
In the Compensation of
Jim Ray Allen, Claimant
Contested Case No: 07-090H
PROPOSED & FINAL ORDER

November 1, 2007
JIM RAY ALLEN, Petitioner
SAIF CORPORATION, Respondent
Before Robert Pardington, Administrative Law Judge

Pursuant to notice, a hearing convened and closed on October 17, 2007, in Portland, Oregon, before Administrative Law Judge Robert Pardington. Claimant was present and represented by attorney John Oswald. The employer, Outlaws Entertainment, and its insurer, SAIF Corporation, were represented by attorney Holly Ansari.

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Exhibits 1 through 27 were admitted.

ISSUE

Entitlement to Vocational Assistance. Claimant appeals the June 25, 2007 Director's Review and Order. (Exhibit 26).

SUMMARY OF FACTS

Claimant sustained a compensable injury to his right leg at work for the employer on March 4, 2006. On the date of injury, claimant worked 12 to 15 hours per week for the employer, at \$8.75 per hour. He earned \$157.50 per week. (Exs. 2, 4; Cl. Testimony).

On the date of injury, claimant worked two other jobs (for two other employers). (*See* wage records, Ex. 1). He was a warehouseman for GTS Interior Supply, 40 hours per week plus some overtime, at \$14.50 per hour. He worked two years for that employer. Claimant also worked as a delivery driver for Round Table, for \$7.25 per hour plus tips. (Ex. 1; Cl. Testimony). There is also one pay stub from "Johnson Acoustical & Supply." (Ex. 1-31).

After the injury, claimant could not return to work as a warehouseman, because "the doctor said I can't do it." (Cl. Testimony). On September 27, 2006, claimant's treating physician, Dr. Edelson, stated that claimant's condition was not medically stationary, but predicted permanent restrictions, and a sedentary work classification which would "[rule out] his prior warehouse employment." (Ex. 5).

In December 2006, claimant underwent vocational and physical capacity evaluations. On December 31, 2006, the vocational counselor recommended that claimant be found not eligible for vocational services, based on his at-injury weekly wage for the employer. (Ex. 9).

In a January 23, 2007 report to SAIF, Dr. Edelson indicated that claimant's condition was medically stationary, and that he was released to work with some (partially unreadable)

permanent restrictions. (Ex. 16).

On February 7, 2007, Dr. Edelson approved several job analyses as appropriate for claimant. (Ex. 17).

On February 9, 2007, SAIF issued a Notice of Ineligibility for Vocational Assistance, asserting that he did not have substantial handicap to employment, and listing several “suitable employment options.” (Ex. 18).

On March 7, 2007, Dr. Edelson indicated that claimant’s former “bouncer” position at the employer was not appropriate for him. (Ex. 19).

SAIF issued a Notice of Closure on March 22, 2007, awarding five percent “whole person” impairment for his right ankle. (Ex. 22).

Claimant appealed the Notice of Ineligibility to the Workers’ Compensation Division. In a Director’s Review and Order dated June 25, 2007, the Director affirmed SAIF’s February 9, 2007 Notice of Ineligibility, finding no substantial handicap to employment. (Ex. 26).

CONCLUSIONS OF LAW AND OPINION

The Director’s Review and Order may be modified only if it: “(a) Violates a statute or rule; (b) Exceeds the director's statutory authority; (c) Was made upon unlawful procedure; or (d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.” ORS 656.283(2)(c); OAR 436-001-0225(3).

Claimant contends that the Director erred in upholding SAIF’s denial of vocational eligibility, because it failed to consider his earnings from all of his employers at the time of injury in determining whether he had a “substantial handicap” to employment. ORS 656.340(6)(a).

ORS 656.340(6)(a) provides that a worker is eligible for vocational assistance if the worker will not be able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury or aggravation, and the worker has a “substantial handicap” to employment. A “substantial handicap to employment” exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. ORS 656.340(6)(a)(A).

One of the definitions of “suitable employment” provides, in pertinent part:

“Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment as defined in subsection (5) of this section. The director shall adopt rules providing methods of calculating the weekly wage currently being paid for the worker’s regular

employment for use in determining eligibility and for providing assistance to eligible workers. * * *

ORS 656.340(6)(b)(B)(iii).

ORS 656.340(5) defines “regular employment” as “the employment the worker held at the time of the injury or the claim for aggravation under ORS 656.273, whichever gave rise to the potential eligibility for vocational assistance; or, for a worker not employed at the time of the aggravation, the employment the worker held on the last day of work prior to the aggravation.”

Under OAR 436-120-0005(13)(a), “Suitable wage” means: “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 436-0120-0007(2) provides that “the insurer shall determine the nature of the job at injury or the job or jobs at aggravation by contacting the employer or employers to verify the worker’s employment status.” OAR 436-0120-0007(1)(e), cited by SAIF, defines “job at injury” as “the job on which the worker originally sustained the compensable injury.”

Nevertheless, OAR 436-120-0007(4), cited by claimant, states: “When the job at injury was other than as described in section (3) of this rule [which applies “when the job at injury or the job at aggravation was temporary or seasonal,”] 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.” ORS 656.210(2)(a)(B), (which applies to calculating temporary total disability) provides that: “(For the purposes of this section, the weekly wage of workers shall be ascertained:) (B) For workers employed in more than one job at the time of injury, by adding all earnings the worker was receiving from all subject employment.”

SAIF responds that ORS 656.210 applies only to determining temporary total disability, and not directly to determine a “suitable wage” or “adjusted weekly wage” for vocational eligibility. ORS 656.210(2)(a); OAR 436-120-0007.

I agree with SAIF, but based on slightly different reasoning. By implication, OAR 436-120-0007(4) applies to determining the weekly wage when the job at injury was not “temporary or seasonal” under OAR 436-120-0007(3). There is no indication that claimant’s job at injury was “temporary or seasonal.” Therefore, subsection (4) applies, and “the weekly wage upon which temporary disability was based” (not “*should have been* based”) must be used to determine “adjusted weekly wage.” OAR 436-120-0007(4). Claimant’s temporary disability rate was calculated (perhaps incorrectly) using only his wages at the employer. (*See* Ex. 4, Boxes 3 and 4); *cf.* ORS 656.210(2)(a)(B).

Under the parameters of this vocational eligibility case, the Director (under whose authority this Order is being written), does not have the authority to address or alter the temporary disability rate. Therefore, unless claimant’s temporary disability rate is changed (voluntarily, pursuant to stipulation, or through litigation at the Hearings Division), I find no error in SAIF’s current calculation of his weekly wage for vocational eligibility purposes, as affirmed by the Director’s Review and Order. OAR 436-120-0007(4). It follows that claimant

does not have a “substantial handicap” to employment, and he was properly found ineligible for vocational assistance.

Inasmuch as this is claimant’s only “assignment of error,” the Director’s Review and Order is affirmed.

ORDER

The Director’s Review and Order dated June 25, 2007 is affirmed.