

In the Matter of the Vocational Assistance of

**Teresa M. Geehan, Claimant**

Contested Case No: 06-054H

**PROPOSED & FINAL ORDER**

July 27, 2006

SENTRY SELECT INSURANCE COMPANY, Petitioner

TERESA M. GEEHAN, Respondent

Before Albert W. Hogue, Administrative Law Judge

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Pursuant to notice WCB No. 05-07327 (aggravation claim) and WCB No. 06-00054H (vocational assistance dispute) were both heard and closed on June 29, 2006 in Portland, Oregon before the undersigned Administrative Law Judge. Claimant was the only witness to testify at hearing. Claimant testified separately regarding the aggravation claim and the vocational assistance dispute. Closing arguments were also separated. Separate orders are being issued in each case. This Proposed and Final Order applies only to the vocational assistance dispute. With the consent of the parties the exhibits received into evidence were utilized as the exhibit record for both the aggravation claim and the vocational assistance dispute.

**ISSUES**

Regarding WCB No. 06-00054H, the employer/insurer/claims processing agent (insurer) appeals the February 1, 2006 Directors Review and Order (VO 06-032) as set forth at Exhibit 51 (hereinafter DRO) that set aside the insurer's July 1, 2005 denial of vocational assistance (see Exhibit 36). There are no cross issues except claimant seeks an assessed attorney fee pursuant to ORS 656.385(1) and OAR 436-001-0265 should she successfully defend against this appeal.

**EXHIBITS**

Exhibits 1 through 59 including 12A through 52A submitted pursuant to exhibit lists dated May 2 and June 7, 26 and 28, 2006 and Exhibits 60 through 63 received at hearing were admitted into evidence.

**FINDINGS OF FACT**

The following factual summary is taken from the exhibit record and serves to introduce the issues argued by the parties.

Claimant, at the age of 34, was compensably injured on December 10, 2003 while working as a new/used care salesperson for the employer. Claimant's claim was accepted as disabling initially for a cervical strain and then later for a C5-6 cervical disc herniation (Exhibits 10, 19 and 33).

Claimant first sought medical treatment toward the end of December, 2003. Dr. Miller, DO, took over claimant's care and served as claimant's attending physician from the beginning of May to the end of July, 2004 seeing claimant on four occasions and referring claimant to Dr.

Ordonez for neurosurgical consultation. Dr. Ordonez evaluated claimant in mid-July, became claimant's attending physician at the beginning of August, and performed discectomy/decompression/fusion surgery at C5-6 on August 10, 2004 (Exhibit 21). After three follow up visits, Dr. Ordonez then performed a closing examination on January 12, 2005.

Based on Dr. Ordonez's closing examination (Exhibit 29 and 29A), a mid-March IME (Exhibit 30) and functional capacity evaluation (Exhibit 31) and mid-May follow up report from Dr. Ordonez (Exhibit 32) claimant's claim was closed on May 17, 2005 with a 30 percent unscheduled PPD award based on impairment of 14 percent for decreased range of motion, 8 percent for surgery and 5 percent for chronic condition and 6 percent for social/vocational factors (Exhibits 34 and 34A).

Shortly after claim closure a rehabilitation specialist (AP - - see resume at Exhibit 59) on behalf of the carrier performed a vocational eligibility evaluation (Exhibit 37) that included an extensive auto sales labor market survey (Exhibit 35) and thereafter found claimant ineligible for vocational assistance effective July 1, 2005 (Exhibit 36). Thereafter AP performed an auto sales job analysis (Exhibits 40 and 38). At the end of October, 2005 Dr. Miller did not approve the job analysis (see Exhibits 45 and 46). As previously indicated the Director's Review and Order VO 06-032 (Exhibit 51) set aside the carrier's Notice of Ineligibility for (Denial of) Vocational Assistance (Exhibit 36). The employer/insurer/claims processing agent requested a hearing to challenge Exhibit 51 (see Exhibit 53). Rehabilitation consultant AB, provides a vocational assessment on behalf of claimant at Exhibit 58.

Also shortly after claim closure, claimant returned to see Dr. Miller and treated with him on six occasions from mid-June through the beginning of December, 2005 with Dr. Miller filing the aggravation claim at the beginning of September (see Exhibit 41) and referring claimant for epidural steroid injections and an MRI (Exhibits 39, 42 and 45) and then back to Dr. Ordonez for evaluation in September and to Dr. Brett, neurosurgeon, for evaluation in December. Claimant has not been back to see Dr. Ordonez (but see his report at Exhibit 49) but did see Dr. Brett in mid-January with referral for a cervical myelogram/CT (Exhibit 52A) and then in follow up at the end of March, 2006. Dr. Miller's reports are at Exhibits 47, 50, 52 and 57 and Dr. Brett's report is at Exhibit 55.

Claimant was rear ended in a motor vehicle accident (MVA) on January 7, 2006. Claimant was the subject of video surveillance on January 6, 7, 22 and 23, 2006 (see Exhibits 60 through 63). Claimant has not worked since her December 10, 2003 compensable injury.

Claimant's testimony and the vocational assistance dispute. Claimant worked for the employer as a new/used car salesperson for approximately three months prior to her December 10, 2003 compensable injury. Claimant has worked approximately 15-16 years in sales with approximately ten years in auto sales. While with the employer, claimant states she earned approximately \$5,000.00 per month gross and has previously earned at times up to approximately \$20,000 per month selling cars. Claimant's income selling cars has always been based on some type of commission formula in lieu of a base salary. Claimant states that if she wasn't in so much pain and/or on pain medication due to her compensable condition she would love to go back to auto sales work.

## CONCLUSIONS AND OPINION

The DRO concluded that claimant has a substantial handicap to employment as a result of limitations caused by her compensable injury and cannot return to suitable employment as a car salesperson and therefore satisfies the conditions of eligibility for vocational assistance. The insurer challenges these conclusions appealing the DRO solely pursuant to ORS 656.283(2)(c)(D).

Pursuant to ORS 656.283(2)(c)(D) the DRO can be modified only if it was characterized by abuse of discretion or clearly unwarranted exercise of discretion. The insurer has the burden or proof. See Harris v. SAF, 292 Oregon 683, 690 (1982) and Cook v. Employment Division, 47 Or App 437 (1980). The abuse of discretion/clearly unwarranted exercise of discretion standard has no hard and fast meaning but failure to consider relevant circumstances/contentions in making a decision in a vocation assistance dispute would be an abuse of discretion. See Liberty Northwest Ins. Corp. v. Jacobson, 164 Or App 37, 44-46 (1999).

I am persuaded that determination of this vocational assistance dispute must be as of the date of the DRO, February 1, 2006, but that the DRO decision regarding eligibility for vocational assistance must be based on the vocational assistance administrative rules in effect on the date the insurer issued its denial of vocational assistance, July 1, 2005 (Admin. Order 05-059). See OAR 436-120-0003(2). In resolving this vocational assistance dispute, I may admit new evidence and make independent findings of fact. Colclasure v. Washington County School District #48-J, 317 Oregon 526, 537 (1993); OAR 436-001-0225(3).

OAR 436-120-0320(10) provides the conditions of eligibility for vocational assistance, including at subsection (c)(C): as a result of the limitations caused by the injury, the worker has as substantial handicap to employment and requires assistance to overcome that handicap. "Substantial handicap to employment", as defined at OAR 436-120-0005(11), means the worker, because of the injury, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. "Suitable employment" or "suitable job" is defined at OAR 436-120-0005(12)(c), in pertinent part, to mean employment or a job which pays or would average on a year-round basis a suitable wage. Pursuant to OAR 436-120-0005(13)(a) "suitable wage", for purposes of determining eligibility for vocational assistance, means a wage at least 80 percent of the adjusted weekly wage as defined at OAR 436-120-0007.

In finding claimant ineligible for vocational assistance effective July 1, 2005, AP, on behalf of the insurer, concluded that claimant did not have a substantial handicap to employment, that claimant possessed the skill and abilities to find employment within 80 percent of her wage at injury, that claimant was able to return to her usual and customary employment as an auto salesperson and that the physical demands of an auto salesperson fell within claimant's permanent restrictions (see Exhibits 35, 36 and 37).

Thereafter AP performed an auto sales job analysis which Dr. Miller did not approve at the end of October, 2005 (see Exhibits 38, 40, 45 and 46), commenting that "[claimant] needs to rest and support neck frequently, should not be riding in demo/test drives with people unfamiliar

with brakes/accelerators, etc.” (Exhibit 45).

DH, a vocational consultant, prepared the DRO after a complete review of the relevant portions of claimant’s file (see Exhibit 51-1 through 51-3) and preparation of a suitable employment analysis (see Exhibit 51-6 through 51-8). DH concludes in the suitable employment analysis at Exhibit 51-8 and in the DRO at Exhibit 51-3 that although claimant has transferable skills gained as a car salesperson and labor market indicators suggest an average labor market existing in her area, car salesperson is not a suitable job for claimant because it would not pay a suitable wage and because it is not approved by Dr. Miller specifically precluding claimant from working in that position.

The DRO at Exhibit 51-3 as supported by the suitable employment analysis explains how claimant’s adjusted weekly wage and “suitable wage” were calculated and, then compared with the auto salesperson labor market calculated wage, is less than claimant’s suitable wage. The employer contends that there has been a clear abuse of discretion regarding the non-suitable wage determination because it is undisputed that claimant’s earnings as an auto salesperson have always been based on a commission formula rather than a base salary with claimant earning approximately \$5,000 per month while with the employer and up to approximately \$20,000 per month with previous employers. The employer’s position is supported by the labor market survey wages/salary range findings at Exhibit 35-1, the opinion of AP at Exhibits 36 and 37 and claimant’s testimony at hearing. Claimant’s rehabilitation consultant, AB, at Exhibit 58-2 appears to take the same position as the DRO.

As far as I can tell from the record and from the testimony and closing arguments at hearing, there is no specific contention that claimant’s adjusted weekly wage, which is the basis for determining a “suitable wage” in determining eligibility for vocational assistance, was improperly calculated according to the applicable administrative rules. The insurer appears to agree with the calculations in its challenge to the DRO at Exhibit 53. But, as I understand the employer’s position, agreeing with the calculations does not mean that employment as a car salesperson does not provide a “suitable wage” for the reasons previously stated (claimant paid per commission formula versus a salary). The DRO does not specifically discuss any commission formula aspect to the calculation of claimant’s adjusted weekly wage/suitable wage. No one testified on behalf of the employer at hearing regarding how claimant was compensated. Claimant did not provide specific payment records to support her actual compensation history with the employer. Because the employer does not appear to be challenging the calculation of claimant’s adjusted weekly wage and because the employer provides no new information at hearing that really was not already in the record (labor market survey establishes that car salespeople are paid pursuant to commission formula rather than base salary) and because the employer cites to no specific administrative rule that has been violated or ignored I am persuaded that the employer has failed its burden of proving an abuse of discretion/clearly unwarranted exercise of discretion regarding the suitable wage component of the DRO.

Regarding claimant’s physical capacity to perform the job of an auto salesperson (see detailed physical demands at Exhibit 35-1) the employer contends that the January, 2006 surveillance video tapes/reports at Exhibits 60 through 63 show what claimant was able to do at that time and contends that what claimant’s doctors say claimant can do and what claimant can

do might be two different things. But no doctors have reviewed these video tapes/reports. In short, claimant's attending physician after claim closure, Dr. Miller, saw claimant on six occasions through the beginning of December and does not approve the auto salesperson job analysis with comment. There is no medical evidence to the contrary. It is not an abuse of discretion/clearly unwarranted exercise of discretion for the DRO to rely upon the opinion of claimant's attending physician, Dr. Miller, regarding the physical capacities/substantial handicap component of the DRO.

Because the DRO was not characterized by an abuse of discretion or clearly unwarranted exercise of discretion, the DRO must be affirmed. Because claimant has prevailed in this proceeding claimant is entitled to an assessed attorney fee pursuant to ORS 656.385(1) and OAR 436-001-0265(1). After considering the factors/matrix consistent with the administrative rule and claimant's attorney's statements at hearing (6-8 hours devoted to this vocational assistance dispute) claimant's attorney is awarded a reasonable assessed attorney fee in the amount of \$1,600.00.

### **ORDER**

The February 1, 2006 Directors Review and Order (DO 06-032) as set forth at Exhibit 51 is affirmed. Claimant's attorney is awarded a reasonable assessed attorney fee pursuant to ORS 656.385(1) and OAR 436-001-0265(1) in the amount of \$1,600.00.