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In the Matter of the ORS 656.340 Vocational Services Dispute of

**Daniel Finley, Claimant**

Contested Case No: H04-058

**PROPOSED AND FINAL ORDER**

August 9, 2004

MULTNOMAH COUNTY SCHOOL DISTRICT No. 1, Petitioner

DANIEL FINLEY, Respondent

Before Catherine P. Coburn, Administrative Law Judge

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**HISTORY OF THE CASE**

Employer appeals the March 10, 2004 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 March 31, 2004, WCD referred the matter to the Office of Administrative Hearings. On June 19, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Attorney Robert J. Yanity represented petitioning self-insured employer, Multnomah County School District No. 1 (Portland Public Schools or employer). Daniel Finley (claimant), *pro se*, failed to appear. Portland Public Schools called Linda Hill, vocational counselor and John Weaver, Custodial Supervisor, as witnesses. The record closed on July 9, 2004, following an opportunity to submit additional evidence.

**ISSUE**

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

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 15 as well as employer's Supplementary Exhibits 14A and 16 were admitted into the record without objection. No additional exhibits were submitted.

**FINDINGS OF FACT**

- (1) On December 15, 2001, claimant suffered a compensable right shoulder injury while working as assistant custodian on the day shift at Jackson Middle School. (Ex. 1; testimony of Weaver.) Employer accepted right shoulder strain and impingement syndrome. (Ex. 6-4.)
- (2) On September 26, 2003, the claim was closed with a permanent partial disability (PPD) award. (Exs. 6-4 and 6-5.)

(3) On November 7, 2003, attending physician Jeffrey Pierson, MD reviewed employer's job description and released claimant to regular work with the following restriction: no repetitive overhead work with the right arm. (Exs. 6-4, 7-2 and 10-1.)

(4) Certified vocational counselor Linda Hill conducted a vocational evaluation at employer's request. She has worked with other custodians at Jackson Middle School and is familiar with the job duties. She wrote to Dr. Pierson and confirmed claimant's physical restrictions. She determined that claimant lacked a substantial handicap to employment because he was able to return to regular work as a school custodian. (Testimony of Hill.) On November 12, 2003, employer issued a Notice of Ineligibility for Vocational Assistance. (Ex. 8; testimony of Hill.)

(5) On November 12, 2003, claimant requested review. (Ex. 9.) On December 20, 2003, claimant submitted an edited job analysis to WCD asserting that his regular work required repetitive overhead work. (Ex. 11.)

(6) A work activity that takes 66 percent to 100 percent of an 8-hour work day is considered repetitive or continuous. (Testimony of Hill.) The day shift custodian position at Jackson Middle School does not require repetitive overhead work. (Exs. 1, 13; testimony of Hill and Weaver.)

## CONCLUSION OF LAW

RRU incorrectly determined that claimant is eligible 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, insurer bears the burden of proving that the administrative order is incorrect. Inasmuch as claimant was duly notified of the hearing date and failed to appear, insurer bears the burden of establishing a *prima facie* case on the record. OAR 137-003-0670(3)(a).

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) provides in pertinent part:

- (a) A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment \*\*\*\*\*.

OAR 436-120-0330(5) lists the conditions for eligibility and provides in pertinent part:

(5) As a result of the limitations caused by the injury or aggravation, the worker:

(a) Is not able to return to regular employment;

OAR 436-120-0005(10) provides;

(10) "Regular employment" means the 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.

RRU determined that claimant is not able to return to regular work as a school custodian because the job duties require repetitive overhead activity that exceeds his physical restrictions. RRU consulted Bend-La Pine and Salem Keizer School Districts concerning custodian job duties there. RRU further determined that if claimant were required to ask his supervisor to accommodate his restrictions in assigning tasks, this would constitute a modified job and noted that employer has not made such an offer to claimant. Employer contends that RRU's conclusion that claimant's regular work requires repetitive overhead work is not supported by the record, and therefore, the Director's Review and Order violates ORS 656.340(6) and OAR 436-120-0330(5).

The record establishes that claimant's regular work as a day custodian at Jackson Middle School in Portland does not require repetitive overhead duties. To begin, RRU's reliance on the job descriptions for day custodians in other school districts is misplaced. In contrast, vocational Consultant Linda Hill has worked with other custodians at Jackson Middle School and is familiar with the duties required in claimant's regular work. She and custodial supervisor John Weaver testified credibly that the overhead job requires less than 66 percent of an eight-hour shift and that assistance is readily available to claimant. Finally, claimant's restriction curtailing overhead work does not constitute a restriction to modified work. Inasmuch as Dr. Pierson released claimant to regular work, he is ineligible for vocational assistance. Accordingly, I reverse the administrative order.

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### **ORDER**

IT IS HEREBY ORDERED

The Director's Review and Order dated March 10, 2004 is reversed.

DATED this 9<sup>th</sup> day of August, 2004.