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In the ORS 656.340 Vocational Eligibility Dispute of

**Maria Benitez, Claimant**

Contested Case No: 07-118H

**PROPOSED & FINAL ORDER**

January 30, 2008

MARIA BENITEZ, Petitioner

LIBERTY NW INSURANCE CORPORATION, Respondent

Before Nicholas M. Sencer, Administrative Law Judge

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Pursuant to notice, the hearing convened on December 27, 2007, in Pendleton, Oregon, before Administrative Law Judge Nicholas M. Sencer. Claimant was present and represented by her attorney, R. Adian Martin. Raymond T. Smitke represented the employer, Smith Frozen Foods, and its insurer, Liberty Northwest. Carlos Vega served as interpreter. Exhibits 1 through 20, together with interlineated exhibit 2A were admitted into the record. Closing arguments were recorded. The record closed on December 31, 2007, upon my receipt of exhibit 2A.

**ISSUES**

Claimant challenges the Director's Review and Order dated September 17, 2007. The issue is claimant's eligibility for vocational assistance.

**STANDARD OF REVIEW AND EVIDENTIARY RECORD**

Under ORS 656.283(2), ORS 656.340, OAR 436-001-0225(3) and *Colclasure v. Washington County School District #48-J*, 317 Or 526, 537 (1993), the administrative law judge ("ALJ") conducts a hearing at which the parties develop a record and on the basis of that record the ALJ finds facts. Based upon those facts, the ALJ 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. ORS 656.283(2)(c).

**FINDINGS OF FACT**

Claimant is a 61 year-old woman. She began working for the employer on July 24, 1994. Claimant sustained a compensable injury on June 19, 2006, when she stepped on a rock and twisted her ankle. On July 26, 2006, Robert G. Waring, M.D. examined claimant and diagnosed her condition as a lateral right ankle sprain with fibular chip fracture. (Ex 2, p 3).

On September 12, 2006, Dr. Waring signed an authorization releasing claimant for modified duty work. (Ex 2A). Claimant returned to light duty work on September 14, 2006. Claimant also worked on September 15 and September 18, but due to increased symptoms she returned to Dr. Waring who, claimant testified, took her off work effective September 18, 2006.

The employer subsequently terminated claimant's employment based on her failure to show up for modified work or to call in to explain her absence on September 28, 29 and October 2, 2006.

On October 9, 2006, claimant's attending physician, Dr. Waring, approved an "alternate regular job analysis" for the position of "re-pack belt worker." (Ex 3). This job required the ability to sit constantly and stand/walk occasionally. On October 19, 2006, the employer advised claimant in writing that it has a written policy of offering modified work to injured workers, that Dr. Waring had approved the re-pack worker job description and that it would have offered her the job if she had not been previously terminated for violation of work rules or other disciplinary reasons. (Ex 4). On November 21, 2006, Dr. Waring released claimant to perform her regular work. (Ex 6). The employer's human resources manager, Shirley Mains, testified that the employer always makes light duty work available to injured workers.

On December 27, 2006, the insurer issued a Notice of Closure that awarded claimant no permanent partial disability. (Ex 8). Claimant requested reconsideration which resulted in the March 15, 2007 medical arbiter examination report of Michael R. Marble, M.D. (Ex 9). Dr. Marble noted current complaints of activity related pain including persistent swelling that worsens with activity and intermittent snapping within the joint. (Ex 9, p 3). Dr. Marble observed visible swelling of the right calf and ankle and measured reduced dorsiflexion and plantar flexion in the right ankle. (Ex 9, p 4). Dr. Marble concluded that claimant had significant pain complaints which suggested instability and intraarticular pathology. (Ex 9, p 6). He regarded claimant as being significantly limited with regard to the use of the right ankle. (Ex 9, p 6). Dr. Marble wrote, "If she were my patient, I would proceed at this point with the assumption that there is interarticular [*sic*] pathology that has not yet been defined but which is related to the injury event. I would recommend that her claim be reopened so that she may be referred to an orthopedic surgeon for a full formal and complete evaluation of her right ankle." (Ex 9, p 6).

On March 30, 2007, the Workers' Compensation Division issued an Order on Reconsideration that awarded claimant 5% whole person impairment for her right ankle injury. (Ex 10). In a check-box report dated May 3, 2007, Dr. Waring wrote, "Assuming that Dr. Marble's findings are an accurate reflection of her clinical circumstances, then his recommendation would seem reasonable." (Ex 11).

On June 26, 2007, the insurer issued a Notice of Ineligibility for Vocational Assistance. (Ex 12). The notice asserts that Dr. Waring released claimant to regular work on November 21, 2006, which made her ineligible for vocational assistance. It also asserts that had claimant been unable to perform her regular job, the employer could have provided permanent modified work had her employment not been terminated. On that basis, the notice explained that claimant would not be eligible for vocational assistance because her "lack of suitable employment is not due to the disability caused by your injury per OAR 436-120-0350(3)." (Ex 12).

## CONCLUSIONS AND OPINION

Claimant bears the burden of proving that the Director's Order should be modified. ORS 656.266(1). Claimant asserts that she is eligible for vocational assistance because her compensable injury prevents her from returning to her job at injury.

“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).

“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).

On September 17, 2007, the Workers' Compensation Division issued its Director's Review and Order in this case. (Ex 19). Concerning claimant's ability to return to her job at injury, the Order deferred to Dr. Waring and concluded that claimant was released to regular work. Dr. Waring's opinion is inconsistent with both claimant's description of her symptoms and Dr. Marble's examination findings and opinion. However, while I conclude that Dr. Marble's evaluation of claimant's impairment is more persuasive than that of Dr. Waring, Dr. Marble did not address the question of claimant's permanent work restrictions. Since Dr. Waring was claimant's attending physician and the only physician in the record who addressed claimant's work restrictions, I conclude that there is no basis on which to modify the conclusion in the Director's Order that claimant was released to her regular work.

The next question concerns whether claimant was able to return to other available and suitable work with the employer at injury. Based on its conclusion that claimant was released to her regular work, the Director's Order did not address the merits of this question. (Ex 19, p 5). Likewise, since the determination that claimant was released to regular work is dispositive of claimant's eligibility for vocational assistance, I conclude that there is no basis on which to modify the conclusion in the Director's Order that it need not address the “other available and suitable” work issue.

Based on the foregoing, I conclude that there are no statutory grounds on which to modify the Director's Order. Accordingly, it will be affirmed.

## ORDER

IT IS HEREBY ORDERED that the September 17, 2007 Director's Review and Order is affirmed.