In the Matter of

JAMES A. MILLER, Claimant

Contested Case No: H05-130

PROPOSED AND FINAL ORDER

December 5, 2005

ST. PAUL FIRE AND MARINE, Petitioner

JAMES A. MILLER, Respondent

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

HISTORY OF THE CASE

St. Paul Fire and Marine (Insurer) appealed an August 22, 2005 Director's Review and Order issued by Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services, which concluded that James A. Miller (Claimant) has a substantial handicap to employment and is eligible for vocational assistance. The matter was referred to the Office of Administrative Hearings (OAH) for hearing on September 16, 2005.

On November 2, 2005, Administrative Law Judge (ALJ) Lawrence S. Smith of the OAH conducted a telephone hearing in this matter. Attorney William Replogle represented Petitioner/Insurer and called two witnesses, vocational consultant Willie Davis, and the employer's manager, John Fast. Respondent/Claimant was represented by his attorney, John C. DeWenter, and testified. The record closed that day.

ISSUE

Whether Claimant is eligible for vocational assistance because he has a substantial handicap to employment.

EVIDENTIARY RULING

WCD's Exhibits 1 through 30, Insurer's Exhibits A1, AA1, 2A, 2Ab1, AA2, 2B, 2C, 3A, 3AA, 3B1, 4C1, 5A, 5B, 6A, 8A, 9A, 11A, 11B, 15A, 16A, 16B, 16C, 16D, 18A, 21A, 21B, 21C, 21D, 21E, 22A, 22B, 22C, 26A, and 29A and Claimant's Exhibits A, B, C, 2Aa, 2Ab, 2Ac, 2Ba, 2D, 2E, 2F, 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i, 3j, 3k, 3B, 3C, 3D, 4A, 4B, 4C, 4D, 7A, 8a, 8b, 9a, 11a, 17A, 22Ba, and 22D were admitted without objection.

FINDINGS OF FACT

The Findings of Fact in the August 22, 2005 Director's Review and Order are accepted and incorporated in this Final and Proposed Order, with the following correction and supplementation:

(1) Claimant's temporary total disability (TTD) benefits were based on a wage of $463.33 per week, his average weekly earnings including overtime during the year before his

injury on January 14, 2003. (Ex. 2.)

(2) Claimant's treating doctor Jorgenson released him to return to his job at injury as a truck driver delivering lumber and other hardware products, with the only restriction that he limit his lifting if his back became painful. (Ex. 4.) This job was considered heavy because it involved lifting up to 100 pounds. (Ex. 2Ab1 at 2.)

(3) Claimant's back became painful after he returned to his job at injury, even though he was careful when lifting and relied on others to help him with some of the heavy lifting. He did not complain to his supervisor about the lifting because he was afraid he would lose his job and medical insurance for his family. His wage was his wage at the time of his injury, $9.30 per hour. He worked some overtime and did not take much sick leave. He was laid off in November 2003 because his employer had less work during the winter and his supervisor believed he was the poorest performing driver due to his low work output. (Test. of Fast and Claimant.) He is not eligible for rehire. (Ex. 5B.)

(4) On February 18, 2004, Claimant wrote to his treating doctor Jorgenson, stating that the required lifting, bending over, and twisting and pulling in his job at injury caused him back pain and he could not return to such work. (Ex. 7A.) On April 5, 2004, Dr. Jorgenson examined him and reported to Insurer that Claimant has lifting limitations of 30 pounds occasionally and 10 pounds frequently, based on his performance when returning to his job at injury. (Ex. 8.)

(5) Claimant worked as a seasonal construction flagger from June 28, 2004, until November 15, 2004, and again for a different company from May 22, 2005, until October 18, 2005. These jobs were temporary. His work hours ranged from 20 to more than 40 hours per week. He was paid around $28 per hour as a flagger. (Test. of Claimant.)

(6) On November 29, 2004, Dr. Jorgenson reported that Claimant could not return to work as a delivery truck driver due to lifting restrictions. (Ex. 16.)

(7) Willie Davis, vocational consultant hired by Insurer, concluded that Claimant does not have a substantial handicap to employment because he had returned to work for his employer at injury and was separated for non-injury reasons, because his work as a seasonal flagger was suitable work for him, and because his work injury did not preclude him from working in a delivery job that did not require lifting and paid him a suitable wage, which for him was $7.44 per hour (80% of his last wage with his employer at injury). (Ex. 18.)

CONCLUSION OF LAW

Claimant is eligible for vocational assistance because he has a substantial handicap to employment.

OPINION

Petitioner/Insurer has the burden of showing that the WCD violated a statute or rule in its Director's Review and Order. OAR 436-001-0225(2);[1] ORS 183.450(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.") Additional evidence may be considered. OAR 436-001-0225(2).

Petitioner/Insurer contends that WCD violated a statute or rule in its Director's Review and Order because there is no causal connection between Claimant's compensable injury and his termination after returning to his job at injury. Insurer cited no specific statute or rule that WCD violated when concluding that Claimant was terminated because he could not do the required lifting. Claimant was not terminated directly for that reason, but for his poor performance. He credibly testified that his poor performance was due to his inability to do the required lifting without assistance, which affected his work output and performance. Therefore, Claimant was in effect terminated because he could no longer do the job as he had before his injury. He was terminated and is not eligible for rehire. 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]

Insurer also argued that Dr. Jacobsen's later report of Claimant's restrictions were not believable because Dr. Jacobsen had released Claimant earlier. The earlier release was not without restrictions, but with the understanding that Claimant would limit his work based on pain. Claimant credibly testified that his back became painful after he returned to his job at injury because of the heavy lifting. Dr. Jacobsen later restricted Claimant to lifting 30 pounds occasionally and 10 pounds frequently and later yet concluded that Claimant cannot return to his job at injury. Insurer offered no contradictory medical opinion. WCD's conclusion that

---

[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.

Petitioner/Insurer did not allege or prove the other standards of review.

[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 at injury or aggravation; and
> * * * * *

Claimant could not return to his job at injury is supported by a preponderance of evidence and does not violate a statute or rule.

Insurer also argued that a suitable wage for Claimant was $7.40 per hour, based on his hourly wage of his job at the time of injury. "'Suitable wage' means: (a) For the purpose of determining eligibility for vocational assistance, a wage at least 80 percent of the adjusted weekly wage as defined in OAR 436-120-0007." OAR 436-120-0005(13). OAR 436-120-0007(4) states that the adjusted weekly wage for Claimant, who was working full-time at the time of injury, is the amount of his temporary disability benefits.[3] Claimant received temporary total disability of $463.33 per week. Eighty percent of this amount is $370.66, or $9.27 per hour for full-time work. This wage is much higher than the wage considered by Insurer's vocational expert when determining suitable work opportunities for Claimant. Therefore, the testimony of the expert is not persuasive and it certainly does not establish a violation of statute or rule.

Finally, Insurer argues that Claimant's seasonal employment as flagger is suitable for him and therefore, prevents his eligibility for vocational assistance. "Suitable employment" or "suitable job" must be permanent if the worker's job at injury was permanent. OAR 436-120-0005(12)(d). His flagger jobs were not permanent. Insurer has not established that these jobs were suitable, much less shown that WCD's conclusion was a violation of statute or rule.

For the above reasons, the Director's Review and Order, which states that Claimant had a substantial handicap to employment and requires vocational assistance to overcome that handicap pursuant to OAR 436-120-0320(9), does not violate a statute or rule.

ATTORNEY FEES

Where a claimant prevails in an appeal of a contested case order of the director, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. ORS 656.385(1). A statement of services may be considered as a factor in assessing the award if submitted within seven days of the hearing date. OAR 436-001-0265(1). Claimant prevailed. His attorney submitted his statement of services within seven days, stating that he spent 10.1 hours on this appeal and charges $160 per hour for non-contingency cases. This is not a non-contingency case because he would not have been eligible for an award of attorney fees if Claimant did not prevail. The value of vocational assistance to Claimant is considerable, which is a basis for a greater award. The hearing lasted 2.1 hours. Absent extraordinary circumstances, the fee may not exceed $2,000. Claimant's attorney did not claimed extraordinary circumstances, so his attorney fee is $2,000.

ORDER

WCD's August 22, 2005 Director's Review and Order is affirmed. Claimant is awarded an attorney fee of $2,000.

---

[3] OAR 436-120-0007(4) states:

> When the job at injury was other than as described in section (3) of this rule, use the weekly wage upon which temporary disability was based, and then convert the weekly wage to the adjusted weekly wage as described in section (6) of this rule.