

In the ORS 656.340 Vocational Assistance Dispute of

Robert Vincent, Claimant

Contested Case No: 10-037H

CORRECTED PROPOSED & FINAL ORDER

April 27, 2011

CMH MANUFACTURING WEST, INC., Petitioner

ROBERT VINCENT, Respondent

Before Kathryn A. Poland, Administrative Law Judge

The April 20, 2011 Proposed and Final Order in this matter was issued with numerous typographical errors. That order is hereby republished with the necessary corrections.

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to the employer's request for hearing from a February 18, 2010 Director's Review and Order, and a March 8, 2010 letter denying the employer's request for abatement and reconsideration of that order. The employer's request for hearing was consolidated with claimant's separate challenge to a Department Order on Reconsideration (OOR) in WCB Case No. 09-06375. Both cases proceeded to hearing before the undersigned ALJ on October 5, 2010 in Salem, Oregon. The employer, Karsten Homes – CMH, was represented by attorney Howard Nielsen, and Harold Fennern was present as the employer representative. Claimant was present with her attorney, Eric Wilborn.

At hearing, the following evidence was admitted into the record in WCB Case No. 10-00037H: Exhibits 1 through 27, as identified in the Department's April 5, 2010 exhibit list; an April 21, 2009 job description for claimant, as submitted by both parties on March 21, 2011 and included in the record as Exhibit 4A; the employer's three-page February 25, 2010 request for abatement and reconsideration of the February 18, 2010 Director's Review and Order, submitted by the employer at hearing as Exhibit 26A; and a two-page March 8, 2010 letter from the Department denying the employer's February 25, 2010 request for abatement and reconsideration, submitted by the employer at hearing as Exhibit 27A. The record in both cases closed with the submission of Exhibit 4A on March 21, 2011.

ISSUES

The employer asserts that the February 18, 2010 Director's Review and Order erred in setting aside the employer's August 26, 2009 determination that claimant was ineligible for vocational assistance based on a finding that claimant's accepted left hand condition prevented him from returning to his at-injury employment. The employer further asserts that the Department abused its discretion in not addressing the employer's alternative argument that claimant is ineligible for vocational assistance because he returned to other suitable employment for 60 days before he was laid off for reasons unrelated to his work injury.

FINDINGS OF FACT

Claimant is a 40 year-old, right hand dominant male who sustained a serious injury to his left hand while working for the employer on July 2, 2008. The injury occurred when claimant

caught his left index, middle and ring fingers in a table saw. Claimant sustained a laceration of the index finger through the distal interphalangeal joint with involvement of the flexor tendon and compound fractures into the joints at the distal phalanx and middle phalanx, and a laceration of the middle finger at the middle phalanx with involvement of the flexor tendon and fracture of the middle phalanx. The employer accepted claimant's injury claim for open fractures and tendon lacerations of the left index and middle fingers. On July 2, 2008, Dr. Stratton, orthopedic surgeon, took claimant to the operating room and performed an open reduction and pinning of the fractures in the index and middle fingers, and a repair of the severed flexor tendons in both fingers. After the surgery, Dr. Stratton continued in the role of attending physician and authorized an extended period of post-surgical physical therapy.

On July 7, 2008, Dr. Stratton released claimant to modified duty with no use of the injured left hand. On November 12, 2008, Dr. Stratton reported in a chart note that claimant "continues to work full-time without restriction." On June 12, 2009, claimant was laid off by the employer as part of a reduction in force due to a decrease in business because of the economic downturn.

By letter dated August 26, 2009, the employer's claims processing agent informed claimant that it had determined that claimant was ineligible for vocational assistance because he had been released to his regular employment.

By letter dated October 23, 2009, counsel for claimant appealed the employer's August 26, 2009 determination that claimant was ineligible for vocational assistance.

On February 18, 2010, the Department issued a Director's Review and Order that set aside the employer's August 26, 2009 determination that claimant was ineligible for vocational assistance. The Department based that conclusion on a finding that claimant's accepted left hand condition prevented him from returning to his at-injury employment.

By letter to the Department dated February 26, 2010, the employer requested abatement and reconsideration of the February 18, 2010 Director's Review and Order. That letter reads in pertinent part:

"The Director's Review and Order addressed only whether claimant was capable of returning to regular work pursuant to OAR 436-120-0320(11)(c). However, during the vocational proceedings, the employer repeatedly argued and put forth evidence demonstrating claimant is not entitled to vocational assistance pursuant to OAR 436-120-0320(2)(b); OAR 436-120-0350(3); and OAR 436-120-0350(4) because claimant had returned to suitable employment for 60 days [before] he was laid off for reasons unrelated to his work injury. Therefore, the employer requests [that] you issue an Abatement and Reconsideration of the February 18, 2009 Director's Order and Review to address this issue and to reverse your decision[.]"

By letter dated March 8, 2010, the Department denied the employer's request for abatement and reconsideration of the February 18, 2010 Director's Review and Order.

On that same date, March 8, 2010, the employer filed a request for hearing from the February 18, 2010 Director's Review and Order and the March 8, 2010 denial of the employer's request for abatement and reconsideration.

On March 17, 2010, the Department issued an order referring this vocational assistance matter to the Workers' Compensation Board for hearing.

**ULTIMATE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND OPINION**

The Division 120 Rules effective December 1, 2007 (WCD Admin. Order 07-067) apply to the review of a Director's decision regarding eligibility for vocational assistance. OAR 436-120-0003 (2) (the Director's decisions under OAR 436-120-0088 regarding eligibility for vocational assistance are based on the rules in effect on the issue date of the notice being reviewed).

Pursuant to *former* OAR 436-120-0320(2)(b) and OAR 436-120-0350(4), a claimant is ineligible for vocational assistance if he has returned to regular or other suitable employment with the employer at injury, or if he has been employed for at least 60 days in suitable employment after the injury and any necessary worksite modification is in place. Pursuant to *former* OAR 436-120-0005(10), "regular employment" means the employment claimant held at the time of his injury. Pursuant to *former* OAR 436-120-0005(12), "suitable employment" means employment or a job for which claimant has the necessary physical capacities, knowledge, skills and abilities, that is located where claimant customarily worked or within reasonable commuting distance of claimant's residence, which pays or would average on a year-round basis a suitable wage.

The employer asserts that the February 18, 2010 Director's Review and Order erred in setting aside the employer's August 26, 2009 determination that claimant was ineligible for vocational assistance based on a finding that claimant's accepted left hand condition prevented him from returning to his at-injury employment. The employer further asserts that the Department abused its discretion in not addressing the employer's alternative argument that claimant is ineligible for vocational assistance because he returned to other suitable employment for 60 days before he was laid off for reasons unrelated to his work injury.

I agree that the Department's failure to determine whether claimant had returned to suitable employment was an abuse of discretion that warrants remand so that the issue may be appropriately considered. OAR 436-001-0170; *James A. Miller*, 11 CCHR 147 (2006); *Francisco Perez*, 14 CCHR 5 (2009).

THEREFORE, IT IS HEREBY ORDERED that this matter is remanded to the Department for further proceedings consistent with this order and applicable law.