

In the ORS 656.340 Vocational Services Dispute of

**BARBARA BAEZ, Claimant**

Contested Case No: H04-087

**PROPOSED AND FINAL ORDER**

October 13, 2004

SAIF CORPORATION, Petitioner

BARBARA BAEZ, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

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**HISTORY OF THE CASE**

The insurer appeals the Director's Review and Order issued on March 30, 2004 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or the department). On July 19, 2004, the department referred the matter to the Office of Administrative Hearings. On August 24, 2004, Administrative Law Judge Catherine P. Coburn convened and continued a contested case hearing. Petitioning employer, the Oregon Department of Corrections and SAIF Corporation (insurer) were represented by attorney Michael O. Whitty. Respondent Barbara Baez (claimant) was represented by attorney James C. Egan. No witnesses testified and the record closed on September 7, 2004 following receipt of written argument.

**ISSUE**

Whether RRU incorrectly determined that claimant is eligible for vocational assistance.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 28 were admitted into the record without objection.

**FINDINGS OF FACT**

(1) Claimant suffered a compensable occupational disease, dated January 21, 2000 while working as a pharmacy technician. (Ex. 1.) Insurer accepted bilateral wrist/forearm tendonitis and bilateral epicondylitis. (Ex. 8-4.) In May 2002, Dr. Fogelsong performed right elbow surgery. (Ex. 10-1.) In June 2002, claimant returned to modified duty, four hours per day, five days per week. (Exs. 2-4 and 3.)

(2) In a August 8, 2002 physical capacities evaluation, claimant demonstrated residual physical abilities in the light-sedentary range, lifting and carrying 15 pounds occasionally. (Ex. 2-5.)

(3) On September 16, 2002, employer notified claimant that modified duty expired within 90 days and that without a medical release to full duty, she would be placed on leave. (Ex. 3.)

(4) On September 27, 2002, Dr. Fogelsberg opined that claimant's condition was stable and released her to full duty. He noted that claimant had some mild tenderness but no objective findings or weakness. (Ex. 4.)

(5) On September 27, 2002, claimant returned to her regular work as a pharmacy technician full time. Her job duties included opening large bottles of medicine, filling smaller prescription bottles, placing the prescription bottles with cards into blister packs and sealing. She processed approximately 500 to 1,200 prescriptions per day. She is right-handed and handwrote information for each prescription. (Exs. 10 and 27.)

(6) On October 15, 2002, Dr. Fogelsberg deferred to the previous physical capacities evaluation to rate any permanent impairment. (Ex. 5.)

(7) On November 26, 2002, Richard B. Rosenbaum, MD examined claimant at insurer's request. Claimant continued to have some right elbow pain but Dr. Rosenbaum recommended no treatment, deferring to Dr. Fogelsong for palliative care. (Ex. 6-7.)

(8) On December 12, 2002, Dr. Fogelsberg prescribed a right arm sling. (Ex. 7.)

(9) On December 27, 2002, insurer closed the claim with a 1 percent permanent partial disability (PPD) award for the left arm and 3 percent PPD for the right arm. (Ex. 8-1.)

(10) On April 17, 2003, claimant sought treatment from Ronald Bowman, MD. (Ex. 10.) He noted slight swelling on the right anterior lateral elbow and recommended a CT arthrogram to rule out an intra-articular loose body. (Ex. 10-3.)

(11) On June 4, 2003, Mark Beuhler, MD stated, "The work restrictions should limit any forceful and repetitive use with her right arm and hand, and this should be permanent." (Ex. 12.)

(12) On June 24, 2003, Raymond B. Brumbaugh, MD opined that claimant has permanent restrictions in her ability to grasp and repetitively use the right hand and wrist. (Ex. 14.)

(13) Claimant last performed her regular work as a pharmacy technician on August 26, 2003. (Ex. 27.)

### **CONCLUSION OF LAW**

RRU correctly determined that claimant is eligible for vocational assistance.

### **OPINION**

Jurisdiction lies with the director. ORS 656.340(4). Pursuant to ORS 656.283(2)(c), I may modify the administrative order if it (A) violates a statute or rule, (B) exceeds the statutory authority of the agency, (C) was made upon unlawful procedure, or (D) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(5). The

burden of proof falls upon the proponent of a fact or position. ORS 183.450(2). In that regard, insurer bears the burden of proving by a preponderance of the evidence that RRU abused its discretion or exercised clearly unwarranted discretion in determining that claimant is eligible for vocational services. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is by a preponderance of the evidence). Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.* 303 Or 390 (1989).

RRU determined that even though claimant returned to her previous employment for more than 60 days, the pharmacy technician job was not suitable and therefore, she is eligible for vocational assistance.<sup>1</sup> Insurer takes the position that the statute does not require the previous work to be suitable. I disagree.

Pursuant to ORS 656.340, employers are required to provide vocational services to injured workers who are eligible. ORS 656.340(6) provides:

(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**.

(B) “**Suitable employment**” means:

(i) Employment of the kind for which the worker has the necessary **physical capacity**, knowledge, skills and abilities;

(Emphasis added.)

The parties dispute the proper construction of ORS 656.340(6)(a). Insurer contends that the subsection is disjunctive because it contains the term “or” and that once an injured worker returns to her previous employment, she is ineligible for vocational assistance and employer is not required to show that the regular work was suitable. In support of its position, insurer argues that RRU erred by addressing the question whether claimant returned to suitable employment because she did, in fact, return to her previous employment. Insurer further contends that RRU erred by considering any medical records after the date claimant returned to her regular work.

In contrast, claimant contends that ORS 656.340(6)(a) is conjunctive because it contains the term “and”. In support of her position, claimant argues that RRU correctly considered

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<sup>1</sup> Even though the administrative order contains the term “pathological worsening”, RRU made no finding concerning the validity of any aggravation claim.

whether her previous employment was suitable. Finally, claimant argues that her previous employment was not suitable, and consequently, she is eligible for vocational assistance.

In interpreting a statute, the court's, and thus my task, is to determine the legislative intent. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). In order to discern the legislative intent, the first level of analysis is to examine the text and context of the statute. The test of the statute is the best evidence of the legislature's intent. If the legislature's intent is unclear, then I consider legislative history, and if still unclear, then I apply the general maxims of statutory construction. *Id.*

Applying the foregoing method of analysis to ORS 656.340(6)(a), I find I need proceed no further than examining the plain meaning. As insurer argues, the first clause of ORS 656.340(6)(a) is disjunctive, meaning that an injured worker may be eligible for vocational assistance in either circumstance *viz.*, if she will be unable to return her previous employment or if she will be unable to return to any other suitable and available employment. However, subsection (6)(a) contains a second clause which is conjunctive and imposes an additional requirement for eligibility. In order to establish eligibility, an injured worker must also have a substantial handicap to employment. The statute goes on to define "substantial handicap" to include "suitable employment" which is defined to include "physical capacity". Read as a whole, the statute provides that if an injured worker returns to her previous employment but lacks the physical capacity to perform that job, rendering it unsuitable, then she may be eligible for vocational assistance.

OAR 436-120-0350 specifies the conditions under which a worker may become ineligible or eligibility for vocational services may end. OAR 436-120-0350(3) provides in part:

A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

(3) The worker has been employed at least for **60 days in suitable employment** after the injury or claim for aggravation and necessary worksite modification is in place.

OAR 436-120-0005(9) defines the term "suitable employment":

"(9) '**Suitable employment**' or 'suitable job' means employment or a job:

(a) For which the worker has the necessary **physical capacities**, knowledge, skills and abilities;

(Emphasis added.)

Here, claimant returned to her previous employment as a pharmacy technician on September 27, 2002 and continued in this capacity until August 26, 2003. The record establishes that claimant performed her regular work for more than 60 days which satisfies the time requirement prescribed by OAR 436-120-0350(3).

However, the rule also specifies that the regular work must be suitable *viz.*, that the worker had the necessary physical capacity to perform the job. The pharmacy technician job duties require repetitive use of claimant's dominant right arm and wrist. On November 26, 2003, within the relevant 60-day period, an insurer's medical examiner noted that claimant continued to have right elbow pain. Then on December 12, 2002, claimant sought treatment from Dr. Fogelsberg, complaining of right elbow pain and he prescribed an arm sling. These facts establish that claimant was not physically capable of performing her regular work for a 60-day period. Moreover, in June 2003, Dr. Beuhler and Dr. Brumbaugh imposed permanent restrictions prohibiting repetitive use of the right arm and wrist. Based on the record, I find that claimant did not have the physical capacity to perform her regular work as a pharmacy technician, and therefore, she is eligible for vocational assistance. Finally, finding no basis for modifying the administrative order, I affirm.

### **ATTORNEY FEES**

Claimant has prevailed in a contested case, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Applying the factors listed in OAR 436-001-0265(1)(b), the quality of representation is beyond question, the value of vocational assistance is significant, and following the hearing, the parties submitted written argument construing the statute and several rules. Therefore, I find that an extraordinary fee of \$4,000 is reasonable for claimant's attorney's services in this matter.

### **ORDER**

IT IS HEREBY ORDERED that:

The Directors Review and Order dated March 30, 2004 is affirmed.