

In the Matter of the Vocational Dispute of

Cooper, Albert V., Claimant

Contested Case No: H03-013

PROPOSED & FINAL ORDER

February 26, 2004

EXPRESS COMPANIES LLC, OREGON CONTRATCORS, WORKER'S
COMPENSATION TRUST, AND EMPIRE PACIFIC RISK MANAGEMENT, INC,
Petitioner

ALBERT V. COOPER, Respondent

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

HISTORY OF THE CASE

Insurer appeals a January 24, 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 set aside 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 February 11, 2003.

The matter was initially scheduled to be heard by Administrative Law Judge (ALJ) Paul Vincent on March 27, 2003. Insurer requested a reset, which was granted. Insurer subsequently requested additional time to depose Thomas J. Macha, MD and Kenneth P. Butters, MD, which occurred on August 20, 2003. Thereafter, ALJ Vincent was unavailable to hear the matter and ALJ Catherine Coburn convened a hearing by telephone on October 21, 2003. Insurer recused ALJ Coburn. The matter was reset before ALJ Ella D. Johnson who convened a telephone hearing on January 9, 2004. Attorney at Law Brad Garber represented petitioning self-insured employer, Express Companies LLC, insurer Oregon Contractors Workers' Compensation Trust and third party administrator, Empire Pacific Risk Management, Inc. (insurer). Attorney at Law Christine Jensen represented the respondent Albert V. Cooper (claimant). No witnesses were called and the record closed following the hearing on January 9, 2004.

ISSUE

Whether RRU's decision that claimant was entitled to vocational assistance because he was unable to return to regular work violates the provisions of ORS 656.283(2).

EVIDENTIARY RULING

The record consists of insurer's Exhibits 1 through 161,¹ which were admitted into the record without objection.

FINDINGS OF FACT

¹ Insurer's exhibits include WCD's exhibits in addition to the exhibits generated as a part of this hearing.

I affirm and adopt RRU's findings of fact set forth in its January 24, 2003 Director Review and Order, with the following supplementation:

(1) Claimant worked for insured, Express Companies LLC (Express), as a permanent, year-round dump truck and heavy equipment operator. (Ex. 152.) On June 3, 1997, claimant sought treatment from Dr. Macha at Orthopedic Healthcare Northwest for right shoulder pain which started when he was lifting weights and was exacerbated by his job of truck driving and having to shift gears. Dr. Macha diagnosed impingement syndrome right shoulder, and possible rotator cuff tear. (Exs. 1, 160.)

(2) On January 14, 1999, claimant compensably injured his left hand while working for Express and was diagnosed with displaced fracture of the 5th metacarpal, intra-articular with 5th metacarpal shaft displaced proximally. He underwent surgery and internal fixation of his left hand. (Exs. 7, 9.) On August 3, 1999, claimant was found to be medically stationary. (Ex. 38.) The claim was closed by a November 8, 2001 Notice of Closure (NOC). His total temporary disability benefit was based on a weekly wage of \$885.03. (Ex. 156.)

(3) On April 17, 1999, claimant reported an injury to his right shoulder when he was pulled forward over a loading roller while working for Express. He was diagnosed with acute right shoulder strain. (Exs. 15-20.) Claimant filed a workers' compensation claim for his right shoulder and insurer placed the claim in deferred status. (Ex. 29.) Insurer accepted claimant's right shoulder claim as non-disabling on July 23, 1999. (Ex. 34.)

(4) On September 9, 1999, claimant requested that insurer expand the scope of the accepted right shoulder strain to include right shoulder rotator cuff tear, which had been subsequently diagnosed by Dr. Macha. (Ex. 41.) On September 14, 1999, insurer amended the claim acceptance to include non-disabling right shoulder strain/contusion. (Ex. 42.) Claimant thereafter filed a request for hearing alleging defacto denial of claimant's right shoulder rotator cuff tear. (Exs. 49, 50.) On November 12, 1999, claimant underwent rotator cuff repair surgery. (Ex. 47.) Dr. Straub found claimant medically stationary on February 2, 2000. (Ex. 58)

(5) On November 23, 1999, Dr. Macha opined that claimant had a preexisting impingement syndrome or tendinitis, which was exacerbated by the April 17, 1999 industrial injury and resulted in a rotator cuff tear. Dr. Macha attributed claimant's need for treatment to the industrial injury superimposed on the preexisting tendinitis but noted that the need for treatment was more related to the industrial injury. (Ex. 51.)

(6) On December 2, 1999, insurer accepted claimant right shoulder strain/contusion with tear of supraspinatus tendon. (Ex. 53.) On March 8, 2000, claimant requested, and Dr. Macha agreed, to a full release to regular work concerning his right shoulder condition. (Ex. 59.) On July 5, 2000, insurer issued an updated notice of acceptance, and closed the claim, awarding 9 percent (28.8 degrees) of permanent partial disability (PPD).² (Exs. 84, 85.) On February 23, 2001, claimant filed an aggravation claim concerning his right shoulder. (Ex. 111.) On July 18,

² Claimant's award was subsequently decreased to 22 percent (33 degrees).

2001, claimant underwent surgery for his right shoulder rotator cuff tear. (Ex. 129.)³

(7) On December 28, 1999, Stephen Fuller MD (Orthopedic Surgery) performed an insurer's medical examination (IME), which concluded that claimant had subjective left-hand complaints but objectively had excellent function in his left hand. Dr. Fuller opined that claimant's subjective complaints should diminish over time and claimant would not have permanent restrictions in that regard. (Ex. 55.)

(8) On January 17, 2001, while working as a permanent year-round chip truck driver for Walsh and Sons Trucking (Walsh) claimant filed an aggravation claim for his left-hand injury. On February 21, 2001, Dr. Butters performed a fusion surgery on claimant's 5th metacarpal finger. (Ex. 161 at page 22.) On March 19, 2001, insurer accepted the aggravation claim for fractured 5th metacarpal finger, left wrist/hand as disabling. (Ex. 116.)

(9) On October 18, 2001, an insurer's medical examination (IME) was performed by Scott Jones, MD, which concluded that claimant was medically stationary. Dr. Jones released claimant to regular work. (Ex. 135.) On October 31, 2001, Dr. Butters concurred with the IME. (Ex. 136.)

(11) On November 16, 2001, claimant provided the department with an affidavit outlining his duties as a chip truck driver for Walsh. Claimant's duties on each 13 to 15 hour shift consisted of loading and unloading product two to three times, including: (a) inspecting the tires by bumping them with a three to five pound hammer and climbing under the truck to check the brake system, reaching overhead to adjust the brakes, if necessary; (b) attaching the 40 foot trailer to the 20 foot bed of the truck by using a 10 to 15 pound, four foot long metal bar using both of his hands to raise the trailer tongue so the trailer and bed can be attached and detached; (c) entering the cab 18 to 27 times per day by climbing a small metal ladder to reach the truck door and opening it with his left hand, grabbing the steering wheel also with his left hand and swing into the cab, supporting all of his body weight with the left hand; (d) loading the 20 foot trailer with product by climbing a ladder 10 to 20 feet 10 to 14 times per load to reach the controls where the wood chips were stored;⁴ and (e) tarping the load, by climbing 14 feet to cover the 20 foot truck and 40 foot trailer, using his left hand to hold up the tarp at or above shoulder height while using his right hand to turn the cranking mechanism to roll out the tarp, reaching up to pull a 10-foot strap to secure the tarp and using his left hand to pull a metal device attached to the side of the truck while exerting 40 to 50 pounds of pressure and using his right hand to pin the strap taught in place. In the winter ice and snow conditions claimant was required to swing and open the rear 10-foot by 8-foot gate and shovel the product to get it loose. The ice and snow conditions also required to chain up the truck using both of his hands with one

³ In January 2001, claimant began working for SAIF's insured, Walsh & Sons Trucking Company (Walsh) as a chip truck driver. (Ex. 155.) SAIF issued a denial of claimant's right shoulder condition and subsequently entered into a Disputed Claim Settlement Agreement (DCS) with claimant, even though the original injury did not occur during the period that claimant worked for SAIF's insured. (Ex. 147.) SAIF also entered into a DCS with claimant concerning a subsequent consequential cervical injury, which did occur while claimant was working for SAIF's insured. (Ex. 148.) Neither SAIF nor Walsh were parties to this proceeding.

⁴ Claimant noted even for those sites that provided the loading, he was still required to climb the truck and trailer ladders approximately six times to check the level of the product and storage. (Ex. 139.)

for every two tires weighing between 75 and 80 pounds. (Ex. 139.)

(12) On November 23, 2001, Dr. Butters declined to make a decision about claimant's ability to return to work without a physical capacity evaluation (PCE). He expected claimant to have some long-term pain associated with his left hand following the fusion surgery. (Ex. 140.) In an administrative meeting with Dr. Butters, claimant reported some improvement in his wrist/hand pain but no improvement in strength. (Ex. 161 at page 22.) A December 14, 2001 corrected Notice of Closure awarded claimant 22 percent permanent partial disability (PPD) for his fractured metacarpal 5th finger, left wrist/hand condition. (Ex. 141.)

(13) Don Remschel, P.T. conducted a PCE concerning claimant's fractured metacarpal 5th finger, left wrist/hand injury on January 18, 2002. The PCE limited claimant to light work of no more than 20 pounds on an occasional basis. It also limited his ability to carry bulky objects bilaterally to 15 pounds maximum. Claimant was told to avoid repetitive or forceful left grip or pinch, grip span greater than three inches, climbing ladders and crawling, and to limit left gripping to rarely or less than six percent of the work day. Claimant's efforts were demonstrated a 94 percent validity score. (Ex. 142.)

(14) On January 30, 2002, Dr. Button concurred with the PCE. After reviewing claimant's affidavit describing his work duties at aggravation, Dr. Button concluded that claimant was unable to return to regular work due to the permanent limitations in the use of his left hand. (Exs. 144, 161 at pages 10-11.)

(15) On March 11, 2002, Bryan L. Andresen, MD, Martha MacRitchie, MD and K. Annette Weller, MD with Rehabilitation Associated performed a panel medical arbiter examination with regard to claimant's accepted left wrist/hand injury at the department's request. The medical arbiters noted that claimant had significant limitations in the repetitive use of his left hand/wrist/forearm. The medical arbiters concluded that claimant's condition was chronic and permanent. (Ex. 145.) A March 22, 2002 Order on Reconsideration awarded claimant 59 percent (88.50 degrees) for loss of use of his left forearm (wrist). (Ex. 146.) A September 3, 2002 Opinion and Order by Workers' Compensation Board ALJ Brown modified the department's March 22, 2002 Order on Reconsideration to reduce claimant's award to 36 percent (54 degrees) for loss of use of his left forearm (wrist). (Ex. 151.)

(16) On December 4, 2002, insurer's vocational consultant, Susan Martin, determined that claimant was released to return to regular work and found him ineligible for vocational assistance. She also opined that, if he were unable to return to his regular work as a truck driver, his inability was not the result of accepted left wrist/hand injury. (Ex. 152.)

(17) In investigating claimant's request for vocational assistance, RRU's vocational consultant contacted claimant, claimant's attorney, insurer's senior claims examiner, and Walsh's human resources coordinator. Claimant told RRU that he could not climb ladders into a chip truck or on top of a load to check the tarp and strap the load. Claimant reported that he had tried to go back to work with Walsh after his two surgeries but could not do the job due to his inability to climb. A Physical Capacity Evaluation (PCE) was performed with regard to his hand/wrist, but Ms. Martin told him that she could not use the PCE. Claimant stated that the last

time he saw Dr. Button, Dr. Button had agreed with the PCE. (Ex. 154.)

(18) On January 23, 2003, Walsh's resources department provided RRU with a job description of chip truck driver. The physical demands of the job were according to the job description included: lift and carry up to 15 pounds occasionally, lifting and carrying up to 100 pounds infrequently, shoveling chips or sawdust at 20 to 40 pounds per shovel load, and frequently climbing 80 feet ladders. (Ex. 155.)

(19) On May 10, 2003, Dr. Butters, who treated claimant for his 5th metacarpal fracture/hand/wrist condition but not for his right shoulder or cervical conditions, opined that claimant's PCE limitations could be due to some extent to his shoulder injury, but Dr. Butters did not know to what extent. (Exs. 158, 161 at pages 17-18.)

(20) On May 19, 2003, Dr. Macha, who treated claimant only for his right shoulder condition, opined that claimant's diminished left-hand grip and pinch strength may be more related to his long-standing cervical condition or his 5th metacarpal fracture rather than his right shoulder condition. Dr. Macha did not treat claimant for his compensable 5th metacarpal fracture, but his practice does include treatment of the hand. (Exs. 159, 160 at page 11-12.) Dr. Macha based his opinion on his knowledge that the cervical spine innervates the hand. In his deposition testimony, Dr. Macha clarified that he had no records substantiating that theory and was only speaking hypothetically. (Ex. 160 at pages 2-3.)

CONCLUSIONS OF LAW

RRU's decision that claimant was entitled to vocational assistance does not violate the provisions of ORS 656.283(2).

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. *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 return to regular work as a chip truck driver. 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:

* * * * *

(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.

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 at aggravation was as a chip truck driver for Walsh. The PCE limited claimant to light work of no more than 20 pounds on an occasional basis and limited his ability to carry bulky objects bilaterally to 15 pounds maximum. Claimant was told to avoid repetitive or forceful left grip or pinch, grip span greater than three inches, climbing ladders and crawling, and to limit left gripping to rarely or less than six percent of the work day. Walsh's resources department provided RRU with a job description of chip truck driver. Walsh described the physical demands of the job as lifting and carry up to 15 pounds occasionally, lifting and carrying up to 100 pounds infrequently, shoveling chips or sawdust at 20 to 40 pounds per shovel load, and frequently climbing 80 feet ladders. Dr. Butters, claimant's attending physician for his 5th metacarpal fracture/hand/wrist surgery, concurred with the PCE and opined that based on claimant's PCE and his affidavit detailing his job duties that claimant was unable to return to regular work. RRU found that claimant's regular job required the ability to lift over 100 pounds,

and therefore, the lifting requirements of chip truck driver were beyond claimant's physical limitations. RRU also noted that the medical arbiters opined that claimant was severely limited in the repetitive use of his left hand/wrist. I also find that the PCE limited claimant to no climbing ladders or crawling, both of which claimant was required to do according to claimant's affidavit and Walsh's job description.

Insurer contended at hearing that RRU violated ORS 656.283(2) because it failed to properly investigate the matter. I disagree. In investigating this matter, RRU's vocational consultant contacted claimant, claimant's attorney, insurer's senior claims examiner, and Walsh's human resources coordinator. The vocational consultant also obtained a job description from the employer. The only additional investigation that could have been done was to shadow a chip truck driver to confirm the employer's and claimant's description of the job, neither of which is required. Therefore, I find insurer's argument in this regard unpersuasive.

Insurer next contends that RRU erred in relying on the PCE because the PCE improperly included restrictions attributable to claimant's right shoulder rotator cuff aggravation condition, which was not an accepted condition. Although Dr. Butters stated that claimant's PCE limitations could be due to some extent to his shoulder injury, he did not know to what extent the shoulder injury played in claimant's limitations. Additionally, Dr. Macha, who treated claimant only for his right shoulder condition, opined that claimant's diminished left-hand grip and pinch strength may be more related to his long-standing cervical condition or his 5th metacarpal fracture rather than his right shoulder condition. However, Dr. Macha later clarified that he had no records substantiating that theory and was only speaking hypothetically. Consequently, given the uncertainty of claimant's treating physicians, I find that insurer's argument is not supported by a preponderance of the medical evidence. Accordingly, I conclude that insurer failed to meet its burden of establishing that RRU's decision in this matter violated ORS 656.283 and affirm RRU's decision.

ATTORNEY FEES

Claimant has successfully defended RRU's decision against challenge and is, therefore entitled to an assessed attorney fee. 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 \$4,000. In awarding this amount, I note that the unusually high attorney fee award is due to complexity of the case, including a history of several injuries and aggravations, the additional preparation time required for multiple rescheduled hearings, including the recusal of Judge Coburn at insurer's request, and depositions of two physicians, Drs. Butter and Macha, which were also at insurer's request.

ORDER

IT HEREBY ORDERED that RRU's Director's January 24, 2003 Review and Order is **AFFIRMED**. Claimant's attorney is awarded an assessed attorney fee of \$4,000.