

In the ORS 656.340 Vocational Services Dispute of

DARIN R. KENNEY Claimant

Contested Case No: H04-122

PROPOSED AND FINAL ORDER

November 03, 2004

SYSCO FOOD CORP., Petitioner

DARIN R. KENNEY, Respondent

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

HISTORY OF THE CASE

Employer appeals the Director's Review and Order issued on June 29, 2004 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department). On August 31, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 6, 2004, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a hearing in this matter. Petitioning self-insured employer Sysco Food Corporation (employer) and its claims administrator, Gallagher Bassett Services were represented by attorney Howard R. Nielsen. Respondent Darin R. Kenney (claimant) was represented by attorney James O. Marsh. Claimant and John J. Fraser, employer's Safety Director, testified. The record closed on the date of hearing.

ISSUE

Whether claimant is eligible for vocational assistance pursuant to OAR 436-120-0320(9)(c)(A).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 32 and 34 were admitted into the record without objection. WCD Exhibit 33 was admitted into the record over claimant's hearsay objection. Insurer's Supplementary Exhibits 35 through 41 were received into the record without objection.

FINDINGS OF FACT

(1) On December 19, 2001, claimant suffered a compensable right arm condition while working as a warehouse forklift truck operator. (Ex. 1.) He spent 75 percent of his work time driving forklift and 25 percent performing other duties. (Testimony of claimant and Fraser.) Claimant drove Craven, Crown and Yale model forklifts which required steering with the left hand and moving a 45 degree angle joy stick up and down to raise and lower the forklift with the right hand. (Exs. 26; testimony of claimant.) The job duties required repetitive right wrist dorsiflexion (lifting with palm facing down). Dorsiflexion is a rare lifting position. (Exs. 16, 26, 31; testimony of claimant.)

(2) Insurer accepted right lateral epicondylitis and right cubital tunnel syndrome. (Exs. 3, 8 and 20.) On November 26, 2001, claimant's conditions became medically stationary and the claim was closed on January 10, 2002 without a permanent partial disability (PPD) award. (Ex. 2.)

(3) In January 2002, following claim closure, claimant returned to part-time work with employer as a forklift truck operator, increasing to full-time work by July 2002. (Ex. 26.)

(4) In 2002, employer purchased some Raymond model forklifts that do not require repetitive dorsiflexion of the right wrist. Claimant drove a Raymond model forklift on some shifts. (Exs. 31, 36, 37, 38, 39, 41; testimony of claimant and Fraser.)

(5) In September 2002, claimant left work due to the work injury. (Ex. 27.) On October 2, 2002, claimant filed an aggravation claim and designated Terrence A. Sedgewick as his attending physician. (Ex. 4.)

(6) On November 4, 2002, Peter A. Nathan, MD examined claimant at insurer's request. Dr. Nathan opined that claimant was capable of performing work avoiding repetitive forceful lifting with the right arm and recommended conservative treatment. (Exs. 5 and 7.)

(7) On December 10, 2002, Dr. Sedgewick declined to concur with Dr. Nathan's opinion. He recommended that claimant either retrain or consider surgical repair. (Ex. 6.)

(8) On January 29, 2003, Dr. Sedgewick performed surgical lateral epicondylectomy. (Ex. 9.) On March 20, 2003, he reviewed a job description for claimant's regular work as a forklift truck operator and opined that claimant probably would not be able to return to that position. (Ex. 10.)

(9) On August 7, 2003, physical capacities evaluation (PCE) indicated that claimant was capable of performing heavy work 8 hours per day but should limit prolonged reaching and lifting at shoulder level. (Ex. 11-1.)

(10) In an August 12, 2003 closing examination, Dr. Sedgewick released claimant to modified work, permanently restricted from lifting more than 20 pounds repetitively. (Ex. 12.)

(11) On September 30, 2003, Dr. Sedgewick concurred with the PCE. (Ex. 13.)

(12) On August 12, 2003, following the aggravation, claimant's condition became medically stationary and the claim was closed on October 13, 2003 without a PPD award. (Ex. 15.)

(13) On September 11, 2003, employer terminated claimant's employment. Under the terms of the union contract, an injured worker who is off the job for more than one year loses all seniority and his employment relationship is terminated. (Ex.14.) Under the terms of the labor contract, claimant may not be rehired as a forklift truck driver. (Ex. 35; testimony of Fraser.)

(14) On October 21, 2003, Dr. Sedgewick commented that the PCE correctly measured claimant's lifting ability not involving wrist dorsiflexion. (Exs. 16 and 31.) Dr. Sedgewick stated, "His permanent restriction is with repetitive dorsiflexion and weights over 20 pounds in the dorsiflexed position." (Ex. 16.) He requested insurer to authorize vocational rehabilitation. (*Id.*)

(15) On November 13, 2003, Dr. Sedgewick opined that claimant was permanently precluded from using the right arm repetitively in a dorsiflexed position. (Ex. 17.)

(16) On December 2, 2003, Dr. Sedgewick agreed that claimant was capable of performing a forklift truck operator job description. (Ex. 18.) On January 20, 2004, Dr. Sedgewick noted that claimant was permanently restricted to right wrist dorsiflexion activities less than 15 minutes duration. Claimant was also restricted to weightbearing less than 20 pounds. (Ex. 19.)

(17) In an Order on Reconsideration dated October 13, 2003, the department awarded 5 percent PPD for loss of use of the right arm. (Ex. 20.)

(18) On April 12, 2004, employer notified claimant that he was ineligible for vocational assistance because he was physically able to return to his regular job as a forklift truck operator. (Ex. 22.)

(19) On September 29, 2004, Brian B. Denekas, MD (Neurology)¹ viewed a videotape of forklift operations at the employer's warehouse showing a Raymond model forklift. He noted that the work activity did not require significant sustained right wrist dorsiflexion. He opined that claimant is capable of performing the lift truck operator's duties as videotaped. (Exs. 40 and 41; testimony of Fraser.)

CONCLUSION OF LAW

Claimant is eligible for vocational assistance pursuant to OAR 436-120-0320(9)(c)(A).

OPINION

Jurisdiction lies with the director. ORS 656.340(4) and ORS 656.704(3)(a). In a contested case hearing, vocational assistance disputes arising under ORS 656.340 are reviewed pursuant to the limited scope of review specified by ORS 656.283. I may modify the administrative order only 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). In determining whether one of those criteria exist, I may admit evidence which was not before RRU and make independent findings of fact. *Colclasure v.*

¹ In August 2001, Dr. Denekas examined claimant as a panel member in an insurer's medical examination. (Stipulation of the parties.)

Washington County School District No. 48-J, 317 Or 526, 537 (1993). The burden of proving a fact or position rests with the proponent. ORS 183.450(2).

The burden of proof falls upon the proponent of a fact or position. ORS 183.450(2). In that regard, employer bears the burden of proving by a preponderance of the evidence that the Director's review and Order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden in 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 (1998).

RRU determined that is not able to return to his regular employment as a forklift truck operator. RRU relied on the opinion of attending physician Sedgewick who opined that claimant is unable to perform repetitive right wrist dorsiflexion. RRU further found that claimant's regular work required such dorsiflexion. RRU further reasoned that employer failed to offer claimant a job performing either his regular work or other suitable work when claimant became medically stationary and subsequently terminated his employment pursuant to the union contract.

Employer contends that claimant is ineligible for vocational assistance because he is able to return to his regular employment as a forklift truck operator. Employer points to Dr. Denekas' opinion as evidence that the job duties do not require repetitive right wrist dorsiflexion. In contrast, claimant contends that the administrative order is correct and should be affirmed. Based on the record, I find that employer has failed to carry its burden of proving by a preponderance of the evidence that the Director's Review and Order is incorrect.

ORS 656.340 requires an insurer to provide vocational assistance to injured workers who are eligible. ORS 656.340(6)(a) provides:

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 436-120-0320 provides:

(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.

Additionally, OAR 436-120-0005(10) provides in pertinent part:

“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;

I find employer’s argument unpersuasive. To begin, in October 2002, at the time aggravation, claimant’s regular employment was forklift truck operator. At that time, he drove three forklift models that required repetitive right wrist dorsiflexion during most work shifts. He drove a newer model that required less dorsiflexion during some shifts. Consequently, I find that claimant’s regular work as a forklift truck operator required repetitive right wrist dorsiflexion. In reaching this conclusion, I note that Dr. Denekas’ opinion is unpersuasive because it was based on a videotape showing only the newer forklift model.

Next, the medical record establishes that claimant is permanently restricted from performing right wrist dorsiflexion. Attending physician Sedgewick reiterated in three reports that claimant is permanently precluded from repetitive right wrist dorsiflexion. Dr. Sedgewick’s expert medical opinion concerning dorsiflexion is unrefuted.

Furthermore, if as employer argues, claimant were able to perform his regular work, employer would have offered him a job in August 2003 when the compensable condition became medically stationary. Instead, employer waited one month and then terminated his employment pursuant to a union contract, rendering his regular work unavailable.

Finally, I agree with RRU’s determination that the record is incomplete for the purpose of determining whether claimant suffers a substantial handicap to employment pursuant to OAR 436-120-0340. Therefore, I order employer to conduct an eligibility evaluation.

ATTORNEY FEES

Claimant has prevailed in a contested case, and therefore is entitled to a reasonable attorney’s fee. ORS 656.385(1). In light of the factors listed in OAR 436-001-0265, I find that \$2,250 is a reasonable fee for claimant’s attorney’s services in this contested case.

ORDER

IT IS HEREBY ORDERED that:

The June 29, 2004 Director’s Review and Order is affirmed.