
In the ORS 656.340 Vocational Services Dispute of

LANCE E. BEARDEN, Claimant

Contested Case No: H04-161

PROPOSED AND FINAL ORDER

JANUARY 13, 2005

SAIF CORP., Petitioner

LANCE E. BEARDEN, Respondent

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

HISTORY OF THE CASE

Insurer appealed the administrative order issued on August 16, 2004 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department). On October 28, 2004, WCD referred the matter to the Office of Administrative Hearings (OAH). On January 3, 2005, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioner SAIF Corporation (insurer) was represented by attorney David L. Runner. Respondent Lance E. Bearden (claimant) was represented by attorney Dale C. Johnson. Insurer called Vocational Rehabilitation Counselor Rob Crymes and claimant as witnesses. The record closed on the date of hearing.

ISSUE

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

EVIDENTIARY RULINGS

WCD Exhibits 1 through 13 as well as insurer's Supplementary Exhibits P1¹ through P14 were admitted into the record without objection.

FINDINGS OF FACT

(1) Claimant dropped out of high school in the 12th grade and has not obtained a general equivalency degree (GED). (Exs. 10-1 and P2A-4.) He took a keyboarding class in high school. (Exs. P2A-4 and P5C-5.) He has been employed as a carpenter framer, finish carpenter, tool crib assistant, shipping/receiving clerk, hardware fastener sales representative, bakery apprentice, and kitchen helper. (Ex. 10-1.) From 1984 through 1994, he performed inside sales for a hardware fastener company. (Exs. P2A-6, P2A-16, P11D-1 and P11E-4.) This position involved retail and wholesale customer service, answering telephone calls, describing various products, filling customer orders, completing invoices and using a cash register. (Ex. P11D2.)

¹ I renumbered insurer's supplementary exhibits "P" for "Petitioner" to distinguish them from the WCD exhibits.

(2) On June 20, 2002, claimant suffered a compensable injury while working as a temporary seasonal framing carpenter varying hours at \$8 per hour. (Exs. 1, P2A-2 and P5C-4, P11E-2.) Claimant did not collect unemployment benefits during the year before the work injury. (Ex. P5-C-4.) Insurer accepted a 9 cm laceration radial side of left hand and fracture and dislocation of the MCP joint of the left thumb. (Ex. 4-4.) The condition became medically stationary on December 2, 2002, and the claim was closed on July 29, 2003 with a permanent partial disability award. (Ex. 3-1.)

(3) On July 2, 2003, certified vocational rehabilitation counselor Rob Crymes evaluated claimant's eligibility for vocational assistance at insurer's request. (Ex. 2A.) Claimant's average weekly wage was \$320 at \$8 per hour. (Ex. P2A-4.) On April 8, 2004, Crymes contacted the employer at injury and ascertained that the current wage paid for claimant's job at injury was \$8 per hour and there had been no cost-of-living increase. (Exs. P5C-4 and P5C-11.) Claimant's suitable wage was \$256 per week or minimum wage (\$6.90 per hour) for 37.1 hours per week. (Exs. P2A-4 and P5C-4.)

(4) Claimant lives in Harrisburg, Oregon in District 5 (Eugene.) (Ex. P2A-3; testimony of Crymes.) In September 2003, claimant began attending Lane Community College, taking basic courses toward an x-ray technician certificate. (Exs. 4-1, 8-1; testimony of claimant.) He took a typing class, received some computer instruction and his computer skills are adequate for his classwork. (Exs. P2A-4, P5C-5, P11E-3; testimony of claimant.) He passed all of his classes until fall 2004 when he developed a non-work related medical condition. (Testimony of claimant.)

(5) On November 11, 2003, a physical capacities evaluation listed no restrictions in sitting, standing or walking or any activities involving grasping or pinching with the left hand. Claimant was capable of lifting 20 to 30 pounds. Claimant was not capable of returning to the job at injury as a carpenter framer due to the heavy grasping demands. Claimant was capable of performing work in the light to medium physical range. (Exs. 4 and P5C-10.) On January 19, 2004, Thomas M. Dreyer, MD concurred. (Exs. 5 and P5C-10.)

(6) On February 26, 2004, Crymes completed research in the Oregon Wage Information 2003 for District 5, Oregon Labor Market Information District 5, and CIS statewide to assess claimant's substantial handicap to obtain employment. Crymes identified six occupations: Counter Attendant, Coffee Shop or Concession, Fast Food Worker, Security Guard, Retail Sales Clerk, Cashier, and Service Station Attendant. (Ex. P5A.) Dr. Dreyer agreed that claimant was capable of performing the duties of a Counter Attendant, Fast Food Worker, Retail Sales Clerk, Cashier/Checker. (Ex. P5-B-1, 2, 4, 5.) Dr. Dreyer agreed that claimant was capable of performing the duties of a Security Guard with use of gloves in cold temperatures. (Ex. P5B-3.) Dr. Dreyer opined that claimant is not capable of performing the duties of a Service Station Attendant. (Ex. P5B-6.)

(7) On April 8, 2004, Crymes recommended that claimant be found ineligible for vocational assistance because suitable employment was available. (Ex. P5C.) On April 22, 2004, insurer notified claimant that he was ineligible for vocational assistance listing the

following suitable employment options: security guard, retail sales clerk, fast food worker and cashier/clerk. (Ex. 6.) Claimant appealed the notice of ineligibility. (Ex. 7.)

(8) On July 2, 2004, RRU interviewed claimant by telephone concerning his work history, job injury and community college classes. (Ex. 8.) RRU found that claimant had worked “briefly” for a hardware fastener company. (Ex. 11-2.) RRU reviewed 74 Oregon Employment Department (OED) purged job orders for cashier/checker positions and determined that the occupation requires lifting more than 20 pounds even though it is listed in the light category. (Ex. 11-3.) Based on purged job orders, RRU determined that cashier/checker occupation requires a high school diploma or GED certificate and three months work experience and pays less than claimant’s suitable wage. (Exs. 10-2, 11-3 and 13.) RRU reviewed 56 purged job orders for retail sales clerk and determined that they require a minimum of three months’ experience. (Exs. 10-3, 11-3 and 13.) RRU reviewed seven purged job order for fast food workers and determined that they were part-time and less than 35 hours per week. (Exs. 10-4, 11-3 and 13.) RRU reviewed 47 purged job orders for security guard and determined that the occupation required six months experience, even though the SVP is one to three months. (Exs. 10-4, 11-3 and 13.) RRU determined that the security guard occupation requires a high school diploma or GED or was part-time. (Exs. 10-4, 11-3 and 13.) RRU determined that the occupation of order clerk or customer service representative were not suitable because claimant had no experience using a computer and no high school diploma. (Ex. 11-3.) RRU concluded that claimant had a substantial handicap to employment, and therefore, was eligible for vocational assistance. (Ex. 11.)

(9) Pursuant to the administrative order, and without waiving its right to appeal, insurer notified claimant that he was eligible for vocational assistance. (Ex. P11A.) On September 2, 2004, insurer referred the file to vocational counselor Doug Smith to provide vocational services. On September 9, 2004, Smith met with claimant in claimant’s home. (Ex. P11B.)

(10) On September 22, 2004, Crymes reported on additional research concerning claimant’s eligibility. (Ex. P11C.) Crymes contacted 12 potential employers in District 5 and ascertained that a GED, high school diploma or prior experience is not required for minimum wage jobs. (Ex. P11C.) Full time employment is available in fast food jobs. (Testimony of Crymes.) Crymes reiterated his opinion that claimant was employable in several minimum wage jobs without additional training. (Exs. P11C-5 and P11D.)

(11) On September 27, 2004, Smith opined that claimant qualified for Direct Employment Services rather than an Authorized Training Plan because there were positions within his physical capabilities, knowledge and skills, that had reasonable employment opportunities to allow him to return to work as close as possible to his \$8 per hour wage at injury. (Ex. P11E.) Smith based his analysis on the Oregon Labor Market Information System (OLMIS) and contact with claimant’s former employer and potential employers in District 5. (Ex. P11E.) Smith identified the following suitable positions: membership solicitor, security guard, gate guard, telephone solicitor, automatic photo developer. (Ex. P11E.) Five potential employers indicated that security guards are not required to have a high school diploma and they offer on-the-job training for full-time work paying claimant’s suitable wage. (Ex. P11E-11.) Smith stated, “This counselor has identified several occupational areas in which [claimant] could

return to employment and I am also confident that there may be other occupational goals that he could access. This counselor can definitely see [claimant] employed at a building supply store in which he could use the ten years of customer service assistance he has gained, coupled with his construction and building experience, and would be an excellent and very helpful sales clerk.” (Ex. P11E-15.)

(12) On October 1, 2004, insurer appealed the administrative order. (Ex. 12.) On October 29, 2004, insurer notified claimant that he was eligible for Direct Employment Services to help him obtain suitable employment. (Ex. P14.)

CONCLUSION OF LAW

Claimant is ineligible for vocational assistance.

OPINION

Jurisdiction lies with the director. ORS 656.340(4). Pursuant to ORS 656.283(2)(c), I may modify the administrative order 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). The burden of proof falls upon the proponent of a fact or position. ORS 183.450(2). In that regard, insurer bears the burden of proving by a preponderance of the evidence that RRU incorrectly determined that claimant is eligible. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is 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).

ORS 656.340 requires an insurer to provide vocational assistance to injured workers who are eligible. OAR Chapter 436 Division 120 governs the provision of vocational services.

Information Sources

OAR 436-120-0340(2)(g) provides in pertinent part:

To complete the substantial handicap evaluation the vocational counselor shall submit a report documenting the following information:

An analysis of the worker's labor market utilizing standard labor market reference materials including but not limited to Employment Department (OED) information such as Oregon

Wage Information (OWI), Oregon Comprehensive Analysis File and other publications of the Occupational Program Planning System (OPPS) and material developed by the division. When using the OWI data, the presumed standard shall be the 10th percentile unless there is sufficient evidence that a higher or lower wage is more appropriate. When such data is not sufficient to make a decision about substantial handicap, the vocational counselor shall perform individual labor market surveys as described in OAR 436-120-0410(6);

RRU based its determinations exclusively on OED purged job orders. However, OAR 436-120-0340(2)(g) requires consideration of other information sources. This is particularly important because minimum wage job openings are frequently not reported to OED and are not listed in OED purged job orders. In contrast, vocational counselor Crymes considered Oregon Wage Information 2003 for District 5, Oregon Labor Market Information, District 5, and CIS statewide and Smith considered OLMIS. Based on these information sources, they determined that reasonable job opportunities existed in District 5 for minimum wage jobs. Based on the record, I find that RRU erred by ignoring information sources specified in OAR 436-120-0340(2)(g).

Eligibility Evaluation

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.

Additionally, ORS 656.340(6)(b)(A) provides:

A “substantial handicap to employment” exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

OAR 436-120-0005(8) provides:

“Substantial handicap to employment” means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

ORS 656.340(6)(b)(B)(iii) provides:

“Suitable employment” means:

Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment as defined in subsection (5)² of this section.

RRU concluded that claimant suffered a substantial handicap to employment and was eligible for vocational assistance. RRU first determined that claimant was not capable of performing as a cashier/checker. Based on OED purged job orders, RRU determined that cashiers/checkers are required to lift more than 30 pounds even though this occupation is listed in the light³ work category. RRU further determined that the cashier/checker occupation requires a high school diploma or GED certificate and three months work experience and pays less than claimant’s suitable wage.

Next, based on purged job orders, RRU determined that claimant was not capable of performing as a retail sales clerk because he lacked the required three months work experience. Next, based on purged job orders, RRU determined that fast food jobs were not suitable for claimant because they are part-time, and therefore, do not pay claimant’s suitable wage.

² ORS 656.340(5) provides:

(5) The objectives of vocational assistance are to return the worker to employment which is as close as possible to the worker’s regular employment at a wage as close as possible to the weekly wage currently being paid for employment which was the worker’s regular employment even though the wage available following employment may be less than the wage prescribed by subsection (6) of this section. As used in this subsection and subsection (6) of this section, “regular employment” means the employment the worker held at the time of the injury or the claim for aggravation under ORS 656.273, whichever gave rise to the potential eligibility for vocational assistance; or, for a worker not employed at the time of the aggravation, the employment the worker held on the last day of work prior to the aggravation.

³ OAR 436-120-0005 provides in pertinent part:

(7) "Physical Demand Characteristics of Work" Strength Rating: The physical demands strength rating reflects the estimated overall strength requirements of the job, which are considered to be important for average, successful work performance. The following definitions are used: "occasionally" is an activity or condition that exists up to 1/3 of the time; "frequently" is an activity or condition that exists from 1/3 to 2/3 of the time; "constantly" is an activity or condition that exists 2/3 or more of the time.

(b) Light Work (L): Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

Next, based on purged job orders, RRU determined that the occupation of security guard was unsuitable. RRU determined that the security guard occupation requires six months work experience even though the SVP is one to three months. RRU further determined that the security guard occupation requires a high school education or GED certificate or was part-time, paying an unsuitable wage

Finally, RRU determined that the occupations of order clerk or customer service representative were not suitable because claimant had no experience using a computer and no high school diploma.

Insurer contends that the administrative order violates a statute or rule, exceeds the WCD's statutory authority, was made upon unlawful procedure and was characterized by abuse of discretion or clearly unwarranted exercise of discretion. In contrast, claimant contends that the administrative order is correct and should be affirmed. I agree with insurer's position.

To begin, Dr. Dreyer opined that claimant was physically capable of performing the following jobs: Counter Attendant, Fast Food Worker, Retail Sales Clerk, Cashier/Checker and Security Guard. Next, claimant's suitable wage is minimum wage. Finally, the record establishes that reasonable opportunities exist for minimum wage jobs in District 5.

First, RRU erred in determining that the occupation of cashier/checker requires lifting 30 pounds. That occupation is listed in the light category which requires lifting a maximum of 20 pounds. Furthermore, the cashier/checker occupation meets claimant's physical restrictions as approved by Dr. Dreyer. Moreover, RRU erred in determining that cashier/checkers are not paid the legally required minimum wage which is claimant's suitable wage. Furthermore, RRU erred in determining that minimum wage entry level jobs require a high school diploma or GED or prior work experience.

Next, RRU erred in determining that claimant was incapable of working as a retail clerk for lack of experience. Retail clerk is an entry level position requiring no previous work experience. Moreover, RRU erroneously found that claimant had worked for a hardware fastener company "briefly" when in fact, claimant worked there for ten years continuously. RRU based this determination on a telephone interview with claimant and failed to confirm claimant's work history with any other source of information such as claimant's resume, the vocational counselor or the previous employer. This failure to investigate constitutes an abuse of discretion. *See Liberty v. Jacobsen*, 164 Or App 37 (1999)(RRU abused its discretion by failing to investigate claimant's contentions about misrepresentation of the training program.) Consequently, RRU erred in determining that claimant was incapable of working as a retail sales clerk.

Next, RRU erred in determining that fast food jobs do not pay claimant's suitable wage because they are part-time. Fast food work is not necessarily

limited to part-time work and full time work is available. Consequently, RRU erred in finding that fast food work was not suitable.

Next, RRU erred in determining that the occupation of security guard was not suitable for claimant because he lacked six months work experience. The SVP for security guard is one to three months, not six months. Moreover, the record establishes that security guards are not required to have a high school diploma, and that employers offer on-the-job training for full-time work paying claimant's suitable wage. Consequently, RRU erred in ruling out the occupation of security guard as suitable employment for claimant.

Next, RRU erred in determining that the occupation of order clerk or customer service representative was not suitable because claimant had no computer skills and no high school diploma. Claimant does have some computer skills. He took keyboarding classes in high school and at the community college. He has received some computer instruction at the community college and his computer skills are adequate for passing classes. Moreover, order clerk or customer service representative is an entry level position that does not require a high school diploma. Furthermore, claimant has ten years experience as performing inside sales for a hardware fastener company. Consequently, RRU erred in ruling out the occupation of order clerk or customer service representative as suitable employment for claimant.

In conclusion, the record establishes that claimant's suitable wage is minimum wage and that he is physically and mentally capable of performing minimum wage jobs that are available in District 5. Consequently, he lacks a substantial handicap to employment under ORS 656.340(6)(b)(A) and is ineligible for workers' compensation vocational assistance. Furthermore, the administrative order reflects reversible errors under ORS 656.283(2)(c). Accordingly, I reverse.

ATTORNEY FEES

Claimant has not prevailed in a contested case, and therefore is not entitled to an attorney's fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated August 16, 2004 is reversed.