

In the Vocational Assistance of  
**Roland A. Collins, Claimant**  
Contested Case No: 09-143H  
**PROPOSED & FINAL ORDER**

January 5, 2010

NORDSTROM INC. , Petitioner  
RONALD A. COLLINS, Respondent  
Before Keith Kekauoha, Administrative Law Judge

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Hearing convened in Portland on October 19, 2009 before Administrative Law Judge Keith Kekauoha.<sup>1</sup> Claimant was present and represented by his attorney, Christine Frost. The self-insured employer, Nordstrom, was represented by its attorney, Dennis Reese. The employer representative was Trish Dunham. Exhibits 1-14 were admitted into evidence. Testimonies were taken, and the record was held open for written closing arguments. After receipt of written closing arguments, the record closed on December 2, 2009.

### ISSUE

Eligibility for Vocational Assistance. The employer requested a hearing on the August 26, 2009 Director's Order and Review, which set aside the employer's June 1, 2009 Notice of Ineligibility for Vocational Assistance and ordered the employer to redetermine claimant's eligibility for vocational assistance.

### FINDINGS OF FACT

On March 11, 2008, claimant sustained a compensable injury to his low back and left leg while regularly employed as a full-time merchandise receiver for the employer. He worked in the employer's Distribution Center and was responsible for unloading boxes of merchandise from trucks and placing them on conveyors to the processing department. He was a "flex" employee, which meant that he was second in line for scheduling of work shifts, behind the "core" employees, who had more seniority and were scheduled first for shifts. (Martin's and claimant's testimonies).

The physical demands of the receiver job included lifting and carrying merchandise boxes weighing up to 75 pounds. (Ex. 3).

Claimant was released from work due to the injury, and the employer initiated payment of temporary disability compensation. (Ex. 2).

In April 2008, claimant accepted the employer's offer of temporary light-duty employment as a processor in the Distribution Center. The processing job involved unpacking merchandise from boxes, putting tickets on the merchandise, and repacking the merchandise for

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<sup>1</sup> This case was consolidated for hearing with WCB Case No. 09-04823. Although a single hearing was held, because the evidentiary record and the parties' appeal rights are different in each case, separate orders are being issued.

shipping to stores. Claimant was treated as a “flex” employee. (Martin’s and claimant’s testimonies).

There were approximately 75 processors working in the Distribution Center. Approximately 12 of the processors were on light duty assignments, and the rest were regularly employed. The employer also hired temporary associates as needed to handle increased freight during the anniversary sales and winter holiday months. (Martin’s testimony). The employer’s need for processors has dwindled over the years as the processing of merchandise has become more automated (*e.g.*, scanning guns replacing handwriting). As a result, the employer has not hired any new employees as processors for several years, although a couple of individuals have stepped down from management into processor positions. (Dortch’s testimony).

When claimant accepted the offer of temporary light-duty employment in the processing position, he was not told of a specific end date for the job. He was told by the Human Resources Manager, Lea Martin, that he would be accommodated for a while. He was not told that he would be offered regular employment in the processing position or any other position if his doctor’s work restrictions did not allow him to return to his regular job as a receiver. (Claimant’s testimony). It was Martin’s expectation that, when claimant became medically stationary from his work injury, his doctor-prescribed physical restrictions would be evaluated at that time to determine if he was capable of returning to his original receiver job or could be accommodated at another job with the employer. (Martin’s testimony).

Claimant worked at his temporary light-duty assignment as a processor from April 2008 until he and several other processors were laid off in January 2009 due to the economic downturn and sagging sales. (Claimant’s testimony).

In January 2009, claimant’s attending physician, Dr. Gerry, reviewed the employer’s job analysis for the receiver job and reported that claimant was unable to perform the duties of that job and could perform no lifting of more than 20 pounds. (Ex. 3).

In February 2009, Dr. Gerry performed a closing examination and opined that claimant was medically stationary from the work injury. The doctor reported loss of range of motion of the lumbar spine, loss of strength in the left leg, and sensory loss in the left leg. He released claimant to work in the light range of physical demand. (Ex. 4).

In March 2009, claimant underwent a Physical Capacity Evaluation (PCE). The evaluator concluded that claimant was capable of full-time work in the light-medium range of physical demand with some restrictions on positional activities. The evaluator also reviewed the “receiver” job position and concluded that claimant did not display adequate capacities to perform that job. (Ex. 5).

The employer accepted the injury claim for a lumbar strain, left leg strain and left L5 radiculopathy, and classified the injury as disabling. (Ex. 6-4).

On March 23, 2009, the employer closed the claim with a permanent partial disability award of 7 percent whole person impairment and 27 percent work disability. (Ex. 6).

In May 2009, Dr. Gerry opined that claimant was significantly limited in the repetitive use of the low back and left leg due to the accepted condition. He also concurred with the PCE report. (Exs. 7, 8).

In May 2009, Dr. Gerry reviewed the employer's job analysis for the processor job and reported that claimant was able to perform the duties of that job. (Ex. 9).

On June 1, 2009, the employer issued a Notice of Ineligibility for Vocational Assistance on the basis that claimant's lack of suitable employment was not due to limitations caused by the work injury or which existed before the injury. (Ex. 10).

Claimant requested administrative review by the Director. Following an investigation, the Director's designate, the Workers' Compensation Division (WCD), issued a Director's Order and Review on August 26, 2009, which set aside the June 1, 2009 Notice of Ineligibility for Vocational Assistance and ordered the employer to redetermine claimant's eligibility for vocational assistance. In reaching its decision, the WCD found that claimant was unable to return to his regular employment as a receiver or to any other suitable and available work with the employer. The WCD reasoned that the processing job to which claimant returned before being laid off was not suitable employment because claimant was never offered permanent employment in that position. (Ex. 13).

### CONCLUSIONS OF LAW AND OPINION

A Director's order in a vocational assistance dispute may be modified only if it: (1) violates a statute or rule; (2) exceeds the statutory authority of the agency; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c).

The employer contends that the WCD violated its own rules in setting aside the Notice of Ineligibility for Vocational Assistance. The employer does not challenge the WCD's determination that claimant was unable to return to his regular employment as a receiver. Rather, the employer challenges the WCD's determination that the processing position to which claimant returned before being laid off was not suitable employment because it was not permanent.

Thus, the central issue in this case is whether claimant's temporary light-duty assignment at the processing position qualified as "suitable employment." The term "suitable employment" is defined in OAR 436-120-0005(12). Subparagraph (d) of that rule provides that the employment must be permanent. OAR 436-120-0005(6) defines "permanent employment" as "a job with no projected end date or a job which had no projected end date at time of hire."

The employer argues that the WCD did not apply the definition in OAR 436-120-0005(6) and that claimant's temporary light-duty assignment as a processor was "permanent employment" under the rule because there was no projected end date for that job. In support of its position, the employer cites the Director's opinion in *Judith A. Jurgens*, 12 CCHR

127 (2007). In that case, the Director determined that the claimant was not eligible for vocational assistance because she had refused an offer of light duty employment that was intended to result in suitable employment. In reaching her decision, the Director found that the offered job accommodated the work restrictions prescribed by the claimant's attending physician. The Director also found that the job was permanent because there was no evidence showing that the offered job had a projected end date.

I find the facts of this case distinguishable from those in *Jurgens*. There is no dispute in this case that claimant was on *temporary* light duty assignment at the time of his layoff. The Human Resources Manager, Lea Martin, testified that the light duty assignment was temporary. She further testified that it was her expectation that, when claimant became medically stationary from the work injury, his physical restrictions would be evaluated at that time to determine if he was capable of returning to his original receiver job or could be accommodated at another job with the employer. This is consistent with claimant's testimony that he was told he would be accommodated at the light-duty processing job for a while and that he received no assurance he would be offered regular employment at the processing position or any other position if his doctor's work restrictions did not allow him to return to his regular job as a receiver.

Martin testified that it was her expectation that, when claimant became medically stationary, he would be accommodated at another job with the employer if his physical restrictions allowed him to perform another available job. However, I find no persuasive evidence that this expectation was communicated to claimant, either orally or writing (*e.g.*, written policy). Absent a communication of this expectation or policy to claimant before his layoff, I find Martin's testimony to be of questionable reliability. But even assuming there was such an expectation or policy, Martin's testimony establishes that no offer of regular employment was to be made until claimant became medically stationary and his permanent work restrictions were determined. Because claimant was laid off before his doctor declared him medically stationary, no offer of regular employment was ever made.

The employer argues that claimant was never told of an ending date for the light duty assignment. I conclude, however, that a projected end date was implied by the undisputed fact that the light duty assignment was temporary. According to Martin's testimony, claimant was to remain at that assignment until he became medically stationary and his physical restrictions were evaluated. Claimant received no assurance that he would be offered regular employment after his medically stationary date. Based on this record, I find that claimant's medically stationary date, although not yet determined, was the projected end date for his light duty assignment; at that time, his restrictions were to be evaluated to determine whether he could return to his regular receiver job or be accommodated at another available job. There was in fact no assurance that the employer would be able to accommodate whatever restrictions were ultimately prescribed by claimant's doctor. In any event, because claimant was not declared medically stationary before his layoff, the triggering event for any potential offer of regular employment never occurred. Consequently, claimant's assignment to the processing position remained in temporary status at the time of his layoff.

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For these reasons, I conclude that the Director's decision did not violate the rules defining "suitable employment" and "permanent employment." Accordingly, the Director's order will be affirmed.

Because the employer initiated the request for hearing, and the compensation awarded under ORS 656.340 (substantial handicap determination) was not disallowed or reduced, claimant's attorney is entitled to a reasonable attorney fee under ORS 656.385(3), to be paid by the employer. After considering the factors set forth in OAR 438-015-0010(4), particularly the time devoted to the case (as represented by the record, which included testimonies from three witnesses and a written closing argument), the complexity of the issues, the limited value of the interest involved (less than \$2,000), and the risk that claimant's attorney's services might go uncompensated, I find that a reasonable attorney fee is \$3,500.

### **ORDER**

1. The employer's request for relief is denied, and the Director's Order and Review dated August 26, 2009 is affirmed.
2. Claimant's attorney is awarded an assessed attorney fee of \$3,500, to be paid by the employer.