

In the Vocational Assistance of

Charles Horsely, Claimant

Contested Case No: 06-019H

PROPOSED & FINAL ORDER

May 18, 2006

ST. PAUL FIRE & MARINE INS. CO., Petitioner

CHARLES HORSLEY, Respondent

Before Robert Brazeau, Administrative Law Judge, Workers' Compensation Board

A hearing was held in this matter on May 9, 2006 in Coos Bay, Oregon before Administrative Law Judge Brazeau. The record closed that day. Charles Horsley was present and was represented by his attorney, Scott McNutt, Sr. The employer, Wicks Broadcast Solutions, and the insurer, St. Paul Fire and Marine Insurance Company, were represented by William Replogle, Attorney at Law.

Exhibits 1 through 76, 35A, 57A and 73 A through D were admitted into evidence at the time of the hearing.

ISSUE

This is the employer's appeal from the Director's Review and Order dated January 19, 2006, which held that Mr. Horsley is entitled to vocational services.

FINDINGS OF FACT

Mr. Horsley (hereinafter "claimant") was severely injured in a work-related car crash on September 24, 2000 while employed by Wicks Broadcast Solutions (hereinafter "Wicks"). Among his injuries was a "traumatic brain injury," diagnosed by Dr. Wiersema on October 4, 2000.

Prior to his accident, claimant was employed by Wicks as a computer programmer. Following several months of recovery after the accident, claimant's employer began working with Willie Davis, a vocational consultant in the Salem, Oregon area. On August 8, 2001, Mr. Davis noted that the primary task was to determine whether claimant had retained the cognitive abilities to perform one or more light duty jobs suggested by his employer. At the same time, Dr. Greif, a clinical psychologist, assessed that claimant would require alternative employment because of the cognitive deficits he had suffered as a result of his injuries. Then, on October 8, 2001, Mr. Mushlitz, a job coach, concluded that claimant would be unable to continue performing his pre-injury job as a computer programmer because of his post-injury cognitive difficulties. Mushlitz recommended that claimant be returned to his position as a Testing Technician and to be enrolled in classes in "Visual Basic," a newer form of programming the employer had begun using during claimant's recovery.

The employer formally offered the testing technician position to claimant with a wage of \$2,750 per month, a reduction of \$2,250 per month from what he was earning as a computer

programmer at the time of his injury. On December 14, 2001, the vocational consultant advised claimant's attorney that the \$2,750 wage was considered "suitable" because it was unlikely that claimant would be capable of earning a greater wage after additional training was provided. Claimant complained that the only reason he was incapable of continuing his former job as a programmer was because he had not yet learned "Visual Basic." He, therefore, requested leave to attend classes to learn the new system and to retain his former job.

On December 21, 2001, Dale Daley, a former Project Manager and Senior Software developer for Wicks, wrote to Dr. Lin (claimant's rehabilitation physician in Oregon), advising that claimant worked for Daley for about two months in the Spring of 2001. In Daley's opinion, claimant maintained a "good working knowledge" of the software with which claimant was working prior to his accident.

Following his receipt of Mr. Daley's letter, Dr. Lin advised the vocational consultant that it appeared claimant was capable of returning to his former job as a programmer if he could obtain new skills related to "Visual Basic." Based on Lin's opinion, claimant was declared ineligible for Preferred Worker Benefits because it did not appear that he was permanently precluded from his job at injury.

On February 22, 2002, the vocational consultant reported that claimant was making "satisfactory progress" in his return to work efforts in his new position as a tester. Claimant had also advised that he was taking classes in an attempt to return to his job at injury.

On April 2, 2002, Dr. Kurlychek, a clinical psychologist, performed an assessment of claimant's then-current cognitive abilities. Kurlychek concluded that claimant had become medically stationary from a neuropsychological standpoint and had suffered a Class I degree of cognitive impairment as a result of his 2000 motor vehicle accident. With regard to claimant's work restrictions, Kurlychek advised that claimant may have difficulty with new and challenging tasks, but that he should be encouraged to progress through instructional courses and to "reach his highest standard of performance."

On April 17, 2002, Willie Davis advised that claimant had been declared ineligible for vocational assistance under OAR 436-120-0320 because he had not been determined to be permanently precluded from his job at injury and had returned to a suitable job with his employer-at-injury for a period of more than 60 days.

Claimant's claim was closed by the insurer on May 9, 2002 with an award of permanent disability compensation for a Class I brain injury. The closure order was later rescinded as having been prematurely issued.

On July 10, 2002, Dr. Glassman, a rehabilitation physician appointed as a medical arbiter, advised the Department that claimant had done well in his Visual Basic classes and felt capable of returning to his job at injury. Glassman opined that there appeared to be no disruption in claimant's ability to perform the general activities of daily life, including those requiring cognitive function ability.

Claimant appealed the vocational consultant's finding of vocational services ineligibility and on December 27, 2002, the denial of vocational assistance was set aside by a Director's Review and Order. Claimant contended that his work as a tester technician was not "suitable employment and that he needed vocational assistance to obtain employment as a Visual Basic computer programmer. The Director agreed that claimant had not been employed in suitable employment for at least 60 days. Noting that claimant was clearly capable of performing the tester job, the Director simply found that wage he was earning as such did not meet the definition of "suitable wage" under OAR 436-120-0005(10).

On January 20, 2003, Dr. Erb, a brain rehabilitation medicine physician, examined claimant as a medical arbiter. She agreed with prior assessments that claimant had suffered a Class I brain injury, that it did not restrict his physical activities, and that he was not restricted in working the number of hours he had worked prior to his injury.

Following the Director's December 27, 2002 Review and Order, Mr. Davis, the prior vocational consultant, performed a "substantial handicap determination" at the Director's direction. On February 5, 2003, Davis concluded that claimant did not have a "substantial handicap to employment" as defined in OAR 436-120-0005(8). Noting that Dr. Lin had apparently released claimant to return to his job-at-injury after he completed class work in Visual Basic, and that claimant had been working as a tester technician for sometime after returning to work, the consultant found no substantial limitations in claimant's ability to be employed. He, therefore, determined once again that claimant was not eligible to receive vocational assistance.

Claimant underwent yet another vocational assessment on September 30, 2003 by Mr. Potocki, a vocational consultant. Potocki interviewed claimant and reviewed his prior records. Claimant reported having no difficulties performing his then-current position of tester technician. He also remained convinced that he could perform his prior job as a computer programmer. Based on his review of available information, Potocki concluded that claimant could return to his pre-injury employment as a computer programmer. Claimant was, therefore, declared ineligible for vocational assistance.

On October 20, 2003, claimant appealed the notice of vocational assistance ineligibility to the Director.

On March 9, 2004, Dr. Boyd performed a neuropsychological evaluation of claimant and concluded that although claimant demonstrated a high level of functioning in many areas, his memory, attention span and ability to manipulate verbal information internally showed signs of impairment. Boyd suggested that claimant might have problems at work related to hurriedness or inattention to detail. Boyd advised, "Although he may well succeed at the competitive level, there is serious concern as to whether he will approximate his previous level of functioning."

On June 1, 2004, the Director's Review and Order issued, concluding that claimant had a "substantial handicap to employment because, due to the limitations caused by his work injury, there was no suitable employment available in his local area.

Following the Director's order, claimant was referred to Nancy Bloom, a vocational consultant, for vocational assistance. Bloom examined whether claimant would benefit from a training program for such positions as Cost Estimator or Medical Stenographer. It was noted on May 31, 2005 that claimant was earning \$40,000 as a tester technician with his employer-at-injury. On July 11, 2005, Bloom submitted a job analysis for a Cost Estimator job to Dr. Boyd. On August 12, 2005, Boyd estimated that claimant's chances of succeeding at that position were roughly 50 percent because of his cognitive deficits.

On September 29, 2005, Ms. Bloom notified claimant that his return-to-work assistance was ending because efforts at finding employment with a wage close to that he was making at the time of his injury had failed. It was also noted that he had been employed for more than 60 days in a permanent modified position with his employer at injury.

On November 4, 2005, Wicks advised the insurer that claimant had been employed in the tester position from the time of his 2001 medical release through November 3, 2005, when he was "laid off."

In the interim, on October 18, 2005, claimant requested the Director's review of the insurer's decision to terminate his vocational assistance. On January 19, 2006, the Director's Review and Order set aside the insurer's decision, finding that claimant remained eligible for vocational assistance. The employer thereafter timely requested a hearing from the Director's order.

CONCLUSIONS OF LAW AND OPINION

The employer has requested a hearing, contesting the Director's review and Order, which held that claimant remains eligible for vocational assistance. The employer contends that the Director's order was an "abuse of discretion" under ORD 656.283(2)(d). It is the employer's burden to prove in that regard. ORS 183.450(2).

ORS 656.283(2)© provides that when the director issues an order after a review under paragraph (b) of the subsection, the order shall be subject to review under ORS 656.704. However, the decision of the director's administrative review shall be modified only if it, among other things, "was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(C)(d). In the present case, the employer asserts that the director's order constituted an abuse of discretion.

OAR 436-036-350 sets forth the conditions under which vocational assistance can be denied or terminated. Subsection(4) of the rule provides that vocational assistance is to end when the worker has been employed at least for 60 days in suitable employment after the injury or aggravation . . ." The parties in this case agree that the determination of the present controversy comes down to whether or not claimant was employed in "suitable employment" for Wicks following his medical release to return to work in 2001. "Suitable employment" is defined by the administrative rule to be employment or a job: (a) For which the worker has the necessary physical capacities, knowledge, skills and abilities; and; (b) is located where the worker customarily worked, or within reasonable commuting distance of the worker's residence.

The job must also pay a “suitable wage,” which is defined by the rule as a wage as close as possible to 100 percent of the adjusted weekly wage. This wage may be considered suitable if less than 80 percent of the adjusted weekly wage if the wage is as close as possible to the adjusted weekly wage. OAR 436-120-0005(13).

The Director’s Review and Order held that claimant’s employment as a tester technician with Wicks for the period of 2001 and late 2005 was not “suitable employment.” The Director’s reviewer found that according to claimant’s supervisors and coworkers, claimant’s work as a tester was not at an acceptable level, that he would not have made it through the probationary period if he had been hired by the employer after his injury. In the opinion of claimant’s coworkers, claimant needed much more direction and assistance than other testers and was unable to “think outside the box,” an attribute required in order to be a successful tester. The Testing Department manager, Mr. Leighton, advised that the employer kept claimant employed out of the “charity of our hearts,” despite claimant’s inability to adequately perform his job. Based on this information, as well as the vocational information gathered by the vocational consultants, the Director’s reviewer concluded that claimant lacked the requisite physical capacities, knowledge, skills and abilities to perform the tester job, even though the employer had allowed him to perform it for a number of years.

On review, the employer argues that claimant performed his job as a tester with Wicks for more than four years after being released to return to work. It cites *Leah M. Lewis*, 9 CCHR 24 (2005), for the proposition that the actual performance of a job is sufficient to establish the “suitability” of that job. The employer argues that the Director’s reviewer “ignored the holding: of *Lewis*, as well as the clear language of OAR 436-120-0350(4) in finding claimant eligible for vocational assistance.

In *Lewis*, the worker suffered a back injury while employed as a retail clerk. She underwent lumbar surgery and then was released for modified work about six weeks later. She performed the light duty position through September 26, 2001, when she quit work after being advised by her physician that she should be taken off work for three weeks. The ALJ found that the worker had “performed satisfactorily” in the modified job from April 2000 through late September 2001 and, therefore, had been “suitably employed” for at least 60 days following her return to work after her injury. In reaching her conclusion, the ALJ specifically found that all of claimant’s modified work duties were within her necessary physical capacities, knowledge, skills and abilities. *Id.* at 27-28.

After carefully reviewing the record, I conclude that the Director’s review and Order should be affirmed. My reasoning is as follows: I agree with the Director that although claimant remained employed from the time he was released to return to work through the date of his 2005 layoff, the job he performed was not “suitable” as that term is used in OAR 436-120-0350. Rather, the preponderance of evidence is that the employer retained claimant as a employee out of kindness, not because he was capable of adequately performing the job of tester technician. As noted from the testimony of Colleen Reilly, the employer’s Human Resources Manager, claimant consistently had difficulty performing basic functions of his job after he returned to work, primarily because of memory deficits and his apparent inability to “think outside the box.” Reilly’s testimony was corroborated by that of Karen Halstead, a testing department supervisor

for 17 years. She testified that while claimant worked as a tester, he was incapable of sequentially following the steps required for successful testing and that he was only able to do a small fraction of the work the other testers performed. She advised that she would not hire a worker with claimant's apparent deficits. Finally, Kurt Brecheisen, who has worked as a tester/programmer for 19 years, testified that after the 2000 motor vehicle accident, claimant was unable to think creatively, link testing procedures together or to perform essential functions of the testing job without a great deal of assistance and detailed, step-by-step instructions.

In my view, although some of the vocational evidence in this record concludes that claimant should have been capable of performing the tester position, the overwhelming evidence from those who know the job best is that claimant was wholly incapable of performing it in fact following his injury. I conclude that this "real life" assessment by claimant's supervisors and coworkers essentially "trumps" the contrary vocational evidence by firmly establishing that during the time the employer benevolently employed claimant between 2001 and 2005, claimant did not have the requisite "knowledge, skills and abilities" to perform the tester position. His employment in that regard was, therefore, not "suitable" as defined in OAR 436-120-0005.

Claimant's attorney is entitled to an assessed attorney fee for assisting claimant in obtaining the vocational assistance subject to this dispute. Under ORS 656.385(1), the attorney fee must be proportionate to the benefit to the injured worker and is not to exceed \$2,000 absent a showing of extraordinary circumstances. *See* also OAR 436-120-0008(2). After reviewing the pertinent statute and rule, I conclude that claimant's attorney is entitled to an attorney fee of \$2,000 in this matter. The value of the vocational assistance that Mr. Horsley will receive as a result of his attorney's efforts is substantial and without those efforts, it is highly unlikely that he would have received vocational benefits.

ORDER

The Director's Review and Order dated January 19, 2006 is affirmed in its entirety.