

In the Matter of the Vocational Dispute of

Haveron, Matthew J., Claimant

Contested Case No: H02-076

PROPOSED AND FINAL ORDER

April 16, 2003

MATTHEW J. HAVERON, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a July 9, 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 insurer's notice that claimant was ineligible for vocational assistance. The matter was referred to the Hearing Officer Panel (Panel) for hearing on August 2, 2002.

On November 19, 2002, Administrative Law Judge Paul Vincent conducted an in-person hearing in this matter in Salem, Oregon. Attorney James C. Egan represented the petitioner, Matthew J. Haveron (claimant). Senior Trial Attorney Robert L. Seelig represented the respondent Liberty Northwest Insurance Corporation (insurer) and its insured Western Oregon Webb Press, Inc (employer). WCD waived appearance at the hearing. Claimant testified on his own behalf and called employer's General Manager Martin Leopard as a witness. Insurer called no 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 he refused to participate in the light duty job offered.

EVIDENTIARY RULING

The record consists of Exhibits 1 through 23 and P1, 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's Review and Order, with the following supplementation:

(1) Mr. Haveron began working for the employer on October 2, 1995. (Ex. 2.) On June 7,

1996, he injured his lower back while working as a maintenance worker/driver. (Exs. 1, 2.) Insurer subsequently accepted his claim for low back strain. (Ex. 15.) In July 2001, he experienced an aggravation to his low back. (Test. of Haveron.) Mr. Haveron's attending physician, Henry Holmes, MD found him medically stationary on December 31, 2001. (Ex. 10.) A Notice of Closure awarded 16 percent (51.2 degrees) unscheduled permanent partial disability (PPD). (Ex. 16.) An Order on Reconsideration increased the award to 20 percent (64 degrees) unscheduled PPD. (Ex. 18.)

(2) Employer subsequently offered Mr. Haveron a temporary light duty job as an assistant camera technician. The employer stated that the physical demands of the light work required: frequently lifting and carrying up to one to two pounds; pivoting but no twisting; occasional slight bending, more like a leaning forward than bending; occasional pushing and pulling with minimal force under one pound; no climbing; no reaching but constant use of both hands; occasional to frequent standing but may sit as needed; occasional walking; and occasional sitting with stool provided to sit as needed. (Ex. 3.)

(3) On October 24, 2001, Mr. Haveron's attending physician, Henry Holmes, MD, approved the temporary light duty job of assistant camera technician for full-time work and listed Mr. Haveron's restrictions as: lifting 25 pounds occasionally; no repetitive bending or twisting; and change positions as needed. (*Id.*)

(4) On November 28, 2001, Mr. Haveron was examined by Dr. Holmes and disagreed with the employer's job analysis (JA). He stated that he was unable to sit as needed, that there was no stool available to use, and that he was required to lean over using a magnifying glass. Mr. Haveron also stated that the job required him to constantly stand during the full shift. Dr. Holmes noted mild pain behavior and inconsistencies in Mr. Haveron's examination. Dr. Holmes reaffirmed his release to the light/modified job of assistant camera technician and ordered a physical capacity evaluation (PCE). (Ex. 7.)

(5) On November 22, 2001, Mr. Haveron began working as camera technician. (Test. of Haveron.) By letter dated October 25, 2001, the employer offered Mr. Haveron the modified, lightduty camera technician job to start on November 1, 2001 at \$9.00 per hour. (Ex. 4.)

(6) The camera technician job consists of preparing film for the printing process. There were three full-time permanent camera technician positions with the employer. The modified position required Mr. Haveron to move from machine to machine preparing an aluminum plate for the printer. While the machines are processing the film, he had an opportunity to sit down. The employer would have provided a stool at the job site to allow Mr. Haveron to sit down while the film was processing if he had asked for one. There were also chairs available throughout the Proposed and Final Order, *Matthew J. Haveron* (Case No. H02-076) Page 3 of 6 facility. (Test. of Leopard.) Mr. Haveron was not required to perform any other tasks during the period he was waiting for the film to process. The person Mr. Haveron assisted was to handle the work at the table because that task required bending. (Exs. 20, 21.)

(7) Mr. Haveron felt he could not perform the modified job because his back hurt and he failed to come to work several times or left work early in November 2001 because that was "all he

could take.”¹(Test. of Haveron.) By letter dated November 9, 2001, the employer terminated Mr. Haveron because he failed to report to work on November 1, 2, 5, 6, 8 9, and 13, 2001 without notifying the general manager or his supervisors, Randy Leopard or “Meo,” of his absence and failed to notify them that he would not return after lunch on November 7, 2001.² (Ex. 5.)

(8) A January 8, 2002 PCE noted self-limiting participation and found that Mr. Haveron was able to perform in the light level of work over an eight-hour workday. The PCE recommended that he seek a light duty job with limited bending and the ability to move frequently between walking, standing, and sitting. Pursuant to *the Dictionary of Occupational Titles*, “frequently” means onethird to two-thirds of the day. (Ex. 9.)

(9) A corrected job analysis noted that the light/modified job of assistant camera technician required one to three consecutive hours of sitting, three to five consecutive hours of standing, and three to five consecutive hours of walking. On February 28, 2002, Dr. Holmes declined to approve the corrected job analysis. (Ex. 6.)

(10) By letter dated March 19, 2002, insurer notified Mr. Haveron that he was ineligible for vocational assistance because he refused to participate in the temporary modified light duty job of assistant camera technician offered by the employer, which would have lead to suitable employment. (Ex. 17.)

CONCLUSIONS OF LAW

RRU correctly determined that claimant was not entitled to vocational services because he refused to participate in the temporary modified light duty job that was intended to result in permanent employment.

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 affirmed the employer’s denial of vocational assistance because it concluded that

¹ Mr. Haveron testified that a stool was not provided and he was never able to work more than four hours at a time performing the assistant camera technician job because he was not allowed to sit down due to “deadlines” and he was required to bend over to look at the film through the magnifying glass. However, I do not find his testimony concerning the conditions for the modified job persuasive inasmuch as RRU observed how the job was performed and RRU found the job was within claimant’s physical capacities.

² Mr. Haveron also testified that he called “Bobby” when he was unable to come to work because of the pain related to his low back injury and that she was to relay the information to his supervisors. Moreover, he also testified that he was never told that calling “Bobby” was insufficient. However, he offered no corroborating evidence, such as the testimony of “Bobby” nor did he subpoena his supervisors. Consequently, I do not find his testimony in this regard persuasive.

claimant failed to participate in the temporary light duty job that was intended to result in permanent employment. Claimant contends that the temporary light duty job was a “sham” and that it was not within his restrictions because it required him bend for a substantial period of time and to constantly stand without an opportunity to sit down.

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.

OAR 436-120-0330(5) 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.

“Suitable employment” means employment for which the worker has the “necessary physical capacity, knowledge, skills and abilities.” OAR 436-120-0005(11)(a).

Claimant argued on administrative review that the modified light duty job of camera technician job was beyond his physical capacity and that his absences from work and his inability to perform the job for more than four hours at a time were caused by his low back pain. RRU found that Dr. Holmes had approved and released claimant to the camera technician job for 40 hours per Proposed and Final Order, *Matthew J. Haveron* (Case No. H02-076) Page 5 of 6 week. Moreover, RRU also observed the job being performed and found that it was consistent within the JA and within claimant’s capabilities. Consequently, RRU concluded that because claimant had refused or failed to make a reasonable effort to perform the available modified light duty job intended to result in suitable employment, he was not eligible for vocational assistance. I agree.

The evidence establishes that the physical demands of the assistant camera technician job required: frequently lifting and carrying up to one to two pounds; pivoting but no twisting; occasional slight bending, more like a leaning forward than bending; occasional pushing and pulling with minimal force under one pound; no climbing; no reaching but constant use of both hands; occasional to frequent standing but may sit as needed; occasional walking; and occasional sitting

with stool provided to sit as needed. Dr. Holmes approved the job of assistant camera technician for full-time work. Although claimant disagreed with the employer's JA, Dr. Holmes did not take claimant off work. Instead, he reaffirmed his release to the assistant camera technician job and ordered a PCE. At that time, Dr. Holmes noted mild pain behavior and inconsistencies in claimant's examination.

At hearing, claimant again argued that the assistant camera technician job was not within his physical capabilities. However, RRU found after observing the job being performed that the job was within claimant's capabilities and consistent with the JA, which Dr. Holmes based claimant's release to full-time work upon. I find RRU's reasoning persuasive and find no error in RRU's assessment.

Claimant next argued that the employer's offer of the modified light duty job was a "sham" and that the employer was attempting to get rid of him because of the potential costs of his workers' compensation claim. In support of his argument, claimant offered the testimony of Michael Grell, a former employee who was terminated by the employer due to absenteeism. Claimant made much of the fact that Mr. Leopard claimed to have called to warn Mr. Grell that further absences would result in termination, but that Mr. Grell never received a message on his answering machine, which was identical to the case here. I find claimant's argument in this regard to be misplaced. The issue is whether the work was within claimant's capabilities and whether claimant made a reasonable effort to perform the available work, not whether Mr. Leopard warned him about his absences. Moreover, the record establishes that the job of assistant camera technician was an actual job, which was available to claimant permanently. Indeed, after claimant left, the employer hired another injured worker as a third assistant camera technician. Furthermore, as noted by RRU, this employer has a history of offering permanent modified employment to its injured workers. Consequently, I conclude that claimant has failed to meet his burden of establishing that RRU's order should be modified pursuant to the criteria set forth on ORS 656.283(2)(c). Accordingly, RRU's order is affirmed.

ATTORNEY FEES

Claimant has not prevailed in overturning RRU's decision that he is ineligible for vocational assistance and is therefore not entitled to attorney fees.

ORDER

IT HEREBY ORDERED that RRU's June 18, 2002 Director's Review and Order is affirmed.

Dated this 15th day of April 2003 at Salem, Oregon.

Paul Vincent, Administrative Law Judge
Hearing Officer Panel