the employer's denial of vocational assistance because it concluded that claimant was unable to perform his regular work and had a substantial handicap to employment. The employer first contends that claimant is not eligible for vocational assistance because he was able to return to his regular employment.

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)

OAR 436-120-0320(9), which is cited by RRU, 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.

Additionally, OAR 436-120-0005 defines “regular employment” as “the employment the worker held at the time of injury.” Claimant’s regular employment at the time of injury was that of material handler.

The evidence establishes that claimant is unable to perform his regular work as a material handler because there was no assurance that claimant would not be required to lift and carry beyond his physical capacity. A PCE performed in December 2000 found that claimant was able to perform medium work and was not to able lift in excess of 40 pounds. Additionally, an October 2001 medical arbiter report determined that due to his compensable injury and its sequelae, claimant was permanently limited to 10 pounds constant lifting, 25 pounds frequent lifting, and 35 pounds occasional lifting. The report also limited claimant to 10 pounds constant carrying, 20 pounds frequent carrying and 30 pounds occasional carrying. He was also precluded from above shoulder height reaching and above shoulder height pushing/pulling. Claimant’s attending physician subsequently concurred with the medical arbiter’s findings, including the restrictions on claimant’s ability to lift and carry objects.

Furthermore, claimant credibly testified that the material handlers were required to manually carry and lift heavy objects such as brakes, and roll and lift heavy objects such as drums and axles. He testified that material handlers lifted and stacked front and rear brakes for approximately 30 minutes during an eight-hour shift, with the front brakes weighing 44.50 pounds each and the rear brakes weighing 77.50 each. He stated that they also rolled, lifted and stacked drums one or two high onto pallets, with the cast drums with no hubs weighing 84 pounds, steel drums with no hubs weighing 64 pounds, and pre-built drums with hubs weighing 162 pounds. Material handlers were also required to re-stack the heavy wooden pallets. The work above enumerated involved lifting and stacking brakes, drums and pallets which exceeded claimant’s physical capacity.

The employer asserts that there were mechanical devices and other workers to assist claimant with the heavy lifting. However, Ms. Frank confirmed that no worker had been specifically designated to assist claimant. Furthermore, claimant credibly testified that the mini-mini-crane, which the employer stated was available, was not. Claimant testified that the mini-crane was in constant use by another department. The only time that the mini-crane was available for use by claimant’s department was when everyone, including claimant, was taking their scheduled breaks. The undisputed evidence established that, during his year and a half on the job, claimant never used and was never trained in the use of the mini-crane. Even Ms. Frank acknowledged that without the use of the mini-crane, claimant would be required to manually lift over 77 pounds which was beyond his physical capacity.

The employer contends that RRU’s decision should be reversed and remanded because it violates ORS 656.283(2)(c). In support of its contention, the employer makes four arguments. First, the employer argues that RRU’s decision reflects an error of law because it relied on claimant’s description of the job as requiring him to lift heavy objects instead of the employer’s description which classified the work as light to medium work with the use of a mini-crane and the assistance of his fellow employees. The employer further argued that Mr. Britton’s review of the job site was perfunctory and that he should not have required Ms. Frank to revise the job analysis to accommodate claimant’s description since it is the employer that sets the job duties.

To begin, the length of time that Mr. Britton spent watching the material handler's job being performed does not mean that his review or the job was perfunctory. Ms. Frank testified that Mr. Britton took notes and talked to the workers performing the job and that she did not know whether he had been to the job site previously. Moreover, inasmuch as the job analysis as originally drafted by Ms. Frank relied on the employer's representation that a mini-crane and other workers would be available to assist claimant with the heavy lifting and I have found that not to be the case based on claimant's credible testimony, I do not find the employer's contention or its description of the material handler's job to be supported by the persuasive evidence.

The employer's second and third arguments are likewise unpersuasive. The employer argues RRU's decision reflects an error of law because none of the information relied upon by RRU in performing the substantial handicap to employment analysis is contained in the record before me, thus foreclosing any review of the analysis. The employer also points to RRU's failure to perform a full market survey as a violation of the rules. However, I find that RRU's decision adequately describes the research reviewed in determining that claimant has a substantial handicap to employment. Ms. Frank testified on direct examination that RRU's transferable skills analysis was incomplete and there was no full market survey completed. She later conceded, however, that RRU's analysis was in compliance with the rules because RRU went back, not five, but 10 years to develop claimant's transferable skills, and thereafter reviewed 44 job titles, which she stated was not outside the industry standards for analysis by vocational consultants. Finally, in its fourth argument, the employer complains that RRU Vocational Consultant Rebecca Folz who wrote the order at issue here, should have remanded the case back to the employer for Ms. Frank to perform the substantial handicap to employment analysis. The employer argues that, because she did not do so, Ms. Folz exceeded her review authority. I disagree. Inasmuch as ORS 656.283, which governs the director's review of vocational decisions, gives the director broad authority to resolve vocational services disputes, I do not find that Ms. Folz exceeded her review authority. Nor has the employer identified any rule or statute that would have required Ms. Folz to remand the matter back to the employer for Ms. Frank to conduct her own substantial handicap to employment analysis. Consequently, I conclude that the employer has failed to meet its burden that RRU's order violates ORS 656.283(2)(c). Accordingly, RRU's order is affirmed and adopted herein by this reference.

ATTORNEY FEES

Claimant has successfully defended RRU's decision that he is eligible for vocational assistance 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 \$2,767.50.

ORDER

IT HEREBY ORDERED that RRU's June 18, 2002 Director's Review and Order is affirmed. The self-insured employer is ordered to pay claimant's attorney \$2,767.50.

Dated this 5th day of February 2003 at Salem, Oregon.