

In the Vocational Assistance Dispute of

**BILLY CLAY, Claimant**

Contested Case No: H04-054

**PROPOSED AND FINAL ORDER**

October 1, 2004

BILLY CLAY, Petitioner

SAIF CORPORATION , Respondent

Before Ella D. Johnson. Administrative Law Judge, Office of Administrative Hearings

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**HISTORY OF THE CASE**

Claimant appeals a March 11, 2004 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department) which concluded that claimant did not have a substantial handicap to employment and affirmed insurer's decision that claimant was ineligible for vocational assistance. The department referred the matter to the Office of Administrative Hearings for hearing on May 12, 2004.

On August 19, 2004, Administrative Law Judge Ella D. Johnson conducted a telephone hearing in this matter in Salem, Oregon. Attorney at Law James Dodge represented petitioner Billy Clay (claimant). Attorney at Law Jerry Larkin represented respondent SAIF Corporation (insurer or SAIF). Claimant testified on his own behalf. The record closed on following the hearing.

**ISSUE**

Whether RRU abused its discretion in determining that claimant did not have a substantial handicap to employment and was ineligible for vocational assistance.

**EVIDENTIARY RULING**

The record consists of WCD's Exhibits 1 through 12, which were admitted into the record without objection.

**FINDINGS OF FACT**

I adopt the Findings of Fact set forth in the March 11, 2004 Director's Review and Order, with the following supplementation:

(1) On September 5, 2002, claimant compensably injured his right shoulder while working as a permanent full-time auto detailer with B & E Import Company, dba Tonkin-Gresham Auto (B & E or employer). Claimant had been working as a manager for AAA Auto Detailing and took substantial pay cut when he moved to B & E, but was told that the reduction

in pay was only temporary. (Exs. 1, 8; test. of claimant.) SAIF accepted right shoulder strain, right rotator cuff tear supraspinatus, rotator cuff subscapulars, right biceps tendinosis and subluxation and right biceps tear conditions. Claimant underwent two unsuccessful surgeries<sup>1</sup> to correct his condition. Claimant's temporary disability benefits were paid at a rate of \$344.83 per week. (Exs. 3, 4, 10)

(2) On September 24, 2003, Marc Davidson, MD, performed a closing examination. Dr. Davidson declared claimant to be medically stationary and permanently limited him to no repetitive movement or overhead lifting, pushing, and pulling over 25 pounds with the upper right extremity. SAIF subsequently closed the claim with 27 percent (86.40 degrees) permanent partial disability (PPD). Dr. Davidson recommended that claimant not return to his regular work as an auto detailer. (Exs. 3-5.)

(3) On December 8, 2003, SAIF's vocational counselor, Jennifer O. Frank, requested that Dr. Davidson review the requirements of several jobs that were within the sedentary to light category and indicate whether they were within claimant's physical limitations as listed in the Dictionary of Occupational Titles (DOT). Dr. Davidson opined that the following jobs were within claimant's physical limitations as described in the DOT: hotel desk clerk, receptionist/information clerk/host, file clerk, general office clerk, watch guard or gate guard, messenger, parking lot attendant, service station attendant, and fast food crew leader.<sup>2</sup> (Ex. 5.)

(4) On December 19, 2003, SAIF denied claimant's request for vocational assistance because it had determined that claimant did not have a substantial handicap to employment. (Ex. 6.) Claimant requested administrative review of SAIF's denial by letter dated January 8, 2004. (Ex. 7.)

(5) In reviewing SAIF's denial, RRU contacted claimant, claimant's attorney, employer's human resources manager and Diana Ellis with Portland Community College (PCC) Computer Applications and Office Systems program. RRU Vocational Consultant Mathew Niblack calculated claimant's suitable wage at \$275.86 or \$6.90 per hour for a 40-hour workweek. In his Suitable Employment Analysis report, Niblack correctly stated claimant's limitations as set forth in Dr. Davidson's report, analyzed claimant's knowledge, skills and abilities and performed a Labor Market research survey. Niblack concluded that the job of hotel clerk, DOT # 238.367-038 was within claimant's physical capabilities, provided a suitable wage of \$320.00 per week or \$8.00 per hour. He noted that claimant met the requirements of the job, which were good customer skills and experience in handling cash.<sup>3</sup> He also noted that his market research

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<sup>1</sup> Claimant told RRU that he had undergone four surgeries. However, the record supports that he underwent only two.

<sup>2</sup> Claimant testified as to each of these jobs that they were not within his physical capabilities because of his restrictions on overhead reaching and/or repetitive movement. However, Dr. Davidson reviewed the job requirements and found that they were. Consequently, I do not find claimant's testimony in this regard persuasive.

<sup>3</sup> Niblack also noted that the DOT Code and some of the hotel clerk jobs required a minimum of three months to six months of experience in the job. (Ex. 9 at 2.)

revealed that there were sufficient jobs available with 77 purged jobs and 877 openings in Region 2, which was within commuting distance from claimant's residence. Niblack opined that claimant's one-year college certificate in Computer Applications and Office Systems, experience as a fast food crew leader and experience owning his own detail business would give him transferable skills in customer service, cash handling and office operations. Niblack concluded that claimant did not have a substantial handicap to employment, and on behalf of the director affirmed SAIF's denial. (Exs.8, 9, 10, 12.)

### CONCLUSIONS OF LAW

RRU correctly determined that claimant did not have a substantial handicap to employment and is ineligible for vocational assistance.

### OPINION

I may modify the department's vocational assistance order 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 an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c); OAR 436-001-0225(5). In determining whether one or more of those criteria exist, I may admit evidence, which was not before the department, and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or at 537; *Joseph A. Richard*, 1 WCSR 3 (1996). The burden rests on the proponent of that fact or position. See ORS 183.450(2). I conclude that claimant has failed to meet his burden.

Pursuant to ORS 656.340(1), an insurer is required to provide vocational services to workers who are eligible. ORS 656.340(6)(a) states:

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.

Pursuant to OAR 436-120-0005(11), a "substantial handicap" to employment occurs when:

the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed at suitable employment." "Knowledge," "skills," and "abilities" have meanings as follows:

(a) "Knowledge" means an organized body of factual or procedural information derived from the worker's education, training and experience.

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(b) “Skills” means the demonstrated and physical proficiency to apply knowledge.

(c) “Abilities” means the cognitive, psychological and physical capacity to apply the worker’s knowledge and skills.

“Suitable employment” or “suitable job” means employment or a job:

(a) For which the worker has the necessary physical capacities, knowledge, skills, and abilities;

(b) Located where the worker customarily worked or within reasonable commuting distance of a worker’s residence. A reasonable commuting distance is no more than 50 miles one-way modified by other factors, including but not limited to, but not limited to:

(A) Wage of the job. A lower wage may justify a shorter commute:

(B) The pre-injury commute:

(C) The worker’s physical capacities, if they restrict the worker’s ability to sit or drive for 50 miles.

(D) Commuting practices of other workers who live in the same geographic area; and

(E) The distance from the worker’s residence to the nearest cities or towns which offer employment opportunities.

(c) Which pays or would average on a year-round basis a suitable wage as defined in section (13); and

(d) Which is permanent. Temporary work is suitable if the worker’s job at injury was temporary ; and the worker has transferable skills to earn, on a year-round basis, a suitable wage as defined in section (13) of this rule.

Finally, “suitable wage “ means:

(a) For the purposes of determining eligibility for vocational assistance, a wage of at least 80 percent of the adjusted weekly wage as defined in OAR 436-120-0007.

(b) For the purpose of providing and/or ending vocational assistance, a wage as close as possible to 100 percent of the adjusted weekly wage.

This wage may be considered suitable if less than 80 percent, if the wage is as close as possible to the adjusted weekly wage.

As noted above, RRU upheld insurer's notice of ineligibility because it found that the job of hotel clerk was within claimant's physical limitations and paid a suitable wage. Consequently, RRU concluded that claimant did not have a substantial handicap to employment. Claimant argues that RRU abused its discretion because it failed to review the job description of hotel clerk with him and had insufficient information without claimant's input to determine whether this job was suitable employment. However, as noted in the record, RRU did contact claimant and his attorney and attempted to obtain their input.<sup>4</sup> Claimant also argues that neither SAIF's vocational consultant nor Dr. Davidson reviewed the job duties with him. However, I find for the reasons set forth below in footnote 4, that claimant is not a good historian. Therefore, I do not find his testimony persuasive.

Abuse of discretion exists when an agency "exercises its discretion to an end or purpose not justified by and clearly against, reason and evidence." *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 664 (1979); *Casciato v. Oregon Liquor Control Commission*, 181 Or 707, 717 (1947). SAIF argues that my review here is not *de novo* and I am not at liberty to reweigh the evidence and substitute my judgement for that of RRU's. In support of its contention, SAIF cites *Liberty Northwest Insurance v. Jacobson*, 164, Or App 37 (1999) and *Teresa Brook*, 8 CCHR 240 (2003).

In *Jacobsen*, the court examined the "abuse of discretion" standard, stating that the essential question in testing whether an abuse of discretion has occurred is "whether the choice made is consistent with one of several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made." 164 Or App at 45. In affirming the director's order, the court found that the director did not err in determining that RRU had no discretion to ignore claimant's contention that the vocational consultant had misrepresented the vocational program when RRU was aware of claimant's contention, but failed to adequately investigate the contention. Consequently, the court concluded that RRU had abused the director's discretion by failing to consider relevant circumstances of which it was aware. *Id.* at 47-48.

In *Teresa Brook*, the director reversed a Proposed and Final Order, which found that RRU abused its discretion because it failed to investigate the nature of the claimant's job at injury. Specifically, the Proposed and Final Order concluded that the claimant was not able to return to her job at injury because her job at injury was performing two jobs and was working 60 to 80 hours per week, six to seven days a week. The director found that RRU was aware of claimant's contention concerning the number of hours worked. The director noted that the

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<sup>4</sup> Claimant first testified that Niblack had not contacted him and then revised his testimony when cross-examined about Exhibit 8 to state that, when Niblack called he told claimant that he was with the Preferred Worker program. Claimant also stated that neither SAIF's vocational consultant nor Dr. Davidson reviewed the requirements of the job with him and that he was unable to perform the hotel clerk duties because he could not lift bags. I do find claimant's testimony persuasive because I conclude that he is not a good historian.

record before RRU was replete with references to claimant's contentions and RRU's order discussed the contentions at length. Despite the long hours claimed, RRU found that claimant could return to her regular work. Distinguishing *Jacobson* from the claimant's case, the director concluded that RRU had not abused her discretion because it had not ignored claimant's contentions but rather had fully considered them in its investigation. The director noted that the Proposed and Final Order's reliance on different evidence than RRU did not constitute an abuse of discretion as described in *Jacobson*. CCHR at 241.

Applying the holdings of *Jacobson* and *Teresa Brook*, I limit my review to whether RRU's substantial employment analysis was correct and whether RRU investigated claimant's allegations to determine if RRU abused the director's discretion. There is no indication that either claimant or his attorney raised these issues with RRU. Because of its thorough substantial handicap analysis, I find the opinion of RRU persuasive and conclude that RRU did not abuse the director's discretion and correctly found pursuant to the above-cited rules that claimant does not have a substantial handicap to employment. Consequently, claimant is not entitled to vocational assistance. Accordingly, RRU's order is affirmed.

#### **ATTORNEY FEES**

Claimant has not prevailed in overturning RRU's order. Therefore, he is not entitled to an assessed attorney fee. ORS 656.385(1).

#### **ORDER**

***IT HEREBY ORDERED* that RRU's March 11, 2004 Director's Review and Order is affirmed.**