

In the Vocational Assistance of
Nabor Munoz-Chavez, Claimant

Contested Case No: 07-088H

PROPOSED & FINAL ORDER

November 1, 2007

NABOR MUNOZ-CHAVEZ, Petitioner
SAIF CORPORATION, Respondent

Before Elizabeth Fulsher, Administrative Law Judge

Pursuant to notice, a hearing was held and the record closed in Portland, Oregon on October 5, 2007 before Administrative Law Judge Fulsher. Claimant was present and was represented by his attorney, Matthew Roy. The employer, Hafferts Nursery Express, and its insurer, SAIF Corporation, were represented by their attorney, Janelle Irving. Ken Marcus was the qualified Spanish interpreter.

Exhibits 1 through 18 were admitted into evidence.

ISSUE

Whether claimant is eligible for vocational assistance.

FINDINGS OF FACT

Claimant was compensably injured on December 7, 2005. The claim was accepted for thoracic sprain and lumbosacral sprain. (Ex. 6). Dr. Lorber was claimant's attending physician and he performed a closing evaluation on December 22, 2006. Dr. Lorber believed claimant was capable of regular work with regard to his compensable injury but he gave claimant a 30 pound lifting restriction because of degenerative changes. (Ex. 4).

The claim was closed on February 1, 2007 with an award of temporary disability. (Ex. 7). Claimant requested reconsideration and a medical arbiter examination took place on March 21, 2007 with Dr. Lee. Dr. Lee did not believe degenerative joint disease was playing any significant role in explaining claimant's current condition. (Ex. 8). An April 18, 2007 Order on Reconsideration awarded 5 percent whole person impairment and 10 percent work disability. (Ex. 10).

On April 23, 2007, SAIF issued a Notice of Ineligibility for Vocational Assistance that was effective April 23, 2007. (Ex. 11). On May 9, 2007, Dr. Lorber, claimant's attending physician, indicated that his opinion was that claimant was released to his regular work based on his accepted conditions and that claimant had been given a work restriction for unaccepted degenerative changes. (Ex. 12).

In a May 16, 2007 letter, claimant, through his attorney, requested review by the Director of claimant's eligibility for vocational assistance. (Ex. 13). A Director's Review and Order issued on June 27, 2007. The order concluded that claimant had no permanent limitations due to

his work injury and affirmed SAIF's denial of vocational assistance. (Ex. 15). In a July 3, 2007 letter, claimant's attorney requested a hearing regarding the Director's order. (Ex. 16).

The parties stipulated that if claimant were to testify, he would testify to the matters set forth on page 4 of Exhibit 15 in the first full paragraph. That paragraph provides:

“Mr. Munoz-Chavez's regular job is nursery worker. The JA [job analysis] stated required duties included intermittent lifting of 21 to 100 pounds; occasional bending and crouching; and intermittent kneeling. However, during our conference Mr. Munoz-Chavez stated the duties of his job were heavier than portrayed by the JA and would include digging up trees that weighed 40 to 250 pounds; and frequent bending, stooping and kneeling.”

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).

OAR 436-120-0320(10)(c) provides the circumstances that must be met for a worker to be eligible for vocational assistance. One of these circumstance is satisfied if the worker is not able to return to regular employment as a result of the limitations caused by the injury or aggravation. OAR 436-120-0320(10)(c)(A).

In this case, the Director's Review and Order concluded that claimant was not eligible for vocational assistance because the limitations caused by his work injury did not prevent him from returning to regular employment. On review of that decision, claimant argues that because an Order on Reconsideration awarded claimant work disability, the law of the case establishes that he was unable to return to his regular work. SAIF responds by citing cases holding that the Rehabilitation Review Unit (RRU), which issued the Director's order, is not bound by the decisions of the Appellate Review Unit. Claimant also argues that Dr. Lee's opinion that claimant's restrictions were related to the injury rather than the degenerative condition is more persuasive than Dr. Lorber's contrary opinion.

I first address claimant's argument that the “law of the case” binds the RRU to accept the Order on Reconsideration's award of work disability. The “law of the case” doctrine applies when a ruling or decision has been made in a particular case by an appellate court; the effect is binding and conclusive upon an inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review. *Blanchard v. Kaiser Foundation Health Plan*, 136 Or App 466, 470 (1995).

The Director has decided in previous decisions that it is not bound by the decisions of the Appellate Review Unit. In *Rick E. Spitzer*, 8CCHR 377 (2004), the Director agreed with the hearing officer that “law of the case” did not apply to bind the Rehabilitation Review Unit to the findings of the Appellate Review Unit, and vice versa. The Director reasoned that: “One unit is

not inferior or superior to the other. Although claimant and the hearing officer use the phrase ‘law of the case’ here, the underlying issue is whether the Appellate Review Unit’s order and award preclude the Rehabilitation Review Unit from making an independent finding regarding claimant’s eligibility for vocational assistance under the doctrine of issue preclusion.” The Director then concluded that the Appellate Review Unit’s order did not preclude the Rehabilitation Review Unit from finding that claimant is able to return to regular work. SAIF also cited *Christine Marson*, 40 CCHR 410 (2005). *Marson* cites *Calvin Ott*, 7 CCHR 342 (2002), as well as other cases, for the proposition that the Director has held that the legal doctrine “law of the case” does not bind the Rehabilitation Review Unit to the findings of the Appellate Review Unit. Based on the case law which is binding, the “law of the case” doctrine does not apply between the Appellate Review Unit and the RRU.

Next, I address claimant’s argument that Dr. Lee’s opinion is more persuasive than that of Dr. Lorber. The RRU in this case gave greater weight to Dr. Lorber’s opinion than that of Dr. Lee because Dr. Lorber has treated claimant since October 2006 and is claimant’s most current care provider and Dr. Lee only saw claimant once. This reasoning does not violate a statute or rule or exceed the statutory authority of the agency and it was not made upon unlawful procedure and is not characterized by an abuse of discretion. Based on the review standard set forth in ORS 656.283(2)(c) and OAR 436-001-0225(3), I am not able to modify the Director’s order. Accordingly, the Director’s order must be affirmed.

ORDER

The Director’s Review and Order dated June 27, 2007 is affirmed.