

In the ORS 656.340 Vocational Assistance Dispute of

MICHAEL A. RAINES, Claimant

Contested Case No: H05-066

PROPOSED AND FINAL ORDER

June 16, 2005

MICHAEL A. RAINES, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on March 2, 2005 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On May 10, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On June 10, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Gary Borden represented petitioner Michael A. Raines (claimant). Attorney Barbara Woodford represented respondent Liberty Northwest Insurance Corporation and its insured, Polyvision Inc. (insurer). Claimant testified on his own behalf and Polyvision Human Resources Manager Joan Nardi testified on insurer's behalf. The record closed on June 10, 2005 following receipt of claimant's supplementary exhibits.

ISSUE

Whether RRU incorrectly determined that claimant is ineligible for vocational assistance because he was released to regular work.

EVIDENTIARY RULINGS

All exhibits were admitted into the record without objection. The documentary record consists of WCD Exhibits 1 through 14, claimant's Supplementary Exhibits 3AA, 4A and 15, as well as insurer's Supplementary Exhibits 1A through 5A.

FINDINGS OF FACT

(1) On December 31, 2002, claimant suffered a compensable injury while working as a warehouse packager. (Ex. 1.) Claimant's job duties consisted of lifting whiteboards¹ from a six-foot high rack onto a table, wrapping them in plastic and packing them into boxes. Claimant is six feet tall. (Testimony of claimant.) The whiteboards weighed from 10 to 45 pounds and claimant worked with a partner as needed. (Ex. 3; testimony of claimant.)

(2) On February 20, 2003, insurer accepted a left shoulder strain. (Ex. 4A-1.) On August 19, 2003, insurer accepted a thoracolumbar strain. (Exs. 3AA and 4A-2.) On February

¹ A whiteboard is similar to a chalkboard but is used with erasable markers.

11, 2004, insurer accepted a cervicothoracic strain. (Exs. 4 and 4A-2.)

(3) On May 2, 2003, claimant designated Robert Ho, MD as his attending physician. (Ex. 2J.) On June 10, 2003, Dr. Ho agreed that claimant could perform the duties of a packager as listed in the job analysis. (Ex. 3.) Claimant last treated with Dr. Ho on June 30, 2003. (Exs. 3C and 15; testimony of claimant.)

(4) On February 4, 2003, claimant sought treatment from John Takacs, MD in Portland, Oregon, complaining of left neck, upper back and shoulder pain. (Ex. 1G-1.) On March 4, 2003, Dr. Takacs returned claimant to modified duty “much to [claimant’s] dismay.” (Ex. 2A.)

(5) Claimant failed to appear for closing examinations with Dr. Ho scheduled for October 8, 2003, December 4, 2003 and January 12, 2004. (Exs. 3D, 3E, 3F, 3G, 3H.)

(6) On February 17, 2004, the claim was closed without a permanent partial disability award. (Ex. 5-2.)

(7) On June 4, 2004, Nels L. Carlson, MD conducted a medical arbiter’s examination. He stated:

In my opinion, based on history, physical examination, and review of the available medical records, I do not believe that the worker has a limited or partial loss of ability to repetitively use the cervical/upper thoracic spine, left shoulder, or lower thoracic/low back due to the accepted conditions which are left shoulder strain, thoracolumbar spine and cervicothoracic strain. By definition strains and sprains are self-limited injuries, I would not anticipate that the worker has chronic and permanent loss of ability secondary to these self-limited injuries. At this time, the date of injury is approximately 17 months prior to this examination. I would anticipate that a strain would have resolved at this time.

(Ex. 6-4.) Dr. Carlson recommended limiting claimant’s lifting above shoulder level to 10 pounds. He attributed this limitation to claimant’s ongoing pain complaints which were not related to the compensable self-limiting sprains. (Ex. 6-6.)

(8) By Order on Reconsideration dated June 17, 2004, WCD awarded 25 percent permanent partial disability. (Ex. 7.)

(9) On August 24, 2004, insurer notified claimant that he was ineligible for vocational assistance. (Ex. 8.)

(10) On November 9, 2004, RRU interviewed claimant by telephone concerning his job at injury. Claimant stated that rarely, not every day, he was required to reach above the shoulder

and lift approximately 10 pounds. (Ex. 10-1.) On February 3, 2005, RRU again interviewed claimant by telephone and claimant confirmed that the job analysis was “basically accurate.” (Ex. 10-1.) Claimant indicated that the only discrepancy concerned twisting and RRU noted that factor did not affect the shoulder. (Id.)

(11) On June 15, 2005, Dr. Ho assumed certain facts and recognized the following work restrictions: occasionally lifting from floor to waist up to 50 pounds, frequently lifting from floor to waist up to 30 pounds, constantly lifting from floor to waist less than 10 pounds, lifting no more than 10 pounds above shoulder level and unspecified restriction on standing and walking. (Ex. 15.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance because he was released to regular work.

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if it: (1) violates a statute or rule; (2) exceeds the agency’s statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283; OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence that was not before the department and make independent findings of fact. *Colclasure v. Washington County School District*, 317 Or 526 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proving any fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving 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 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 the 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 (1989). Based on the record, I conclude that claimant has failed to meet his burden.

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(6) provides in pertinent part:

- (a) A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment *****.

OAR 436-120-0320(9) provides in pertinent part:

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;

Additionally, OAR 436-120-0005(10) provides;

(10) "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.

RRU determined that claimant was released to regular work as a whiteboard packager, and therefore, is ineligible for vocational assistance. RRU relied on medical arbiter Carlson's opinion approving the job analysis. Claimant contends that RRU erred by failing to obtain Dr. Ho's opinion concerning claimant's ability to return to regular work in light of the subsequently accepted medical conditions. In support of his position, claimant argues that the administrative order is faulty because attending physician Dr. Ho considered only the left shoulder when he approved the job analysis and did not consider the subsequently accepted thoracolumbar strain and cervicothoracic strains. In contrast, insurer contends that the administrative order is correct and should be affirmed.

Under substantial evidence review standard, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001). Based on the record, I find that RRU properly relied on the opinion of medical arbiter Carlson in concluding that claimant is able to return to his regular work. Dr. Carlson examined claimant recently in June 2004 and considered all of the accepted conditions. Dr. Carlson reviewed the job analysis that claimant acknowledged was "basically accurate." Next, attending physician Dr. Ho approved the job analysis in June 2003 when he last treated claimant. Finally, I assign no weight to Dr. Ho's recent opinion because he has not examined claimant since June 2003 and based his opinion on assumed facts.

Claimant next contends that he is unable to perform his regular work as a whiteboard packager because Dr. Carlson restricted him to lifting 10 pounds overhead. Based on the record, I find that this activity does not preclude claimant's performance of his regular job. To begin, the whiteboard rack is six feet high and claimant is six feet tall. Next, claimant testified that rarely, not every day, his regular work required him to lift approximately 10 pounds overhead and that he worked with a partner as needed. Consequently, the preponderance of the evidence indicates that claimant is able to perform the lifting activities required by his regular work as a whiteboard packager.

For these reasons, I conclude that RRU correctly determined that claimant was released for regular work, and therefore, is ineligible for vocational assistance. Finally, finding no grounds for modifying the administrative order, I affirm.

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 March 2, 2005 is affirmed.