

In the ORS 656.340 Vocational Assistance Dispute of

Delbert L. Satterfield, Claimant

Contested Case No: 09-060H

PROPOSED & FINAL ORDER

November 3, 2010

SAIF CORPORATION, Petitioner

DELBERT L. SATTERFIELD, Respondent

Before Chuck Mundorff, Administrative Law Judge

A hearing convened on December 21, 2009 in Eugene, Oregon before Administrative Law Judge Chuck Mundorff. Claimant was present and was represented at the hearing by attorney Brian Pocock. The employer, McIntyre Construction –Fuller Cabinets, and its insurer, the SAIF Corporation, were represented by attorney Jesse O’Bryant. Also present was employer representative Jill Lane. The matter was continued for the deposition of Dr. Tavakolian. Subsequent to the deposition Mr. Pocock notified the hearings division that he no longer represented claimant. The matter was submitted by written argument and the record closed on September 16, 2010 following a conference call with the parties and additional admission of exhibits.

ISSUES

SAIF appeals the April 2, 2009 Director’s Order which ordered SAIF to restore vocational services to claimant.

EXHIBITS

At hearing exhibits 1-40 were admitted into the hearing record. Post hearing exhibits 41, 42, 45-53 and 40A were submitted and are hereby admitted into the record.

JURISDICTION AND STANDARD OF REVIEW

I review this Order pursuant to ORS 656.704(2). In accordance with ORS 656.340(16)(d) the Director’s Order shall be modified 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.

GENERAL FACTS

Claimant was injured on 11/15/05 when he fell off a ladder while employed by McIntyre Construction. (Ex. 1). His claim was accepted for non-displaced intra-articular fracture of the right distal radius; right triangular fibrocartilage complex (TFCC) tear; left ankle lateral puncture

wound and left ankle peroneal tendon tear. (Ex. 12). Claimant's attending physician for the wrist, Dr. Tavakolian released claimant to modified work with restrictions of lifting less than 30 lbs and no hammering. (Ex. 2).

A physical capacity examination was done on September 4, 2007 which showed that he demonstrated the capacity to perform the job of carpenter albeit with some restriction in function. (Ex. 4). Dr. Tavakolian concurred with the PCE findings. (Ex. 5). The claim was closed on October 29, 2007 with an award of 9% whole person impairment of the right arm. (Ex. 7). SAIF found that claimant was eligible for vocational training. (Ex. 8).

On January 8, 2008 an Order on Reconsideration issued which set aside the closure. (Ex. 9). On April 3, 2008 Dr. Tavakolian evaluated claimant's right wrist and noted that he supported vocational retraining due to claimant's impairment. (Ex. 10). Claimant's attending physician for the ankle injury, Dr. List, released claimant to regular work without impairment. (Ex. 11). The claim was reclosed on July 9, 2008 with an award of 9% loss of whole person impairment and work disability of 12%. (Ex. 14).

A training plan was developed for the goal of "building inspector." (Ex. 15). Claimant began training on September 29, 2008. (Ex. 16). On August 29, 2008 an Order on Reconsideration issued which rescinded the second closure and the claim remained in open status. (Ex. 17). On September 26, 2008 claimant was referred to Dr. Kenneth Wilson due to ongoing right wrist pain. Dr. Wilson's impressions were right TFCC arthroscopic repair, right dorsal wrist ganglion removal and symptom magnification with no evidence for an objective wrist problem. (Ex. 18). Dr. Tavakolian did not concur with Dr. Wilson's findings and continued to indicate that claimant had limitations due to his accepted wrist injuries. (Ex. 19).

On December 2, 2008 claimant was seen for insurer requested medical evaluation (IME) with Dr. Swan, an occupational medicine physician. Dr. Swan determined that claimant was medically stationary for both the wrist and ankle injuries and reported that he agreed with Dr. Wilson that claimant showed evidence of pain behavior with inconsistent objective findings to support the subjective complaints. (Ex. 20-15). He believed claimant's presentation was most consistent with secondary gain issues. (Ex. 20-16). Dr.'s List, Jones and Tavakolian concurred with Dr. Swan's IME report. (Exs. 21, 22, 23).

On January 2, 2009 SAIF issued a Notice of Training End and a Notice of End of Eligibility for Vocational Assistance both effective 1/2/09 due to a change in his permanent limitations. (Exs. 25, 26). SAIF reclosed the claim as a result of the end of eligibility for vocational assistance. (Ex. 28).

Claimant returned to Dr. Tavakolian on January 12, 2009. Dr. Tavakolian did not feel that any other work up was indicated and reported that claimant remained medically stationary with no further treatment to offer him. (Ex. 29). On January 29, 2009 Dr. Tavakolian summarized a conversation he had with claimant's counsel. He noted that while he had concurred with Dr. Swan's IME report his concurrence was partially in error as claimant had clearly documented loss of range of motion of the injured wrist which affected his functioning particularly with lifting and carrying. (Ex. 30).

Claimant appealed the End of Eligibility. (Ex. 31). On February 17, 2009 Dr. Tavakolian concurred with a summary of his conversation with claimant's counsel in which he agreed that claimant was unable to return to his job at injury due to his compensable injury. That claimant had objective loss of range of motion wrist that affected his strength. That the most accurate assessment of claimant's function capacity was a physical capacity examination (PCE) that had previously been performed and that claimant did not exhibit significant secondary gain issues. (Ex. 32). The therapist that performed the PCE concurred that her assessment was accurate and demonstrated weakness in the wrist. (Ex. 34).

On April 1, 2009 claimant was seen for a medical arbiter's examination with a panel of physician's, including Dr. Nagel, an orthopedic surgeon, Dr. Miller and Dr. Libertore in regards the January closure. (Ex. 36). After reviewing all of the treatment records and performing a physical examination the panel found that claimant had 5/5 strength in the right upper extremity, he had normal sensation in the right fingers and loss of sensation in the palm, however that finding was not consistent with a nerve injury. The panel also reported that claimant was not limited in the ability to repetitively use his right wrist. (Ex. 36-10). As regards the ankle injury they found 5/5 muscle strength, no loss of sensation, full range of motion, no instability of the ankles and no chronic condition impairment. The objective findings due to the accepted conditions were loss of range of motion of the right upper extremity. (Ex. 36-12).

On April 2, 2009 the Worker's Compensation Division issued an order to restore claimant's eligibility for vocational services. The Order noted that Dr. Swan's IME report did not constitute "new information" that would exclude claimant from eligibility as it was merely a reevaluation of medical evidence in existence at the time claimant was first determined eligible. (Ex. 37). SAIF appealed that Order. (Ex. 38).

On July 9, 2009 Dr. Tavakolian wrote to SAIF's claims adjuster after reviewing the medical arbiter's report and stated that while claimant may have some degree of weakness in the right wrist "I do not believe this degree of weakness would prevent him from his job as carpenter... I have reviewed the job analysis from McIntyre Construction and I believe that Mr. Satterfield is capable of performing these job duties based on my previous examinations as well as the arbiter's findings." (Ex. 40).

On January 21, 2010 the parties deposed Dr. Tavakolian. Dr. Tavakolian testified that claimant likely had pain and loss of strength due to his compensable injury and was asked if in consideration of those findings was he incapable of returning to his regular work? He responded that he did not think claimant could return to the essential functions of his job. (Ex. 41-7). Dr. Tavakolian stated that he had no other treatment to offer claimant and that he had referred him to pain management for any further care.

In response to questions from SAIF, Dr. Tavakolian testified that he could not discern any clinical explanation for claimant's on-going pain complaints and that he was not very aware of what claimant's job at injury consisted of. (Ex. 41-10). He said that decreased range of motion was not necessarily synonymous with strength loss but that the PCE did document some deviation from 5/5 strength in the right upper extremity but that he was unable to document

strength loss with manual muscle testing. (Ex. 41-13). His notation of loss of strength was based upon the PCE report. He also acknowledged that he wrote to SAIF reporting that claimant's loss of strength was not such that it would preclude him from performing his regular work. (Ex. 41-16). Dr. Tavakolian testified that it was not a black and white determination in this case, claimant had ongoing pain in his wrist for which the doctor could not identify a specific pathology, but that this pain would preclude him from working his regular work. He noted that the answer to whether claimant can return to work depends upon how the question is asked – stating that the PCE did a good job of factoring how the pain complaints affected performance. (Ex. 41-17). He did agree that claimant had more pain than was typical for the type of injury he suffered although he was aware that claimant continued to treat for ongoing pain with a pain management specialist. (Ex. 41-21).

On re-cross, Dr. Tavakolian said that he had no reason to question claimant's pain complaints and that speculation in regards to "secondary gain" issues were just that – speculation and that he could not rule it in or out. (Ex. 41-24-26).

Additionally, separate decisions concerning claimant's continuing eligibility for vocational services were issued and other medical exhibits submitted in the record which do not pertain to this proceeding. (Exs. 40A,42, 46-53).

CONCLUSIONS OF LAW AND OPINION

SAIF appeals the Director's Order contending that WCD erred in setting aside SAIF's Notice of End of Eligibility as that Order new evidence provided to the Department indicated that claimant did not have a substantial handicap to returning or performing his regular work. SAIF argues that WCD excluded or key medical evidence which indicated that claimant could return to his job at injury and arguing the vocational reviewer interpreted the phrase "new evidence" far too narrowly in determining that there was no new evidence to support SAIF's end of training.

Claimant responds that he documented objective findings of impairment of loss of range of motion and strength such that he could not return to his job at injury as a carpenter. He relies upon the work releases of Dr. Tavakolian and the PCE report done at the time of his first claim closure and notes that there is not a preponderance of evidence that outweighs the original determination entitling him to vocational assistance.

As the party appealing the Director's order, SAIF has the burden of proving error in the Director's determination. *See Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000). The Director's decision 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 RRU reviewer concluded claimant's work injury prevented him from returning to his regular work. The reviewer pointed out that Dr. Tavakolian and the PCE identified restrictions which were related to claimant's injury that would preclude him from returning to regular work.

While Dr. Tavakolian was unable to cite with precision the source of claimant's continued pain he did not question that claimant's subjective complaints were real, and, in conjunction with the loss of range of motion, would preclude him from returning to regular work.

The reports of Drs. Wilson and Swan both of whom were unable to relate claimant's continued symptoms to his compensable injury, did not address the undeniable loss of range of motion on an objective basis or the functional findings of the PCE. While both reports released claimant to his regular work these releases were predicated on the speculation that claimant was motivated by "secondary gain" a diagnosis inconsistent with the impairment findings.

Although there was initially some inconsistent reports from Dr. Tavakolian regarding his agreement with the IME report, his subsequent clarification at deposition did result in his acknowledgement that work restrictions related to claimant's compensable wrist injury resulted in his inability to perform his job at injury. The doctor noted that what appeared to conflicting responses to the parties was essentially a function of how the question he was asked was phrased.

While the medical evidence is conflicting, there is significant, credible evidence in the record that supports the reviewer's conclusion that claimant was unable to return to his regular work. On this record I cannot find there was a violation of law or an abuse of discretion.

Attorney Fees

Claimant is entitled to an award of assessed attorney fees pursuant to ORS 656.385(3)¹. This provision applies where, as here, a contested case hearing is initiated by a carrier and an ALJ finds that compensation ordered pursuant to a Director's Order should not be disallowed or reduced. In determining a reasonable fee amount, I consider the factors in OAR 436-001-0265(2) and OAR 438-015-0010(4), particularly the time devoted to the case (as represented by the record), the complexity of the issues, the value of the interest involved, the benefits obtained, and the risk that claimant's attorney's efforts might go uncompensated.

This case involved a hearing on the propriety of the Director's decision. While the convened hearing was intertwined with numerous corollary issues, much of the testimony concerned the vocational order. The documentary record was of average length, the legal and factual issues raised by this case were of average complexity and claimant's legal counsel's presentation of claimant's case necessitated numerous hours of work in pursuing this dispute. I find that an assessed fee of \$4,500.00 is appropriate for claimant's counsel's services at hearing and post-hearing.

ORDER

The Director's Review and Order of April 2, 2009 is affirmed without modification.

Claimant's former counsel is awarded an assessed attorney fee of \$4,500.

¹ At the time of hearing claimant was represented by counsel. After convening and continuing the hearing, claimant's former counsel participated in the deposition of Dr. Tavakolian. Subsequently the representation ended and claimant submitted his closing argument pro se. Claimant's former counsel filed an attorney fee lien for services provided in relation to this Order.