

In the ORS 656.340 Vocational Assistance Dispute of

**CHARLES A. PARLIER, Claimant**

Contested Case No: H04-134

**PROPOSED AND FINAL ORDER**

November 02, 2004

CHARLES A. PARLIER, Petitioner

SAIF CORPORATION, Respondent

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

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### **HISTORY OF THE CASE**

Claimant appeals the June 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 (department or director). On September 14, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 26, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Attorney Martin J. McKeown represented petitioner Charles A. Parlier. Attorney Jerome P. Larkin represented respondent SAIF Corporation (insurer). Claimant testified on his own behalf and the record closed on the date of hearing.

### **ISSUE**

Whether RRU incorrectly determined that claimant is ineligible for vocational assistance pursuant to OAR 436-120-0330(5)(a).

### **EVIDENTIARY RULINGS**

WCD Exhibits 1 through 14 were admitted into the record without objection.

### **FINDINGS OF FACT**

(1) On March 29, 2003, claimant suffered a low back injury while working as a ranch handyman. (Exs. 1 and 6; testimony of claimant.) Insurer accepted a low back strain. (Ex. 4.) In May 2003, claimant was treated by Richard Sandell, MD and in June, he received physical therapy. (Ex.6-2.) On July 3, 2003, James J Sinnott, MD released claimant to light duty. (Ex. 3.)

(2) Beginning in July 2003, claimant worked as a welder assistant for a subsequent employer. In December 2003, the project ended and claimant was laid off. (Ex. 6-2; testimony of claimant.)

(3) On September 12, 2003, the claim was closed without a permanent partial disability (PPD) award. (Ex. 5.)

(4) On December 13, 2003, Mark R. Leadbetter, MD (Orthopedic Surgeon) conducted a medical arbiter's examination. (Ex. 6.) Claimant was not under medical care at that time. (Ex. 6-2.) After examining claimant, Dr. Leadbetter opined that claimant had no functional capacity limitations and could sit, stand and walk eight hours per day. Dr. Leadbetter further opined that claimant was not permanently precluded stooping, crawling, twisting, climbing, reaching, crouching, kneeling, balancing, pushing/pulling, as related to the work injury. Dr. Leadbetter also opined that claimant had no permanent restrictions in working the same number of hours he worked pre-injury. (Ex. 6-2.)

(5) In an Order on Reconsideration dated December 26, 2003, the department awarded 22 percent PPD for loss of use of the low back. (Ex. 7-3.)

(6) On January 6, 2004, insurer notified claimant that he was ineligible for vocational assistance because the medical arbiter had released him to regular work. (Ex. 8.)

## CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance pursuant to OAR 436-120-0330(5)(a).

## OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if it: (1) violates a statute or rule; (2) exceeds the agency's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283; OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence that was not before the department and make independent findings of fact. *Colclasure v. Washington County School District*, 317 Or 526 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proving any fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving that the administrative order is incorrect. Inasmuch as claimant was duly notified of the hearing date and failed to appear, insurer bears the burden of establishing a *prima facie* case on the record. OAR 137-003-0670(3)(a).

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(6) provides in pertinent part:

- (a) A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment \*\*\*\*\*

OAR 436-120-0330 lists the conditions for eligibility and provides in pertinent part:

- (5) As a result of the limitations caused by the injury or aggravation, the worker:

(a) Is not able to return to regular employment;

OAR 436-120-0005(10) provides;

(10) "Regular employment" means the employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance.

Relying on the medical arbiter's report, RRU determined that claimant was released to regular work, and therefore, is ineligible for vocational assistance. Claimant contends that he is unable to perform regular work as a ranch handyman and that the administrative order violates OAR 436-120-0330(5)(a). However, claimant offers no medical evidence to support his contention that he is unable to return to regular work. Consequently, I find that claimant has failed to carry his burden of proof. Finally, finding no basis for modifying the administrative order, I affirm.

#### **ATTORNEY FEES**

Claimant has not prevailed in a contested case, and therefore, is entitled to no attorney fee. ORS 656.385(1).

#### **ORDER**

IT IS HEREBY ORDERED

The Director's Review and Order dated June 11, 2004 is affirmed.