

In the ORS 656.340 Vocational Assistance Dispute of

Dale E. Van Bibber Jr., Claimant

Contested Case No: 07-053H

PROPOSED & FINAL ORDER

October 5, 2007

SAIF CORPORATION., Petitioner

DALE E. VAN BIBBER JR , Respondent

Before Martha J. Brown , Administrative Law Judge

Pursuant to notice, a hearing was scheduled to be held on July 23, 2007 in Salem, Oregon before Administrative Law Judge Martha J. Brown. Prior to hearing, the parties requested that the matter be decided on the written record. Claimant is represented by his attorney, R. Adian Martin. The employer, Larry Hofenbredl, and its insurer, the SAIF Corporation, are represented by their attorney, Jerome P. Larkin. Following receipt of the parties' written closing arguments, the record closed on September 5, 2007.

Exhibits 1 through 14 and supplemental exhibits 1A, 2A and 4A have been admitted into the record.

ISSUE

Whether claimant is entitled to vocational assistance. SAIF has appealed the Director's April 19, 2007 Review and Order, which found that claimant remained eligible for vocational assistance. (Ex. 13).

FINDINGS OF FACT

Claimant was compensably injured on January 21, 2005 while working for the employer as a choker setter. SAIF accepted claimant's fractures of L1, L2, L3 and L4 transverse process on the left and left flank subcutaneous contusion.

A February 2, 2006 Notice of Closure closed the claim and awarded claimant 19 percent permanent disability for his low back.

On March 16, 2006, SAIF issued a Notice of Ineligibility for Vocational Assistance on the ground that claimant was able to return to regular employment, and because his lack of suitable employment was not due to the limitations caused by the injury.

On May 26, 2006, an Order on Reconsideration issued that affirmed the February 2, 2006 Notice of Closure. The Order on Reconsideration found that claimant was given a regular work release, work was available, but claimant failed to return to that job.

On June 30, 2006, a Director's Review and Order issued which set aside SAIF's March 16, 2006 Notice of Ineligibility for Vocational Assistance.

The order found that claimant was not able to return to his regular employment. The Director's order was not appealed and became final.

SAIF subsequently determined that claimant had a substantial handicap to employment, and notified him that he was eligible for vocational assistance and entitled to training beginning August 15, 2006.

An Opinion and Order dated October 27, 2006 affirmed the May 26, 2006 Order on Reconsideration.

On January 25, 2007, SAIF ended claimant's eligibility for vocational assistance, relying on the Opinion and Order, and concluding that claimant did not have a substantial handicap to employment.

On January 30, 2007, claimant appealed SAIF's notice ending vocational eligibility.

On April 19, 2007, a Director's Review and Order issued that concluded that claimant was eligible for vocational assistance.

An August 14, 2007 Board Order on Review modified the October 27, 2006 Opinion and Order and increased claimant's award of permanent impairment.

CONCLUSIONS OF LAW AND OPINION

SAIF argues that the Director's Review and Order erred by finding that SAIF had not obtained new information entitling it to end claimant's vocational assistance. Claimant contends that the Review and Order should be affirmed.

Here, the review of a dispute under ORS 656.340 (vocational assistance) may only be modified if the decision:

- (1) violates a statute or rule;
- (2) exceeds the Director's statutory authority;
- (3) was made upon unlawful procedure; or,
- (4) involved an abuse of discretion.

In this case, SAIF contends that it was an abuse of discretion for the Vocational Consultant to conclude that it had no basis to rely on the Opinion and Order to reevaluate whether claimant had a substantial handicap to employment because of the injury. SAIF also argues that the Vocational Consultant misapplied the legal preclusion doctrine of *res judicata* with regard to his conclusion that the prior Director's order has found that claimant's job at injury was not suitable and that order was final by operation of law.

After reviewing the Director's Order and considering the parties' arguments, I do not agree that SAIF has established an abuse of discretion in this case. At that level, SAIF relied on the Opinion and Order to establish that claimant did not have a handicap to employment because of his injury. However, I agree with the Vocational Consultant that the issue of extent of permanent disability and vocational assistance are not the same and SAIF could not rely on the Opinion and Order for purposes of ending vocational assistance. Moreover, as claimant notes, the Opinion and Order relied on by SAIF has now been modified by an October 27, 2006 Board Order on Review.

Next, SAIF also disagrees with the Vocational Consultants' conclusion that the prior, June 30, 2006 Director's Review and Order (setting aside the Ineligibility for Vocational Assistance Notice) was final, and that SAIF could essentially not revisit its disagreement with that Order as opposed to appealing it before it became final. However, I also agree with the Vocational Consultant in this regard, and I do not find that his conclusion in this regard was an abuse of discretion.

Finally, I agree with claimant's position that the Opinion and Order was not "new information" that would allow it to end vocational assistance. The record had been previously established and there was no "new information" as required by the statute.

Under the circumstances, I conclude that SAIF has failed to establish that there was an abuse of discretion in this matter. Therefore, the April 19, 2007 Director's Review and Order is affirmed. For services at the Hearings level, claimant's counsel is awarded an assessed attorney fee of \$600, to be paid by SAIF. *See* OAR 436-001-0265.

ORDER

IT IS THEREFORE ORDERED that the April 19, 2007 Director's Review and Order is affirmed. Claimant's counsel is awarded an assessed attorney fee of \$600, to be paid by the SAIF Corporation.