
In the ORS 656.340 Vocational Assistance Dispute of

DALE R. BARTLES, Claimant

Contested Case No: H05-013

PROPOSED AN FINAL ORDER

APRIL 6, 2005

SAIF CORPORATION., Petitioner

DALE R. BARTLES, Respondent

Before Lawrence S. Smith, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

SAIF Corporation (SAIF) appeals an administrative order issued on January 5, 2005, by the Workers' Compensation Division (WCD), Department of Consumer and Business Services, which concluded that Dale Bartles (Claimant) did not refuse an offer of suitable employment and therefore continued to be eligible for vocational assistance. The matter was referred to the Office of Administrative Hearings (OAH) for hearing on January 28, 2005.

On March 7, 2005, Administrative Law Judge (ALJ) Lawrence S. Smith conducted a telephone hearing in this matter. Attorney Jerry Larkin represented Petitioner/SAIF and called one witness, vocational consultant John Glazier. Respondent/Claimant was represented by his attorney Aaron Klingerman, and no one testified on his behalf. The record closed that day.

ISSUE

(1) Whether Claimant is ineligible for vocational assistance because he can return to suitable employment with his employer-at-injury.

(2) Whether WCD made an error of law in its Director's Review and Order.

EVIDENTIARY RULINGS

The record consists of Exhibits 1 through 29 and 5A, which were admitted without objection.

FINDINGS OF FACT

The Findings of Fact in the January 5, 2005 Director's Review and Order are accepted and incorporated in this Final and Proposed Order, with the following supplementation.:

(1) On September 13, 2004, Claimant's treating doctor, Karl C. Wenner MD reported to SAIF :

I have just seen [Claimant] who earlier this month came in with complaints of increasing pain going down his left leg. Because of his

worsening status, I did obtain a repeat MRI scan which showed some increase in prolapse of his L4-5 disk bulge, not a lot of other changes other than those associated with his prior surgery. *** At this point, I am not certain where the source of this is coming from or whether it is or is not related to this increase in prolapse or the scarring noted at his prior surgeries or just what exactly the etiology of this pain is. *** I think based on the history the patient tells me about his pain level, he is not going to be able to work, at least in the short term, although we certainly went through a lot of effort to determine an appropriate job for him, his current symptoms would preclude that. ***

(Ex. 19 at 1.)

(2) On September 29, 2004, Dr. Wenner reported to SAIF:

[Claimant] is again having a significant increase in his ongoing pain, down his left leg to the point that he feels he is unable to work and, as you know, an MR scan did show some change the L4-5 level with worsening of prolapse that may or may not be the source of his current increase in symptoms. As you know, it is very difficult to determine exactly where pain may be coming from as a result of the diffuse nature of [Claimant's] problems. Typically, I would expect the pain from an L2-3 level to be more in the groin in the area or upper thigh, but it is possible that problems there could produce pain radiating all the way down the leg. At this point, I have no real objective way of knowing exactly what is worsened in a pathologic way to have increased his current symptoms. At this point, it is difficult to know exactly what that is. ***

(Ex. 21.)

(3) On December 30, 2004, Dr. Wenner responded to WCD's request for his opinion whether Claimant could perform the job as packager. Dr. Wenner checked the line that said "No, it is my opinion that [Claimant] cannot perform the product packager job." Dr. Wenner wrote on the form, "There appears to be more twisting than is appropriate in this job." (Ex. 25)

(4) On February 17, 2005, Dr. Wenner signed a Physical Capacity Evaluation of Claimant that found that he could stand of up to three hours and walk up to three hours per day. (Ex. 29.)

CONCLUSIONS OF LAW

Claimant is ineligible for vocational assistance because his accepted injury does not prevent him from returning to suitable employment with his employer-at-injury.

OPINION

Petitioner has the burden of showing that the WCD's Review and Order violates a statute or rule, among other bases for reversal. Additional evidence may be considered. OAR 436-001-

0225(2),¹ ORS183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”)

Petitioner SAIF contended that WCD committed an error of law because there is no causal connection between Claimant’s compensable injury and his refusal of a job with his employer at injury. Claimant remains eligible for vocational services if he “is not able to return to any other suitable and available work with the employer at injury” as a result of the limitations caused by his injury. OAR 436-120-0320(9).²

Claimant’s treating doctor, Dr. Wenner, first released him as able to perform a different job offered by his employer at injury, but later changed his mind, based on new symptoms alleged by Claimant, and concluded Claimant was not able to do the job due to the new symptoms. Dr. Wenner reported that he could not conclude that Claimant’s new symptoms were the result of limitations caused by his compensable injury. WCD in its Review and Order concluded that there was a connection between Claimant’s inability to do the offered job and his compensable injury, but there is no evidence of such connection and WCD cannot presume such a connection. *SAIF v. Alton*, 171 Or App 491, 502 (footnote 6) (2000). Such a conclusion is in violation of OAR 436-120-0320(9), which requires that employer’s offer will be considered unsuitable if Claimant cannot do the work due to limitations from his compensable injury. Therefore, the offer was suitable within the limitations of Claimant’s compensable injury, and Claimant’s refusal of it makes him ineligible for vocational assistance.

ATTORNEY FEES

Claimant has not prevailed and is not entitled to attorney fees. ORS 656.385(1).

ORDER

WCD’s January 5, 2005 Director’s Review and Order is set aside. Attorney fees are not ordered.

¹ OAR 436-001-0225(2) states:

In vocational assistance (ORS 656.340) disputes, new evidence may be admitted.

The standard of review is to determine whether the director’s order:

- (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

² OAR 436-120-0320(9) states in relevant part:

A worker entitled to an eligibility evaluation is eligible for vocational services if

All the following additional conditions are met:

- (a) The worker is authorized to work in the United States.
- (b) The worker is available in Oregon for vocational assistance. ***
- (c) As a result of the limitations caused by the injury or aggravation, the worker:

- (B) Is not able to return to any other suitable and available work with the employer a injury or aggravation; and
