

In the Vocational Assistance of

**James A. Miller, Claimant**

Contested Case No: 06-150H

**PROPOSED & FINAL ORDER**

February 8, 2007

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

JAMES A. MILLER, Respondent

Before Robert Pardington, Administrative Law Judge

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The above captioned matter convened on January 24, 2007, in Ontario, Oregon, before Administrative Law Judge (ALJ) Robert Pardington. John DeWenter appeared over the telephone, representing claimant. Also appearing by phone was attorney Bill Replogle, representing the employer, Lumbermen's, Inc., and its insurer, St. Paul Fire and Marine. The record was continued for the receipt of claimant's attorney's affidavit of services, and for any objections. The record closed on receipt of that affidavit on January 29, 2007.

**Exhibits** 1 through 113 (including 113, page 1A) were admitted.

**ISSUES**

1) Whether claimant is eligible for vocational benefits. The employer appeals the Director's September 18, 2006 Review and Order, finding claimant eligible. (Ex. 111).

2) Claimant cross appeals from the Department's Order, and contests the specific finding that he was suitably employed from June through November, 2003.

**FINDINGS OF FACT**

Claimant, age 61, started working as a delivery truck driver for the employer on December 6, 2001. His wage was \$9.00 per hour. (Ex. 7).

On January 14, 2003, claimant compensably injured his back when he slipped and fell while tying down a load in the back of a truck. (Exs. 7, 8). That day, he sought treatment at St. Elizabeth Hospital Emergency Room (in Baker City) with Dr. Richards, who diagnosed an unstable fracture of L1, based on a CT-scan, and arranged for claimant to be transported to St. Vincent Hospital in Portland. (Exs. 9-2, 11).

At St. Vincent, Dr. Johnson examined claimant and assessed an L1 "burst fracture," subsequent to the fall at work. He predicted that claimant would probably require operative stabilization. (Ex. 10-2).

A MRI scan of the lumbar spine the next day, January 15, 2003, revealed a compression fracture at L1, and a small focal disc protrusion at L4-5. (Ex. 13).

The employer offered claimant a light duty "office assistant" position, to begin on April

11, 2003, at the wage of \$9.30 per hour. (Ex. 15-3). Exhibit 15-2 is a description of the “Driver I” position.

A February 10, 2003 x-ray of the lumbar spine showed the compression fracture at L1 with an approximate 40 percent loss of height, slight retropulsion of the posterior aspect of L1, and hypertrophic degenerative changes at L1-2, L2-3, and L3-4. (Ex. 16).

On February 26, 2003, claimant came under the care of Dr. Jorgenson, who assessed “L1 burst fracture with progressive kyphosis and lateral listhesis.” (Ex. 20-2).

On March 3, 2003, the insurer accepted the claim for “Fracture of L-1 vertebrae.” (Ex. 23).

On April 9, 2003, Dr. Jorgenson stated that claimant’s fracture had consolidated to the point that he could remove his back brace, and that he could “slowly transition back into normal activities.” Claimant was released to return to work modified duty with minimal bending or lifting. (Exs. 29, 32). Dr. Jorgenson anticipated a return to full duty in two months. (Exs. 32, 33).

On April 11, 2003, Dr. Jorgenson approved a light duty Office Assistant position as appropriate for claimant. (Ex. 34).

On June 11, 2003, Dr. Jorgenson released claimant to full duty as of June 12, 2003, with instructions to work “cautiously” with pain as a guide. (Exs. 40, 41, 42). He found no permanent impairment. (Ex. 43).

On November 6, 2003, the insurer issued a Notice of Closure, awarding periods of temporary disability, and 7 percent unscheduled permanent disability for the L1 compression fracture. (Ex. 45). That Notice of Closure was then rescinded by a January 27, 2004 Order on Reconsideration, based on a finding that the insurer did not obtain “sufficient information” to determine the extent of permanent impairment. (Ex. 51).

On November 7, 2003, the employer terminated claimant due to a “seasonal layoff.” (Ex. 48).

In a January 12, 2004 affidavit, claimant described the physical duties of his truck driver/yard worker position for the employer from November 2001 to November 2003. (Ex. 50).

In a February 18, 2004 letter to Dr. Jorgenson, claimant described how he could not, in fact, tolerate the delivery driver position to which he had returned. (Ex. 52).

Dr. Jorgenson performed a closing examination with impairment findings and work restrictions on April 5, 2004. (Ex. 53).

On June 10, 2004, the insurer issued another notice of closure, awarding 39 percent (118.4 degrees) unscheduled permanent disability. (Ex. 58). That notice of closure was

corrected on July 29, 2004 to reflect a 37 percent unscheduled award. (Ex. 63).

On June 28, 2004, claimant started work for another employer as a “flagger.” That employer entered into a Preferred Worker Wage Subsidy Agreement with the Workers’ Compensation Division (WCD).

In an August 13, 2004 affidavit, claimant stated that he did not graduate from high school and never earned a “GED” certificate. (Ex. 65).

On August 26, 2004, claimant initiated a formal written request for the insurer to accept T12 compression fracture. (Ex. 66).

An Order on Reconsideration issued on October 18, 2004, increasing claimant’s award of unscheduled permanent disability to 42 percent (134.40 degrees). (Ex. 68-3).

On October 25, 2004, the insurer amended its notice of acceptance to include Compression Fracture at T-12. (Ex. 69).

On November 12, 2004, the insurer requested a vocational eligibility evaluation from Willie Davis & Associates, a vocational consultant. (Ex. 73).

On January 20, 2005, the vocational consultant issued a “Notice of Ineligibility for Vocational Assistance,” finding that claimant did not meet the eligibility requirements in OAR 436-120-0330(9)(c), because he did not have a “substantial handicap to employment.” (Exs. 78, 79). The consultant identified “Auto Parts Delivery Person” as a suitable employment option. (Ex. 78). The consultant determined that claimant had demonstrated his capacity to return to work at a higher wage subsequent to his injury, and that therefore his restrictions did not preclude him from earning a suitable wage. (Ex. 79-6). Claimant requested review by the Director.

Drs. Grossenbacher and Dietrich examined claimant at the request of the insurer on March 18, 2005. (Ex. 80). These physicians concluded that there had been no objective worsening of claimant’s condition since claim closure. (Ex. 80-6). They also found that claimant was not capable of performing his previous duties as a truck driver, due to his lifting restrictions. (Ex. 80-6, -7).

On April 14, 2005, the insurer issued another notice of closure (apparently on the T12 fracture condition), awarding a total of 44 percent (140.8 degrees) (two percent additional) unscheduled permanent disability for the low back and thoracic spine. (Ex. 90).

In a Director’s Review and Order dated August 22, 2005, the Director set aside the insurer’s January 20, 2005 ineligibility decision and found claimant eligible for vocational assistance. (Ex. 99). The insurer requested a contested case hearing. (Ex. 100).

The parties proceeded to (telephonic) hearing before an ALJ from the Office of Administrative Hearings (OAH) on November 2, 2005. (*See* Transcript, Ex. 101). John Fast,

claimant's former supervisor at the employer's store, testified that claimant returned to work in June 2003 and worked his regular job (at his wage at injury) without restrictions, until he was laid off on November 7, 2003, due to a "seasonal downturn in business." Mr. Fast stated that claimant was not fired because of an inability to perform heavy lifting. Claimant agreed that the stated reason for the layoff was "[a]n effort to reduce payroll." (Ex. 101-44). However, he performed the job during that time "very carefully," getting help with loading and unloading from coworkers or from customers. (-47). Still, he agreed that he completed the job without complaints. (-49).

In a Proposed and Final Order dated December 1, 2005, the OAH ALJ affirmed the August 22, 2005 Director's Review and Order. (Ex. 102). The parties filed exceptions.

On June 2, 2006, the Director issued an Order reversing and remanding the OAH ALJ's decision. (Ex. 106). The Director found that neither the Rehabilitation Review Unit (RRU) nor the ALJ had addressed the applicability of OAR 436-120-0350(4) (worker ineligible if employed for at least 60 days in suitable employment after the injury), and remanded for a determination of that issue. (Ex. 106-3).

After conducting an additional review, on September 18, 2006, the RRU issued a Director's Review and Order, again finding claimant eligible for vocational assistance, because he has a "substantial handicap to employment," as found in the August 22, 2005 Director's Review and Order. (Ex. 111-5). The Director reasoned that the issue of whether claimant was suitably employed for at least 60 days (in 2003) became moot when the insurer reopened claimant's claim to process a new medical condition in 2004, citing OAR 436-120-0003(3). (Ex. 111-4).

The employer requested, and claimant cross-requested, a hearing. (Exs. 112, 113). The case was referred to the Hearings Division.

### CONCLUSIONS OF LAW AND OPINION

A decision of the Director's administrative review shall be modified by the ALJ 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. ORS 656.283(2)(c); OAR 436-001-0225(3). Still, the ALJ should make Findings of Fact from which to conclude whether the Director's decision survives this standard of review. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993).

The employer contends that the Director misapplied OAR 436-120-0350(4) (worker ineligible for benefits if employed for at least 60 days in suitable employment after the injury), and incorrectly reasoned that that rule became "moot" when the insurer reopened claimant's claim to process a new condition. See OAR 436-120-0003(3). Essentially, under the terms of my standard of review, the employer contends that the Director's decision violated a statute or rule; *i.e.*, OAR 436-120-0350(4). See ORS 656.283(2)(c).

Here, the employer initially accepted and processed claimant's claim for "Fracture of L-1

vertebrae.” (Ex. 23). After a November 6, 2003 Notice of Closure on that condition was rescinded, the insurer issued a Notice of Closure on that claim on June 10, 2004, awarding 37 percent unscheduled permanent disability, which was increased on reconsideration to 42 percent. (Exs. 45, 51, 58, 63, 68).

In the meantime, claimant had returned to work for the employer, from June to November 2003.

On October 25, 2004, the employer amended its notice of acceptance to include a compression fracture at T-12. (Ex. 69). On April 14, 2005, the insurer issued another notice of closure (on the T12 fracture condition), awarding a total of 44 percent (140.8 degrees) (two percent additional) unscheduled permanent disability for the low back and thoracic spine. (Ex. 90).

The Director reasoned that, by reopening claimant’s claim for that additional T-12 compression fracture condition, the issue of whether claimant was suitably employed for at least 60 days (in 2003) became moot, citing OAR 436-120-0003(3). (Ex. 111-4).

OAR 436-120-0350(4) provides:

“(A worker is ineligible or the worker’s eligibility ends when any of the following conditions apply):

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(4) The worker has been employed at least for 60 days in suitable employment after the injury or aggravation and any necessary worksite modification is in place, unless [OAR 436-120-0350\(17\)](#) applies.”

The Director concluded that claimant was suitably employed from June 11, 2003 through November 7, 2003 (more than 60 days). (Ex. 111-4). However, OAR 436-120-0003(3) provides, in pertinent part:

“ \* \* \* a claim for aggravation or reopening a claim to process a newly accepted condition will be considered a new claim for purposes of vocational assistance eligibility and vocational assistance \* \* \*”

Relying on this rule, the Director reasoned that the fact that claimant was suitably employed for more than 60 days in 2003 was made moot by the employer’s acceptance of the T-12 fracture in 2004, which must be considered a “new claim” for purposes of eligibility. (*See* Ex. 111-5); OAR 436-120-0003(3). That is a very reasonable interpretation of the plain language of OAR 436-120-0003(3), and I decline to find that the Director “violated” a statute or rule, exceeded its statutory authority, or abused its discretion in so interpreting the rule. ORS 656.283(2)(c); OAR 436-001-0225(3).

In the alternative, the employer contends that, merely because OAR 436-120-0350(4) does not apply, claimant is not, by that very fact, automatically eligible for vocational benefits. Instead, the employer contends, all conditions for vocational eligibility must be reevaluated.

Nevertheless, the Director also found that claimant was eligible for vocational assistance because he had a “substantial handicap” to employment, citing the preponderance of medical evidence in the record. (Ex. 111-5). Under the standard of review in ORS 656.283(2)(c), I cannot disturb that finding.

Claimant’s cross-request for hearing involves the Director’s finding that claimant was “suitably employed” for more than 60 days, from June 11, 2003 through November 7, 2003. (Ex. 111-4). However, inasmuch as I have affirmed the Director’s Review and Order (which found claimant eligible for vocational benefits), I find that claimant’s cross-appeal is moot. In other words, resolving a sub issue that was decided adversely to claimant, but would not change the overall outcome, is a moot point.

Claimant’s attorney is entitled to an assessed attorney fee for services in upholding the RRU’s decision. ORS 656.385(3). Claimant’s counsel submitted an affidavit of services, detailing 7.67 hours of professional time for himself, and 7.50 hours for his associate, totalling 15.17 hours. I find the amount of time expended to be reasonable. After considering the factors in OAR 438-015-0010(4), and applying them here, I find that a reasonable assessed fee for claimant’s attorney’s services is \$3,000, payable by the employer. In reaching this conclusion, in addition to the time devoted to the case, I have considered the skill of the attorneys, the nature of the case, the value of the interest involved (vocational services) and the risk of going uncompensated.

### **ORDER**

- 1) The Director’s Review and Order dated September 18, 2006 is affirmed.
- 2) For services under ORS 656.385(3), claimant’s attorney is awarded an assessed fee equal to \$3,000, payable by the employer.