

In the ORS 656.340 of
Judith A. Jorgens, Claimant
Contested Case No: 06-185H
PROPOSED & FINAL ORDER

March 6, 2007

JUDITH A. JORGENS, Petitioner
SAIF CORPORATION, Respondent

Before Emerson G. Fisher, Administrative Law Judge

Claimant appeals the Director's Review and Order issued on October 19, 2006 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (Director or Department).

Pursuant to notice, a hearing was convened on February 26, 2007, in Portland, Oregon, before the undersigned Administrative Law Judge (ALJ). Claimant (not present) was represented by attorney George Wall. The employer, PS Enterprises Inc., and its insurer, the SAIF Corporation, were represented by attorney Roy Miller. Gary Meiers, an employer representative, was present. WCD waived appearance. The proceedings were recorded by the ALJ.

The documentary evidence received consists of exhibits 1 through 27, 1A through 1C, 5A, 6A, 20A, 20B, 21A, and 22A through 22J.

The record closed on February 26, 2007.

ISSUE

Whether claimant is eligible for vocational assistance.

FINDINGS OF FACT

Claimant compensably injured her left shoulder on December 3, 2003. (Exs. 1; 2; 4; 10). SAIF initially accepted a left shoulder strain, but ultimately amended its acceptance to include a partial rotator cuff tear. (Exs. 10; 22D; 22E; 22F). Claimant's shoulder injury eventually resulted in an award of 11 percent (equal to 35.2 degrees) unscheduled permanent disability. (Ex. 22H).

Claimant's regular work at the time of her injury was floor covering sales person. (Ex. 4-1).

On April 13, 2005, the employer offered claimant a modified sales job, approved by attending physician McWeeney, which claimant declined to accept. (Exs. 6, 6A, at hearing stipulation).

On February 28, 2006, the employer offered claimant the position of Sales Account Expeditior. (Ex. 20B-2). According to the employer's letter to claimant, the position offered

required no work in the showroom, and thus required no lifting. (*Id.*) Claimant declined the job offer. (At hearing stipulation).

SAIF issued a Notice of Ineligibility for Vocational Assistance. (Ex. 16).

Claimant requested administrative review, contending (among other things) that she is restricted from overhead lifting and climbing ladders, and that the press of the employer's business would ultimately require (with either of the offered jobs) that she work outside her physical restrictions. (Ex. 18).

Finding that claimant refused an offer of light employment intended to result in suitable employment, Rehabilitation Review Unit (RRU) issued an October 19, 2006 Director's Review And Order affirming SAIF's Notice of Ineligibility for Vocational Assistance. (Ex. 25-7).

Claimant requested a hearing.

CONCLUSIONS OF LAW

Pursuant to ORS 656.283(2)(c), a director's administrative review regarding vocational assistance may be modified only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by an abuse of discretion or clearly unwarranted exercise of discretion.¹ However, in determining whether any of the factors set forth in ORS 656.283(2)(c) were violated, the ALJ may admit evidence and make independent findings of fact. *See Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The ALJ has the responsibility to ensure that the record is fully developed and sufficient for judicial review. ORS 183.415(10). In doing so, the ALJ may admit and consider new evidence. OAR 436-001-0225(3).

“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.” ORS 656.340(6)(a).

¹ “The phrase ‘abuse of discretion’ is a legal term of art meaning a discretion exercised to an end or purpose not justified by and clearly against reason or evidence; any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and laws pertaining to the matter submitted. BLACK’S LAW DICTIONARY 10-11(6th ed. 1990); *Jerry L. Bell*, 2 WCSR 394, 395 (1997), *citing Casciato v. Oregon Liquor Control Comm’n*, 181 Or 707, 717 (1947) and *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 663 (1979). On review for abuse of discretion, ‘[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made.’ *Teresa Brooke*, 8 CCHR 240, 241 (2003) *quoting Liberty Northwest v. Jacobson*, 164 Or App 37, 45 (1999).” *Suzanne P. Blakley*, 9 CCHR 287, 294 (2004).

“Suitable employment” (among other things) is employment for which the worker has the necessary physical capacities/abilities, and is “permanent.” OAR 436-120-0005(12)(a) and(d). “‘Permanent employment’ is a job with no projected end date or a job which had no projected end date at time of hire.” OAR 436-120-0005(6).

As noted above, claimant does not dispute that she refused the sales expeditor job offered to her on February 28, 2006. Nor does claimant dispute that the job, as offered, fits within the physical restrictions prescribed by attending physician McWeeney. Rather, based, on how the offered job is actually performed by other workers, and based further on her own work experience with SAIF’s insured, claimant contends that pressure to get work done would eventually result in the employer declining to accommodate her physical restrictions. Thus, claimant argues the sales expeditor job is not “suitable employment.”

Claimant bears the burden of establishing her eligibility for vocational assistance. ORS 656.266(1).

The employer’s place of business is physically divided into two sections, a front office and a “showroom.” (Witness testimony). The “showroom” is where the employer displays the various types of floor coverings available for sale. (*Id.*)

The job of sales expeditor involves (in addition to answering telephones) greeting customers in the front office, determining the types of products the customer may be interested in purchasing, and assigning a sales representative to accompany the customer to the showroom where the customer views, and subsequently selects products for purchase. (Witness testimony; Exs. 20B-3; 20B-4). After the selection process, the customer returns to the front office where the expeditor “prices” the purchase and facilitates pick-up/delivery. (*Id.*) Thus, the expeditor job, unlike claimant’s job at injury, does not require the worker to be in the showroom physically handling floor covering samples. In other words, the expeditor job, as envisioned by the employer, does not require overhead lifting or climbing ladders.

During cross examination, Mr. Bussard (employer’s Sales & Marketing Manager) acknowledged that the expeditor job, as actually performed by workers who have held that position, involves being in the showroom 20 to 25 percent of the time. In doing so, Mr. Bussard explained that he prefers that expeditors not leave the front office, because he does not want the front office “unmanned.” (*Id.*) I have no reason (demeanor or otherwise) not to believe Mr. Bussard’s testimony that he does not require, and would in fact prefer, that sales expeditors not work in the showroom. Consequently, I conclude, notwithstanding the actual practice of workers who have held the expeditor job, that the employer would not have required claimant (had she accepted the job as sales expeditor) to perform work in the showroom. Accordingly, I conclude that in offering claimant the sales expeditor job, the employer was willing (contrary to claimant’s assertions) to accommodate claimant’s work restriction.

Nothing presented establishes that the sales expeditor job was not “permanent.” Therefore, having concluded that the sales expeditor job accommodates claimant’s work restrictions, I necessarily conclude that the offered sales expeditor was “suitable employment.”

Consequently, I necessarily conclude that claimant has failed to establish she is eligible to vocational assistance. ORS 656.340(6)(a).

Accordingly, I conclude there are not statutory grounds for modifying the October 19, 2006 Director's Review and Order.

ORDER

The October 19, 2006 Director's Review and Order is affirmed.