

In the Matter of the Vocational Dispute of

**Blakley, Suzanne P., Claimant**

Contested Case No: H03-132

**PROPOSED & FINAL ORDER**

March 4, 2004

SUZANNE P. BLAKLEY, Petitioner

SAIF CORPORATION, Respondent

Before Ella D. Johnson, Administrative Law Judge, Office of Administrative Hearings

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**HISTORY OF THE CASE**

Claimant appeals an October 22, 2003 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 denial of vocational assistance. The matter was referred for hearing to the Office of Administrative Hearings (OAH), formerly the Hearing Officer Panel, on November 17, 2003.

On January 29, 2004, Administrative Law Judge Ella D. Johnson convened a telephone hearing in this matter. Attorney at Law Christopher D. Moore represented petitioner Suzanne P. Blakley (claimant). Trial Counsel Michael G. Fetrow represented respondent SAIF Corporation (insurer or SAIF). Claimant testified on her own behalf and called former co-worker Gordon Frank as a witness. Insurer called no witnesses and WCD waived appearance. The record closed following the hearing on January 29, 2004. The record was subsequently reopened to receive argument on whether claimant's counsel is entitled to an attorney fee in excess of \$2,000 as provided in OAR 436-001-0265 and closed again on February 25, 2004.

**ISSUES**

(1) Whether RRU's decision that claimant is not entitled to vocational assistance because she was able to return to regular work violates the provisions of ORS 656.283(2).

(2) Whether claimant's counsel is entitled to an attorney fee in excess of \$2,000 as provided in OAR 436-001-0265.

**EVIDENTIARY RULING**

The record consists of WCD's Exhibits 1 through 19, which were admitted into the record without objection.

**FINDINGS OF FACT**

(1) Claimant is a 41 year old woman with a high school degree and four years of college. (Ex. 5; test. of claimant.) She was employed by Lancair Company (Lancair), an aviation production company, for one and one-half years before her injury. On October 31, 2001,

claimant injured her left shoulder while working for Lancair as an upholstery associate. (Exs. 2, 7.) She was cutting the carpet and felt a sharp pain in her shoulder. (Claimant's testimony.) Claimant was diagnosed with left shoulder strain, synovitis involving the left AC joint, partial thickness of left rotator cuff tear. On February 20, 2001, insurer accepted claimant's claim for strain (left shoulder) and left rotator cuff tear. Claimant's weekly wage for the purposes of temporary disability was \$381.62. (Exs. 3, 9, 13.)

(2) On March 12, 2002, claimant underwent left shoulder arthroscopic surgery with debridement of the undersurface of the rotator cuff followed by acromioplasty and open Munford procedure. She underwent four to five weeks of physical therapy. On September 26, 2002, claimant's attending physician Rodney P. Wigle, MD (Orthopedic Surgeon) examined claimant six months post surgery. Claimant reported some left shoulder soreness and difficulty sleeping on her left side because of the pain. Dr. Wigle noted a full range of motion in her left shoulder with 180 degrees abduction, 90 degrees external rotation and 70 degrees internal rotation. Dr. Wigle referred claimant for a level two physical capacity evaluation (PCE). He opined that if claimant could be released to work, he would release her to medium work. He wanted her to work at her regular work for six weeks before declaring her medically stationary.<sup>1</sup> (Exs. 4, 5, 13.) Claimant was able to perform only light duty work such as paperwork and filing orders. She tried to do her regular job but was unable to perform her job for more than two hours. Dr. Wigle was retiring and claimant thought that he was not very interested in her medical problems. (Claimant's testimony.)

(3) On October 10, 2002, Robert Nelson, P.T. with Rebound Physical Therapy performed a two hour, second level PCE. The PCE concluded that claimant could lift up to 37 pounds from floor to knuckle, 17 pounds overhead, and that she was capable of occasional bending, stooping, squatting, crawling, reaching above shoulder level, crouching, kneeling, and balancing. The PCE also noted that claimant could push 70 dynamic pounds of force and pull 113 dynamic pounds of force. Claimant's major limitation was overhead activity and she reported weakness with overhead activities. The PCE concluded that claimant was able to lift 20 pounds overhead with her left hand and 17 pounds overhead with both hands. The PCE opined that claimant's regular work was medium work and that she could now perform medium work, exerting 20 to 50 pounds of force occasionally and 10 to 25 pounds of force frequently. (Ex. 5.) When claimant finished the PC, she was very sore and could not do anything for the rest of the day. (Claimant's testimony.)

(4) After reviewing claimant's PCE results, Dr. Wigle found claimant to be medically stationary on November 12, 2002. Dr. Wigle did not have claimant work at her regular work for six weeks prior to declaring her to be medically stationary as previously planned. (Ex. 6.) On January 16, 2003, claimant was contacted by the employer at injury and told that she would not be rehired. (Ex. 8.)

(5) Employer described the physical demands of the upholstery associate job to include, but not limited to: standing, bending, reaching, carrying, climbing, balancing and ability to occasionally move up to 50 pounds. (Ex. 1.) On February 12, 2003, a job analysis (JA) of

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<sup>1</sup> Claimant had not returned to work because Lancair was not working due to financial problems.

claimant's job as an upholstery associate was performed at SAIF's request. The JA found that the job entailed frequent lifting of less than five pounds, frequent reaching to the front and up to full arm distance, occasional lifting of up to 25 pounds, and rare overhead reaching. The JA also found that the job required kneeling and crawling for prolonged periods, reaching above shoulder height to cut carpet, frequently bending from the knees and waist, pushing and pulling up to 20 pounds of force with up to 10 pounds sustained pull eight times per day. (Ex. 7.)

(6) After reviewing the JA, Dr. Wigle opined on February 27, 2003 that claimant was able to perform the work activities of upholstery associate, released her to medium work as long as she was not required to lift more than 50 pounds and noted that claimant was not to exceed PCE restrictions. He also noted that claimant was experiencing a waxing and waning of her symptoms. (Ex. 8.)

(7) On February 27, 2003, SAIF issued a Notice of Closure, awarding 13 percent (41.60 degrees) unscheduled permanent partial disability for loss of use or function of her left shoulder. On April 1, 2003, SAIF found claimant ineligible for vocational assistance because she returned to or was able to return to regular or other suitable work. (Exs. 9, 10.)

(8) On April 21, 2003, claimant signed an affidavit in which stated that her job at injury required her to lift more than five pounds overhead when she lifted various sizes of boxes of panels, weighing from 5 to 25 pounds onto storage shelves approximately six to eight feet high. She also lifted airline seats weighing in excess of 25 to 50 pounds onto a table from the floor, put the panel on the back of the seat and had to reach up over her head to pull the fabric over the seat and secure the fabric. She stated that following her injury, Dr. Wigle limited her overhead lifting to less than five pounds and restricted her lifting to less than 50 pounds. Claimant stated that in her job, she had to push and pull in excess of 50 pounds occasionally when moving carpet away from the walls and lift rolls of carpet without assistance that weighed in excess of 100 pounds. She also had to lift and carry five gallon glue containers which weighed 40 to 50 pounds. Sometimes she had to install the upholstered panels in the plane. She had to pull herself up into the plane using her arms.<sup>2</sup> She stated that she had reviewed the JA and it was not accurate because there was no mention of the need to move rolls of carpet or the overhead lifting requirement. Dr. Wigle's understanding of the duties of her job was also inaccurate. Both the JA and Dr. Wigle thought that all she did was cut carpet. She further stated that she continued to have significant pain. (Exs. 12, 17; test. of claimant.)

(9) Gordon Frank worked with claimant at Lancair and had performed the job that claimant held at injury before he was moved to quality control. While performing claimant's job as upholstery associate, Frank confirmed that the job required him to lift materials such as upholstered panels in excess of 50 pounds and install them into the plane's cockpit. He also confirmed that he had to move huge carpet rolls weighing 80 to 100 pounds by himself, reach and work overhead, lift himself up into the plane by his arms, and lift and carry five gallon glue containers weighing 40 to 50 pounds. (Test. of Frank.)

(10) On April 21, 2003, Timothy A. Hill, MD became claimant's attending physician.

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<sup>2</sup> Claimant weighs in excess of 100 pounds. (Ex. 13.)

Dr. Hill examined claimant and reviewed her medical records. Claimant reported ongoing pain in her left shoulder, which she rated at a level five to seven out of a scale of one to ten. She further reported that the pain increased with use of her left arm. She was unable to do any overhead reaching and had difficulty lifting above the waist. Dr. Hill noted a loss of left shoulder range of motion and loss of strength due to pain and residual rotator cuff tendinopathy. Dr. Hill disagreed with the conclusions of the PCE, opining that the appropriate release was to light, not medium work. Dr. Hill based his opinion on his knowledge that PCEs are done over a two hour period and do not evaluate the worker's condition several hours or days after the PCE. The PCE measures the maximum capacity range, not the ability to perform everyday at that range. Dr. Hill noted that because claimant never performed her regular work on an ongoing basis, there was no proof that claimant could actually perform her regular work. He restricted claimant to a maximum lifting of 30 pounds, only occasional lifting of 15 pounds, no overhead reaching, avoid significant lifting above the waist and forceful pushing and pulling with the left arm. He prescribed medication and palliative physical therapy. (Ex. 13.)

(11) On April 30, 2003, Dr. Wigle opined that claimant was unable to frequently push and pull using her left arm for six hours out of an eight hour work day. (Ex. 11.)

(12) On May 29, 2003, medical arbiter Robert Steele, MD (Orthopedic Surgeon) examined claimant at WCD's request to determine claimant's permanent disability at the time of claimant's claim closure. Dr. Steele noted a slight decrease in range of motion in the left shoulder compared to the right, 5/5 symmetric left shoulder flexion, extension, abduction, and external rotation, 5/5 symmetric elbow flexion and extension, 5/5 symmetric wrist flexion and extension, and decreased grip strength in the left hand compared to the right. Dr. Steele opined that claimant is able to work at the medium level exerting 50 pounds occasionally and 25 pounds frequently and constantly but has a partial loss to repetitive use of her shoulder in overhead activity related to her rotator cuff tear and is limited in overhead reaching to no more than 20 pounds. (Ex. 15.)

(13) A June 17, 2003 Order on Reconsideration reduced claimant's unscheduled permanent partial disability award to eight percent (25.60 degrees). (Ex. 16.)

(14) Dr. Hill opined in a November 20, 2003 chart note, after reviewing the results of a November 4, 2003 MRI that the MRI revealed that claimant had experienced a pathological worsening of her compensable condition. He noted a thickening and signal distortion involving the distal supraspinatus tendon consistent with tendinitis and subacromial fluid indicating probable bursitis. Dr. Hill filed an aggravation claim on claimant's behalf. He continued to opine that claimant needed vocational assistance because she was not able to return to her previous work because it involved significant lifting and reaching at or above the shoulder level. (Ex. 20.)

## CONCLUSIONS OF LAW

RRU's decision that claimant is not entitled to vocational assistance violates the provisions of ORS 656.283(2)(c).

## OPINION

I may modify the department's vocational assistance order only 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.<sup>3</sup> *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 upheld the employer's denial of vocational assistance because it concluded that claimant was able to return to regular work. 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(9) (eff. 7-1-02; Admin. Order No. 02-057) provides in relevant part the conditions that the worker must meet to be eligible for vocational assistance:

(9) A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

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(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 or aggravation; and

(C) Has a substantial handicap to employment and requires assistance to overcome that handicap.

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<sup>3</sup> Insurer argued at hearing that I am prohibited from reweighing and reevaluating the evidence and reviewing this matter *de novo*. Claimant responded that in order to comport with due process, under the Oregon Supreme Court's opinion in *Colclasure*, I am required to conduct a *de novo* review of the facts in order to determine if any of the four bases for modification are present. I agree and review the evidence here *de novo* to determine if RRU abused its discretion in relying on the opinions of Dr. Wigle and the JA.

OAR 436-120-0005(10) defines regular employment as:

[T]he employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance; or, for a worker not employed at the time of aggravation, the employment the worker held on the last day of work prior to the aggravation claim. If the basis for potential eligibility is a reopening to process a newly accepted condition, "regular employment" is the employment the worker held at the time of the injury; when the condition arose after claim closure, "regular employment" is determined as if it were an aggravation claim.

Claimant's regular job was as an upholstery associate for Lancair. Her job was to upholster the interior of small airplanes, including the components and the cockpit panels and floor. Claimant argued at hearing that RRU abused its discretion by relying on the opinions of Dr. Wigle and the JA because both had an inaccurate understanding of claimant's job at injury. Additionally, claimant argued that it was abuse of discretion to ignore Dr. Hill's attending physician opinion that the PCE's conclusion concerning claimant's lifting capacity and ability to reach overhead could not be sustained over an eight-hour work day.

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).

The PCE found that claimant could lift up to 37 pounds from floor to knuckle, 17 pounds overhead, and occasionally bend, stoop, squat, crawl, reach above shoulder level, crouch, kneel, and balance. The PCE also noted that claimant's major limitation was overhead activity. The PCE concluded that claimant was able to lift 20 pounds overhead with her left hand and 17 pounds overhead with both hands. The JA of claimant's job as an upholstery associate found that the job entailed frequent lifting of less than five pounds, frequent reaching to the front and up to full arm distance, occasional lifting of up to 25 pounds, and rare overhead reaching. The JA also found that the job required kneeling and crawling for prolonged periods, reaching above shoulder height to cut carpet, frequently bending from the knees and waist, pushing and pulling up to 20 pounds of force with up to 10 pounds sustained pull eight times per day.

However, the weight of the credible evidence establishes that claimant's work at injury required her to lift boxes of panels weighing from over 50 pounds onto storage shelves approximately up to eight feet high. She also lifted airline seats weighing in excess of 25 to 50 pounds onto a table from the floor, put the panel on the back of the seat and had to reach up over her head to pull the fabric over the seat and secure the fabric. She had to push and pull in excess of 50 pounds occasionally when moving carpet away from the walls and lift rolls of carpet without assistance that weighed in excess of 100 pounds. She also had to lift and carry five-gallon glue containers that weighed 40 to 50 pounds. Sometimes she had to install the

upholstered panels in the plane's cockpit. She had to pull herself up into the plane using her arms to lift her body weight that was in excess of 100 pounds.

Claimant's former co-worker, Mr. Frank, who had previously held the job of upholstery associate, confirmed that the job required him to lift materials such as upholstered panels in excess of 50 pounds and install them into the plane's cockpit. He also confirmed that he had to move huge carpet rolls weighing 80 to 100 pounds by himself, reach and work overhead, lift himself up into the plane by his arms, and lift and carry five gallon glue containers weighing 40 to 50 pounds.

Former attending physician Dr. Wigle, who did not have accurate information concerning the job duties of upholstery associate, released claimant to medium work restricting her to lifting to no more than 50 pounds and otherwise adopted the PCE's restrictions. On the other hand, current attending physician Dr. Hill restricted claimant to a maximum lifting of 30 pounds, with occasional lifting of 15 pounds. He also restricted her to no overhead reaching, no significant lifting above the waist and no forceful pushing and pulling with the left arm. His limitations for claimant were more realistic because, based on his experience, a PCE that is conducted over a two-hour period and measures the worker's maximum capacity, does not test a worker's ability to sustain that effort over an eight-hour work day. I find Dr. Hill's opinion more persuasive both because it takes into account the inability of the PCE to measure sustained effort and because he had an accurate understanding of the duties of claimant's job as an upholstery associate. Consequently, I conclude that RRU abused its discretion by relying on the inaccurate JA, the opinion of the PCE which did not account for the impact of working an eight hour day at maximum capacity, and the opinion of Dr. Wigle, which was based on inaccurate information.

### ATTORNEY FEES

Claimant has successfully challenged RRU's decision and is, therefore entitled to an assessed attorney fee. ORS 656.385(1). Claimant's counsel requests an assessed fee in the amount of \$6,000 for 20 hours worked on the case at a fee of \$250 per hour. Insurer objects to the fee arguing that claimant has identified no extraordinary circumstances warranting assessment of such a fee. Insurer further argues that, even at an hourly fee of \$250, the \$6,000 requested exceeds the hourly fee rate by \$1,000. Finally, insurer objects to the requested fee because there is no breakdown of the number of hours expended.

ORS 656.385 provides in relevant part:

(1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327 or 656.340, where a claimant finally prevails in a contested case order by the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a **reasonable** attorney fee to the claimant's attorney. (Emphasis added.)

Additionally, OAR 436-001-0265(1)(b) now limits the amount of attorney fees in cases before the director to \$2,000, absent a showing of extraordinary circumstances, based on

amendments to ORS 656.285(1) by section 2, chapter 756 OL 2003. The factors to consider in assessing a reasonable attorney fee are: (a) The complexity of the issue(s) involved; (b) The quality of the legal representation; (c) The value of the interest involved; (d) The nature of the proceedings; (e) The risk in a particular case that an attorney's efforts may go uncompensated; (f) The assertion of frivolous issues or defenses; (g) A statement of services, if submitted within seven days of the hearing date, unless the administrative law judge instructs otherwise; and (h) Any other relevant consideration deemed appropriate by the administrative law judge or director. OAR 436-001-0265(2).

Claimant responds that a fee of \$6,000 is reasonable and identifies a number of circumstances that warrant a fee greater than \$2,000, including additional preparation time and two different attorneys involvement due to scheduling problems. Claimant also argues that the statute requires a consideration of both the amount of the time expended as well as the factors set forth in OAR 436-001-0265(2), including the value of the interest involved, which claimant estimates may exceed \$25,000 for an authorized training program given claimant's time loss rate and other expenses. Claimant further argues that the department's attorney fee matrix is inapplicable because it tops out at 15 hours expended for the case and tops out below the value of claimant's interest. Finally, claimant argues that neither the statute or rule require a breakdown of the hours spent and notes that the purpose the amendment to the statute was to increase attorney fees, not to decrease them.

I find claimant's arguments persuasive. I also note that, in awarding this fee, I considered the high quality of the representation and that the high risk that the attorney's efforts would go uncompensated. Accordingly, for all the reasons set forth herein, I award claimant an assessed attorney fee of \$6,000.

### **ORDER**

*IT HEREBY ORDERED* that RRU's Director's October 22, 2003 Review and Order is REVERSED. Insurer is ordered to evaluate claimant for vocational assistance. Claimant is awarded an assessed attorney fee of \$6,000.