

In the Vocational Assistance of
Steven L. Blasingame, Claimant
Contested Case No: 07-069H, 07-071H

PROPOSED & FINAL ORDER

November 6, 2007

SAIF CORPORATION, Petitioner
STEVEN L. BLASINGAME, Respondent
Before John Mark Mills, Administrative Law Judge

Hearing in this matter was set before Administrative Law Judge John Mark Mills in Bend, Oregon on August 28, 2007. Prior to the time of hearing the parties advised that the matter could be submitted on a documentary record. Claimant was represented by his attorney, Philip Garrow. The employer, TMA Inc., and their insurer, SAIF Corporation, were represented by their attorney, Holly O'Dell. No proceedings were recorded. The record consists of Exhibits 1 through 48, submitted by the Workers' Compensation Division (WCD). Written closing arguments were submitted by the parties, the last of which was received on October 16, 2007 and the record was closed on that date.

ISSUES

The insurer appeals the May 21, 2007 Director's Review and Order on Remand which set aside the insurer's termination of claimant's eligibility for vocational benefits. Claimant seeks the award of an assessed attorney fee should he prevail in this proceeding.

FINDINGS OF FACT

I adopt and incorporate the findings fact set forth in the Director's Order. (Ex. 46). I make the following supplemental findings of fact.

Claimant demonstrated full participation in the PCE which occurred on October 10, 2004. (Ex. 10). The testing was an accurate representation of claimant's abilities.

Dr. Courogen indicated in the IME which took place on February 15, 2005, in response to an inquiry as to whether claimant was a credible reporter and if there was any exaggeration of his symptoms or holding back, that there was no exaggeration of symptoms and claimant's range of motion had improved since the time of his PCE. (Ex. 15, pg. 8).

Claimant saw Dr. Mara on only one occasion, July 31, 2006. (Ex. 36). At that time he declined to address claimant's ability to return to work as he was only providing a second opinion.

Standard of Review

This is a review of a Director's Order concerning a vocational dispute under ORS

656.704. I may modify the Director's Order only if it; (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.

Evidentiary Record

While the standard of review is limited in this matter, under the applicable statute and case law, I am allowed to receive additional evidence and make additional findings of fact. *Colclasure v. Wash. County School District No. 48-J*, 317 Or 526, 537 (1993). However, no testimony on documentary evidence beyond that developed before the Director was submitted in this matter. Accordingly, I have adopted the findings of fact from the Director's Order, which are not really in dispute. I have only made a few supplemental findings of fact from the same record.

CONCLUSIONS AND OPINION

The insurer bears the burden of proving that the Directors' Order in this matter should be modified. The insurer's position is that the Order is characterized by either an abuse of discretion or error of law based on the same argument. That argument is essentially as follows:

Up to the point to the closure in his claim in the Order on Reconsideration dated June 14, 2005, all of the medical and vocational evidence indicated that claimant could not return to his regular work as a full duty auto technician given the compensable right arm injury that he had suffered and the residual effects of that injury and surgery that have been performed. However, after the Order on Reconsideration, the insurer surveilled claimant and obtained video evidence which the insurer felt was inconsistent with the limitations that had been placed on claimant's use of his arm to that point. The insurer then showed this surveillance video to claimant's long term treating physician, Dr. Verheyden and to two additional physicians who saw claimant after the closure of his claim, Drs. Andrews and Mara. All three agreed in one fashion or another that based upon claimant's physical abilities revealed in the surveillance video, that he was able to return to his regular work and on that basis claimant's vocational benefits were denied. The findings of fact set forth in the Director's Order clearly reflect the factual scenario presented above.

The Director's original order in this matter was remanded because it appeared to the reviewing administrative law judge that the Director may have engaged in impermissible medical or vocational analysis of the record beyond the scope of the Director's reviewing authority. In the Order on Remand which is at issue in this case, the Director did not engage in his own independent medical or vocational analysis of the evidence and therefore this Order does not suffer from that potential error.

Rather what occurred in this case is that the Director compared the medical and vocational and other evidence as to claimant's limitations which was in existence up to the time of the closure of his claim with the evidence that was developed post closure based upon the surveillance video. After that review the Director determined that the prior evidence was more persuasive than the latter evidence.

In terms of the abuse of discretion standard, I do not find persuasive the insurer's position that the Director's conclusion was such an abuse because it was clearly against the evidence. The Director explained his decision and provided persuasive reasons for it. As the Order explains, Dr. Verheyden had been claimant's long treating physician and was in as good a position as any doctor to assess claimant's ability to return to work. He indicated that claimant would never return to his work as an auto technician. Claimant had not one but two physical capacities evaluations that were valid and interpreted by Dr. Verheyden as consistent with his view that claimant could not return to his regular work. Claimant had not one but two independent medical evaluations, one from an IME physician and one from a medical arbiter, who evaluated claimant's functional capacity and found him to have limitations based upon his compensable injury.

The evidence developed after closure is not similarly objective and persuasive. Dr. Verheyden did check a box indicating that after his review of the surveillance video, he felt that claimant could return to his regular work. However, that opinion was wholly conclusory and unexplained. After claimant found out about this, as the Director's Order reflects, he went to Dr. Verheyden and explained that the video did not truly reflect his ability to return to work doing full duty as an auto technician. Despite that encounter, Dr. Verheyden provided nothing more in the way of explanation for his conclusion or any rebuttal to the position being taken by claimant.

Dr. Mara indicated that claimant could return to his regular work. However, on the one time visit he had with claimant, he indicated that he would not comment on claimant's work capacity since he was only seeing claimant as a consulting physician. Dr. Andrews at least provided somewhat more of an explanation based on the video as to why he felt claimant could perform his regular work, but it was not an abuse of the discretion of the Director to conclude that that evidence was persuasively outweighed by other more objective evidence in the record.

In sum, I find no abuse of discretion.

The insurer argues that the medical evidence pre-closure, which did not consider the video evidence, is therefore based on an incomplete history and unpersuasive. It was nevertheless neither an abuse of discretion nor an error of law to give persuasive weight to this evidence. The fact that the PCE evaluators, the IME physician and the medical arbiter did not view the video prior to expressing their opinions and conclusions can be considered in evaluating the persuasive weight of the evidence they provide. It does not in of itself render that evidence unpersuasive. It was neither an error of law or abuse of discretion for the Director to conclude that that evidence remain persuasive give its objective nature.

The insurer also argues that it was an error of law for the Director to consider Dr. Verheyden's pre-closure evaluation of claimant's ability to return to work given his change of opinion based on the video evidence. The doctor provides a basis for his change in opinion. The fact that the Director did not find it to be a persuasive change in opinion does not render Dr. Verheyden's prior opinion unpersuasive. This is not a case where Dr. Verheyden has engaged in unexplained flip flopping which would indeed render essentially all of opinions unpersuasive.

In sum I do not find that the insurer has carried its burden of proving that the Director's Order should be modified. I therefore approve the Order. For prevailing in this matter, claimant's counsel is entitled to the award of an assessed fee under ORS 656.385 and OAR 436-120-0008. As the Director's Order notes, the value of the vocational services which claimant is entitled to exceeds \$6,000.00 that is set forth in matrix under the rule. Claimant's counsel has filed a statement of services, showing significant time expended on this case by both counsel and his paralegals in this matter. This justifies the maximum fee under the rule of \$2,000.00. OAR 436-001-0265.

ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Director's Order issued in this matter on May 21, 2007 is approved.
2. Claimant's counsel is awarded an assessed fee in the sum of \$2,000.00.