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In the Matter of the Vocational Assistance Dispute of

**SCOTT M. CRAPPA, Claimant**

Contested Case No: H05-139

**PROPOSED AND FINAL ORDER**

November 21, 2005

SAIF CORP., Petitioner

SCOTT M. CRAPPA, Respondent

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

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**HISTORY OF THE CASE**

Insurer appeals the Administrative Order issued on July 15, 2005 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On September 30, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). Attorney Stefan J. Gonzales represents petitioner SAIF Corporation (insurer). Attorney Philip H. Garrow represents respondent Scott M. Crappa (claimant). By letter dated October 25, 2005, the parties agreed to waive appearance at hearing and the record closed on that date.

**ISSUE**

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

**EVIDENTIARY RULINGS**

Both parties waived appearance at hearing. Thus, WCD Exhibits 1 through 30, as well as insurer's Supplementary Exhibits 16A through 29C, were admitted into the record without objection.

**FINDINGS OF FACT**

(1) On February 4, 2004, claimant suffered a compensable injury; insurer accepted a cervical strain and right shoulder bursitis. (Exs. 1, 2 and 15.) On October 27, 2004, the claim was closed without permanent partial disability (PPD). (Ex. 15.) In an Order on Reconsideration dated March 3, 2005, the department awarded 13 percent PPD. (Ex. 21-4.)

(2) On April 14, 2005, insurer notified claimant that he was ineligible for vocational assistance. (Ex. 23.) On July 15, 2005, RRU issued a Director's Review and Order determining that claimant was eligible for vocational assistance. (Ex. 29.)

(3) By Opinion and Order dated July 19, 2005. Workers' Compensation Board Administrative Law Judge John Mark Mills reduced the PPD award to zero. (Ex. 29A-5.) On July 26, 2005, insurer again notified claimant that he was ineligible. (Ex. 29C.) On August 8, 2005, insurer requested RRU to reconsider claimant's eligibility in light of the zero PPD award. (Ex. 29B.) On September 12, 2005, insurer requested a contested case hearing. (Ex. 30.) On September 30, 2005, the department referred the matter to OAH for a hearing.

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**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) 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. 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). As petitioner, insurer bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of a 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 preponderance of 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).

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. However, insurer is not obligated to evaluate vocational eligibility where the claim was closed without a PPD award. OAR 436-120-0320 provides in pertinent part:

(2) The insurer is not required to determine eligibility if:

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(c) The worker's claim was closed with no permanent disability award.

Based on an Order on Reconsideration awarding PPD, RRU determined that claimant was eligible for vocational assistance. However, the PPD award was subsequently reduced to zero. SAIF asserts that the Administrative Order, finding claimant eligible, is not supported by substantial evidence and I agree. The claim was closed without a PPD award by virtue of the Opinion and Order which is now final by operation of law. Therefore, claimant is ineligible for vocational assistance. Furthermore, the Administrative Order is not supported by substantial evidence, and accordingly, I reverse.

**ATTORNEY FEES**

Claimant has not prevailed in a contested case hearing and is entitled to no attorney fee. ORS 656.385(1).

**ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated July 15, 2005 is reversed.