

In the Vocational Services of
Delare D. Holte, Claimant
Contested Case No: 09-007H
PROPOSED & FINAL ORDER

May 26, 2009

DELARE D. HOLTE, Petitioner
BROADSPIRE, Respondent

Before Robert Pardington, Administrative Law Judge

Pursuant to notice, under the jurisdiction of the Director of the Department of Consumer and Business Services, a hearing convened and closed on May 6, 2009, before Administrative Law Judge Robert Pardington. Claimant was present and represented by attorney Dan Snyder. The employer, Alco, Inc., and its processor, Broadspire, were represented by their attorney, Gordon Clark.¹

Exhibits 1 through 18, including A through D, 1A-F, 3A&B, 7A-E, 12A&B, 14A, 15AA, 15A, but not including 17 (withdrawn), were admitted. Paragraph Two of Exhibit 4-2 was redacted at claimant's request.

ISSUES

- 1) Entitlement to vocational assistance. Claimant appeals the December 16, 2008 Director's Review and Order. (Ex. 14).
- 2) Propriety of an "Overpayment" asserted by the carrier, on temporary disability from June 7, 2007 through July 23, 2007.

SUMMARY OF FACTS

Claimant, age 52, started working for the employer in 1982, in Colorado, and in Oregon since 1986. He has a high school degree and a trade school certificate in welding. He was initially a "delivery guy" but was promoted to Assistant Service Manager in 1991. In 1994, he became Service Manager, or "Customer Service Manager." (Ex. B; Cl. Testimony). He supervised district managers and "route men." His highest salary was \$67,000 per year.

As Service Manager, claimant sometimes had to do "physical" work, not depicted in the job description in Exhibit B. When the employer was shorthanded, he would make deliveries in a truck. Some products (like floor mats and roll towels) were heavy.

On March 26, 2007, claimant was made Customer Service Manager, with an office in the stockroom and no responsibilities with the Delivery Department. (Ex. C).

¹ On May 19, 2009, claimant submitted a written "Post Hearing Brief." The employer objects to its receipt. I agree with the employer that the record was not left open for any such post-hearing submissions, and I have accordingly stricken the "Post Hearing Brief."

On May 18, 2007, claimant sustained a compensable injury when he slipped and fell while carrying several mats on a delivery route. At that time, his salary had been reduced to about \$55,000. (Ex. 1).

The claim was accepted for “lumbar radicular syndrome.” (Ex. 6). On June 7, 2007, the carrier commenced payment of temporary disability. (Ex. 1A).

A few days later, on about June 12, 2007, claimant started a “co-management” position in the stockroom. (Exs. A, 1D, Cl. Testimony). His salary was cut. In that position, claimant had to lift up to 55 pounds (e.g., boxes of garments), sometimes taking them up stairs and ladders.

Claimant never really “got into” the co-manager job and was back off work on June 18, 2007. Temporary disability resumed on June 21, 2007. (Exs. 1A, 1F). He had surgery for a herniated disc in September 2007.

On January 2, 2008, claimant returned to work, but not as service manager or co-manager of the stockroom. Instead, he was an hourly “clerical clerk.” He understood that that position was “light duty,” and not permanent, and thought that he would be a manager again when he was released to regular work.

Dr. Arbeene examined claimant at the request of the employer on August 7, 2008. Dr. Arbeene concluded that claimant’s accepted conditions were medically stationary, with no permanent work restrictions due to the accepted injuries, and especially considering that he was in a new position as a “collections agent.” (Ex. 4-5)

On August 12, 2008, Dr. Schmidt concurred with Dr. Arbeene’s report, and specifically that claimant was medically stationary with no work restrictions due to the compensable injury. (Ex. 5). In some earlier (March 2008) notes, Dr. Schmidt had placed some restrictions on claimant. (Ex. 11-2).

On August 29, 2008, the carrier issued a Notice of Closure, awarding 22 percent “whole person” impairment. (Ex. 7). Claimant requested a “lump sum” payment of the permanent disability award. A December 16, 2008 Order on Reconsideration affirmed the Notice of Closure on other issues. (Ex. 14A).

After the Notice of Closure issued, claimant kept doing the clerk job until September 16, 2008. He then became an “All Fresh Sales Consultant,” which is the same as an “Account Sales Consultant.” (Exs. 7A, 7C). This was not the same job as he had had at the time of injury, and he had never done it before. He was required to lift (up to 55 pounds), carry, push and pull. He loaded his delivery truck with samples.

Although he never returned to the Sales Manager position, claimant believes that he could have done the job.

On September 16, 2008, the claim processor asserted a total overpayment of \$5,435.44, mostly based on a lack of authorization for temporary disability from June 7, 2007 through July

23, 2007. (Ex. 7D). In a handwritten note dated September 20, 2008, claimant's attending physician, Dr. Schmidt, stated with respect to the period in June and July 2007 that claimant was receiving treatment and "appropriately not able to work because of ongoing symptoms. Authorization for time loss given." (*Id.*) (*See also* Ex. 18).

In a September 23, 2008 "Employability Determination Report," the employer/processor concluded that claimant was not eligible for vocational assistance because he had been released to regular work. (Ex. 8). It then issued a September 24, 2008 Notice of Ineligibility for Vocational Assistance. (Ex. 9). Claimant appealed to the Director of Department of Consumer and Business Services, Workers' Compensation Division (the Director).

On December 16, 2008, the Director issued a Review and Order, affirming the September 24, 2008 Notice of Ineligibility. (Ex. 14).

CONCLUSIONS OF LAW AND OPINION

I) Vocational Assistance

ORS 656.283(2)(c) provides, in relevant part:

"When the director issues an order after review under paragraph (b) of this subsection [regarding vocational assistance], the order shall be subject to review under ORS 656.704. At the contested case hearing, the decision of the director's administrative review 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."

See also OAR 436-001-0225. Nevertheless, in these proceedings, "new evidence may be admitted and considered." OAR 436-001-0225(3).

Even after considering the "new" evidence in the form of claimant's testimony, I agree with the Director that claimant is not eligible for vocational assistance because he has no permanent restrictions due to his accepted injury. (Exs. 4-5, 5). *See* OAR 436-120-0320(11)(c)(A) (a worker is eligible for vocational services if, as a result of the *limitations caused by the injury* or aggravation, the worker is not able to return to regular employment). Claimant's attending physician, Dr. Schmidt, specifically concurred with Dr. Arbeene's report in this respect. (*Id.*) The fact that Dr. Schmidt had placed some restrictions on claimant in March 2008, before his condition was medically stationary and permanent, is not relevant. (*See* Ex. 11-2).

There is similarly no persuasive evidence that claimant is “not able to return to regular employment[,]” which is a condition for qualifying for vocational services. OAR 436-120-0320(11)(c)(A). In this regard, regardless of the physical requirements of the “sales manager” position (which claimant acknowledges was his “regular employment,”) Dr. Schmidt has not placed *any* permanent restrictions on claimant due to the compensable injury. Moreover, even if, as claimant contends, Dr. Arbeene relied on an incorrect history of claimant’s duties as “sales manager” or evaluated the wrong position (*i.e.*, his post-injury position as “collections agent”), again, there is no affirmative medical evidence in the record that claimant had any permanent restrictions or that he was not able to return to regular employment. Finally, claimant acknowledged, in both the proceeding before the Director and at this hearing, that he could have returned to his sales manager job.

Accordingly, I find no error in the Department’s Review and Order under the above standard of review, and it is affirmed.

II) “Overpayment”/Temporary Disability

Claimant asserts that he was, in fact, authorized to be off work during the bulk of the period asserted as the basis for the insurer’s “overpayment” and cites Dr. Schmitt’s later affirmation that claimant was, in fact, authorized to be off work in June and July 2007 (*See Ex. 7D*).

The authorized periods of temporary disability, however, have been finally determined in the August 29, 2008 Notice of Closure, as affirmed by the December 16, 2008 Order on Reconsideration. (Exs. 7, 14A). The temporary disability award (which is the basis for the “overpayment”) is not subject to collateral attack at this point. *See, e.g., David A. Hutchens*, 58 Van Natta 1982 (2006).

ORDER

- 1) The December 16, 2008 Director’s Review and Order is affirmed.
- 2) Claimant’s request to modify or disallow the asserted “overpayment” is denied.