

In the Matter of the ORS 656.340 Vocational Services Dispute of
Jeffries, Roark, Claimant

Contested Case No: H03-118

PROPOSED & FINAL ORDER

June 3, 2004

TRAVELERS INSURANCE COMPANY, Petitioner
ROARK JEFFRIES, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

Insurer appeals an administrative order issued on September 2003 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department). On September 24, 2003, WCD referred the matter to the Office of Administrative Hearings (OAH). On April 22, 2004, Administrative Law Judge Catherine P. Coburn convened a hearing in this matter. Petitioner Travelers Insurance Company (insurer) was represented by attorney Linh T. Vu. Respondent Roark Jeffries (claimant) was represented by attorney James L. Edmunson. Vocational Consultant Celeste Forgues testified on insurer's behalf. I left the record open pending receipt of Insurer's Supplementary Exhibit 92 and the record closed on April 27, 2004.

ISSUE

Whether claimant is eligible for vocational assistance.

EVIDENTIARY RULINGS

Insurer's Exhibits 1 through 91 were received into the record without objection. Insurer's Supplementary Exhibit 92 was received into the record over claimant's relevance objection.

FINDINGS OF FACT

(1) In 1999, claimant was convicted of driving while under the influence of intoxicants (DUII). (Ex. 91.)

(2) On April 20, 2000, claimant suffered a compensable right knee injury while working in a warehouse and earning \$9.24 per hour. (Ex. 1.) On November 20, 2000, insurer accepted a right knee strain. (Ex. 36.)

(3) In May 2001, claimant worked as a permanent, year-round cashier, earning \$7 per hour. (Ex. 91.)

(4) On August 1, 2001, insurer accepted "tear, posterior horn, medial meniscus, right knee." (Ex. 49.) On January 31, 2002, attending physician Kenneth M. Singer, MD, performed arthroscopic partial medial meniscectomy, right knee. (Ex. 64.) On October 8, 2002, Dr. Singer noted that a June 2002 MRI was normal and that claimant had unexplained continuing pain. Dr.

Singer opined, “Based on his subjective description of pain, I do not think it would be possible for him to return to his current activities.” (Ex. 75-2).

(5) On October 18, 2002, claimant was released to work with the following restrictions: Limit work to 8 to 10 hours per day; No pushing, pulling or lifting in excess of 50 pounds; Move around when necessary for comfort; Can be walking, driving and sitting. (Ex. 76.) On November 6, 2002, the claim was closed with a permanent partial disability award. (Ex. 79.)

(6) On January 15, 2003, Vocational Consultant Celeste Forgues met with claimant who had recently become employed as a permanent on-call substitute school bus driver with Sutherlin School District earning \$11.38 per hr. Claimant performed this job for 71 days and voluntarily terminated because it was too stressful. (Ex. 91; testimony of Forgues.)

(7) In 2003, after leaving his employment with Sutherlin School District, claimant was convicted of DUII. (Ex. 91.)

(8) On February 5, 2004, attending physician Kenneth M. Singer, MD opined, that based solely on claimant’s subjective complaints, he should be restricted to work to include alternating between sitting and standing as necessary. (Ex. 92.)

CONCLUSION OF LAW

Claimant is ineligible for vocational assistance.

OPINION

Jurisdiction lies with the director. ORS 656.340(4). Pursuant to ORS 656.283(2)(c), I may modify the administrative order 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. OAR 436-001-0225(5). The burden of proof falls upon the proponent of a fact or position. ORS 183.450(2). In that regard, insurer bears the burden of proving by a preponderance of the evidence that RRU abused its discretion or exercised clearly unwarranted discretion in determining that claimant remained eligible for vocational services. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is by a preponderance of the evidence). Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.* 303 Or 390 (1998).

ORS 656.340 requires an insurer to provide vocational assistance to injured workers who are eligible. ORS 656.340(6)(a) provides:

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.

Additionally, ORS 656.340(6)(b)(A) provides:

A “substantial handicap to employment” exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

OAR 436-120-0005(8) provides:

“Substantial handicap to employment” means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

RRU determined that claimant suffered a substantial handicap to employment and was eligible for vocational assistance. RRU reasoned that the job claimant returned to after the aggravation, that of school bus driver, did not produce a suitable wage because the job did not guarantee the number of work hours. Insurer first contends that the wage at injury and not the wage at aggravation should serve as the basis for determining claimant’s eligibility for vocational assistance. Insurer next contends that the school bus driver job was suitable, and therefore, claimant is ineligible. In contrast, claimant contends that the administrative order is correct and should be affirmed.

Suitable Wage

ORS 656.340(6)(b)(B) provides in part:

(B) “Suitable employment” means:

(iii) Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment as defined in subsection (5) of this section.

Additionally, ORS 656.340(5) provides in part:

As used in this subsection and subsection (6) of this section, “regular employment” means the employment the worker held at the time of the injury or the claim for

aggravation under ORS 656.273, whichever gave rise to the potential eligibility for vocational assistance*****.

RRU used claimant's wage at aggravation in determining his eligibility. On the other hand, insurer contends that the wage at injury should be applied because the claim was reopened for acceptance of a new condition rather for an objective worsening. I agree with insurer's position. Pursuant to ORS 656.340(5), the wage at aggravation serves as the basis for determining eligibility only if the claim is reopened pursuant to ORS 656.273. However, here, insurer initially accepted a right knee strain and subsequently, the claim was reopened for acceptance of a medical meniscus tear pursuant to ORS 656.262(6)(d). Moreover, the subsequent claim reopening gave rise to the current potential vocational eligibility. Therefore, claimant's wage at injury properly serves as the basis for evaluating claimant's eligibility.

Claimant's wage at injury was \$9.25 per hour. Pursuant to ORS 656.340(6)(b)(B)(iii), claimant's suitable wage is 20 percent of \$9.25 per hour which is less than minimum wage. RRU incorrectly applied the wage at aggravation and determined that several jobs do not pay a suitable wage. However, inasmuch as claimant's suitable wage is minimum wage, the school bus driver, delivery route driver, light truck driver shipping and receiving clerk jobs pay claimant's suitable wage.

Causation

Insurer contends that claimant does not have a substantial handicap because he was suitably employed as a school bus driver and he voluntarily terminated his employment for reasons unrelated to the work injury. Insurer further contends that claimant's work restrictions are due to factors that are unrelated to the work injury or aggravation. In contrast, claimant contends that his inability to return to suitable work was caused by the accepted injury.

ORS 656.340(6)(b)(A) defines the term "substantial handicap" to include a requirement that claimant's inability to return to suitable work was caused by the work injury or aggravation.

Additionally, OAR 436-120-0005(9) defines the term "suitable employment". OAR 436-120-0005(9)(a) provides in pertinent part:

"(9) 'suitable employment' or 'suitable job' means employment or a job:

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

Also, OAR 436-120-0350 provides in pertinent part:

A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

(3) The worker's lack of suitable employment is not due to the limitations caused by the injury or which existed prior to the injury.

(4) The worker has been employed at least for 60 days in suitable employment after the injury or aggravation and any necessary worksite modification is in place.

Here, claimant's attending physician, Dr. Singer, restricted claimant to work that allowed him to move around at will; the school bus driver job did not accommodate that physical restriction. However, in a letter dated after RRU's determination, Dr. Singer attributed claimant's work restrictions solely to his subjective complaints. Moreover, the opinion of the attending physician on this point is unrefuted. Furthermore, claimant voluntarily terminated the school bus driver job because it was too stressful. Based on the record, I find that claimant was suitably employed as a school bus driver for at least 60 days and also that his lack of suitable employment is not due to limitations caused by the work injury.¹ Therefore, claimant is ineligible for vocational assistance under OAR 436-120-0350(3) and (4). In conclusion, I find that insurer has carried its burden of proving by a preponderance of the evidence that RRU's determination contravenes statute and rule, albeit based on a recent opinion of the attending physician. Accordingly, I reverse. ORS 183.283(2)(c)(A).

ATTORNEY FEES

Claimant has not prevailed in a contested case, and therefore is not entitled to an attorney's fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The September 10, 2003 Director's Review and Order is reversed.

¹ I further note that claimant's DUII convictions are factors unrelated to the work injury.