
In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Spitzer, Rick E., Claimant

Contested Case No: H02-124

PROPOSED AND FINAL ORDER

February 18, 2003

RICK E. SPITZER, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a November 18, 2002 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 January 23, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Attorney Michael A. Gilbertson represented petitioner Rick E. Spitzer (claimant). Attorney Michael G. Fetrow represented respondent, SAIF Corporation (insurer). WCD waived appearance at hearing. Claimant testified on his own behalf and the record closed on the date of 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 is ineligible for vocational services.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 15 as well as insurer's Supplementary Exhibit A were admitted into the record without objection. Also, the parties stipulated that the Opinion and Order dated September 11, 2002 is currently pending on appeal before the Workers' Compensation Board. Finally, insurer objected to claimant's testimony, arguing that it was not relevant within the limited scope of review specified by ORS 656.283(2)(c). I overruled the objection 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). Finally, the parties stipulated that the September 11, 2002 Opinion and Order (Ex. A) is currently on appeal.

FINDINGS OF FACT

(1) Claimant has a high school education and has worked in heavy construction and demolition. (Testimony of claimant.) On December 21, 2000, claimant suffered a compensable injury while performing heavy demolition work in a lifting basket on a three-story roof. (Exs. A and 1; testimony of claimant.) Insurer accepted the following as compensable conditions: left

wrist contusion and sprain, left shoulder sprain and SLAP lesion, and chest wall contusion. (Exs. 6 and 11-4.)

(2) On March 12, 2001, Mark J. Buehler, MD diagnosed claimant's left wrist condition as a malunion of the left distal radius secondary to the fracture many years earlier. Dr. Buehler opined that the work December 2000 work injury may have exacerbated the pre-arthritis problem of the left wrist. (Ex. 3.)

(3) On July 30, 2001, Robert E. Tennant, MD treated claimant for left wrist pain secondary to post traumatic arthritis. Dr. Tennant wrote, "I told him that the trouble he is having with his wrist extends from the injury 15 years ago when he fell from a cliff and not from the injury where he hurt his shoulder in December of 2000." (Ex. 5-1.)

(4) On September 12, 2001, Stephen L. Brenneke, MD released claimant to full duty without restrictions. (Ex. 7.) Dr. Brenneke opined,

He has not returned to his previous form of employment and this is related to a right wrist fracture, which was nonindustrial, and a left wrist injury which is *presumed to be treated with fusion of the left wrist*. At the present time the patient could do his job based upon this left shoulder problem. I find no evidence of restriction based upon the left shoulder problem. His claim can be closed without evidence of permanent partial impairment to the left shoulder related to his industrial injury. No further treatment is indicated. (Ex. 8.)

(5) On September 14, 2001, Dr. Brenneke stated that claimant could return to work as a demolition worker. (Ex. 6.)

(6) On September 19, 2001, insurer issued a Notice of Ineligibility for Vocational Assistance; claimant appealed (Exs. 9 and 10.)

(7) On November 14, 2001, insurer issued a Notice of Closure listing the medically stationary date as September 12, 2001 and awarding zero permanent partial disability (PPD). (Ex. 11.)

(8) On January 9, 2002, James Harris, MD examined claimant at WCD's request. (Ex. 12.) He opined that no restriction was appropriate for the left shoulder. He further opined that a restriction for repetitive use of the left wrist was appropriate but he attributed the left wrist restriction in major part to a nonindustrial injury claimant suffered fifteen years ago. Dr. Harris stated:

It is my opinion that the current status of the left wrist is due to both the fracture 15 years ago and the injury of 12/21/00. It is my opinion that any findings of impairment are mostly (75%) due to the earlier fracture and resultant healing. This opinion is based on the fact that the earlier left wrist injury was much more severe, being a fracture involving the wrist joint. Furthermore, both Dr. Tennant and Dr. Buehler make mention that his current symptoms are due mostly to the old injury and resultant degenerative changes. (Ex. 12-4.)

(9) In an Order on Reconsideration dated February 22, 2002, WCD affirmed the medically stationary date and awarded 5 percent unscheduled permanent partial disability for the left shoulder and 3 percent scheduled permanent partial disability for the left wrist. (Ex. 13-4.)

(10) On September 11, 2002, Workers' Compensation Board Administrative Law Judge Abigail Herman issued an Opinion and Order affirming insurer's compensability denial of a left wrist scapholunate ligament tear. (Ex. A-6.)

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 attending physician Brenneke released him to regular demolition work. RRU relied on the opinions of Dr. Brenneke, Dr. Beuhler and Dr. Tennant attributing claimant’s left wrist problems to a nonindustrial injury that occurred many years before the work injury. Also, RRU noted that medical arbiter Harris apportioned the cause of claimant’s left wrist impairment 25 percent to the work injury and 75 percent to the old, nonindustrial injury.

Claimant first contends that RRU abused its discretion by ignoring the law of the case. Claimant next contends that the administrative order reflects a legal error because ORS 656.340 does not contain a major contributing cause requirement for establishing vocational assistance eligibility. In contrast, insurer contends that the doctrine of the law of the case does not apply to claimant’s previous permanent partial disability 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 WCD’s Appellate Review Unit awarded permanent partial disability for loss of use of the left wrist 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 may award a permanent partial disability award but RRU may determine that the injured worker is ineligible for vocational assistance.

Here, ARU awarded 3 percent scheduled permanent partial disability for loss of use of the left wrist. Contrary to claimant's argument, the law of the case does not bind RRU to find claimant eligible for vocational assistance. RRU is free to evaluate the medical evidence presented and to determine whether claimant is eligible for vocational assistance.

Causation

Claimant correctly points out that ORS 656.340 does not require claimant to establish that the work injury was the major contributing cause of his physical impairment or work restrictions. However, ORS 656.340(6)(b) requires establishment of a causal link between the compensable work injury and claimant's eligibility for vocational assistance. Furthermore, in enacting ORS 656.726(4)(a)¹, the legislature authorized the director to promulgate administrative rules to govern the provision of vocational assistance to injured workers. The plain meaning of 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 Brenneke released claimant to regular work. Furthermore, the weight of medical evidence, including the opinions of attending physician Brenneke, Dr. Beuhler and Dr. Tennant establishes that claimant's left wrist impairment was not caused by the work injury. Only Dr. Harris apportioned causation of the left wrist impairment between the industrial and nonindustrial injuries. On the other hand, the only medical evidence contained in the record that supports a causal link between the work injury and the impairment is Dr. Harris' opinion which attributed 25 percent causation to the work injury. Based on the record, I find that claimant has failed to establish a causal link between the work injury and his left wrist impairment, and therefore, is ineligible for vocational assistance.

¹ ORS 656.726(4)(a) provides:

(4) The director hereby is charged with the duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may:

(a) make and declare all rules and issue orders which are reasonably necessary in the performance of the director's duties.

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 November 18, 2002 is affirmed.

DATED this 18th day of February 2003.

Catherine P. Coburn, Administrative Law Judge
Hearing Officer Panel