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In the ORS 656.340 Vocational Assistance Dispute of

**Garry E. Claxton, Claimant**

Contested Case No: 11-060H

**PROPOSED & FINAL ORDER**

September 22, 2011

GALLAGHER BASSETT SERVICES INC., Petitioner

GARRY E. CLAXTON, Respondent

Before Joy M. Dougherty, Administrative Law Judge

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Pursuant to notice, a hearing was scheduled to convene on July 20, 2011, in Bend, Oregon. By agreement of the parties, the case was submitted for decision based on the exhibits and written closing arguments. Philip Garrow represents claimant. Brian Solodky represents the employer, Ameritech Machine MFG and its claims administrator Gallagher Bassett.

Exhibits 1- 37 and 32A were received and admitted into evidence.<sup>1</sup> The record closed August 23, 2011 upon my receipt of the employer's written reply closing arguments.

**ISSUE**

Vocational Assistance. Entitlement to vocational assistance. The employer appeals the March 10, 2011 Amended Director's Review and Order which set aside the October 11, 2010 and February 10, 2011 Notices of Ineligibility for Vocational Assistance. (Ex. 33).

**FINDINGS OF FACT**

On July 6, 2009, claimant, who worked as a press brake operator, welder and machine fabricator, injured his left hand at work while performing maintenance on a machine. (Ex. 1). The claim was accepted for left hand traumatic distal amputation, long, ring and small fingers. (Ex. 4).

On March 4, 2010, Dr. Holmboe, claimant's attending physician, found claimant's condition medically stationary with impairment to the left hand of decreased 2 point sensation, and decreased grip strength and pinch strength. Dr. Holmboe released claimant to regular work without limitation. (Exs. 5-2, 6).

The claim was closed on June 8, 2010 with 9 percent whole person impairment and no award of work disability. (Ex. 7).

However, on August 1, 2010, Dr. Holmboe indicated that when he released claimant to regular work without limitations, he was unaware of the necessity for claimant to have the

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<sup>1</sup> Consistent with OAR 436-001-0240, WCD provided a copy of the evidence that was relied on in making its determination. This submission included Exhibits 1 through 35. However, there is no reference made to the exhibits, by number, in the Director's Review and Order. Additionally, claimant's counsel submitted three additional exhibits. Because this matter is governed by OAR 436-001-0225(3), which allows for the admission of new evidence, the aforementioned exhibits are *all admitted into* the record.

bilateral ability to manipulate and handle small parts. He thought claimant was returning to "heavy machining." After considering the necessity for machine fabricators to manipulate and handle small parts efficiently and at a production rate, Dr. Holmboe no longer considered claimant released to his regular job at injury without restrictions because claimant could not manipulate small parts due to loss of sensation and loss of nails. (Ex. 8-2).

On July 26, 2010, Dr. Holmboe examined claimant and noted that he had permanent impairment in his fingers. Dr. Holmboe further indicated that claimant had attempted to get back to some degree of employment but his current job requirements required fine dexterity with use of his left hand. He further noted that claimant had been unable to perform those job requirements because of his lack of sensation and lack of dexterity after loss of the tips of the ring and long fingers. (Ex. 9). Thus, Dr. Holmboe released claimant to modified work. (Ex. 9-3).

On August 17, 2010, the employer conducted a job analysis which indicated that claimant's position required simple and firm grasping, as well as fine manipulation of both hands. (Ex. 11-3).

An August 31, 2010 Order on Reconsideration increased claimant's permanent disability award to 11 percent whole person impairment and awarded 17 percent work disability. (Ex. 14). Thereafter, claimant requested vocational evaluation. (Ex. 15). The employer requested a hearing. (Ex. 28-3).

On September 24, 2010, when presented with information that "there [was] no reason [claimant] cannot perform the necessary job duties requiring fine motor skill with his right hand only[.]" Dr. Holmboe opined that claimant was released to his regular work. (Ex. 16).

On October 11, 2010, Mr. Gonzalez, a vocational case manager, issued a Notice of Ineligibility for Vocational Assistance effective October 11, 2010. (Ex. 17). In that notice, Mr. Gonzalez indicated that Dr. Holmboe had "released [claimant] to regular work without limitations to [his] job at injury as a Shear & Press Brake Operator/Steel Fabricator[.]" (Id.) Thus, claimant was ineligible.

Claimant requested the Director's review. (Ex. 18). In a supporting affidavit, claimant indicated that his job required use of both hands simultaneously. (Ex. 19-2).

The matter was submitted to the Director's Employment Services Team (EST). (Exs. 20). Conference calls were conducted with the parties. On December 3, 2010, an Order of Deferral was issued to allow time for additional evidence.<sup>2</sup> (Exs. 23, 24).

On December 28, 2010, Dr. Holmboe agreed that claimant needed to change how he performed his work duties, but that he was still capable of performing the duties and tasks he did

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<sup>2</sup> The copy of the order in the record is not signed. However, its inclusion in the record would not be warranted if not issued. Because the exhibits have been submitted *directly from* WCD, and neither party has challenged its submission, I find no basis to question the contents of this document.

before the injury. (Ex. 25). Again, Dr. Holmboe restricted claimant's lifting and use of the left hand. (Ex. 26).

On February 2, 2011, a prior ALJ affirmed the August 31, 2010 Order on Reconsideration that awarded 17 percent work disability. (Ex. 28). In doing so, the prior ALJ found that the employer's argument that claimant could perform his job with the uninjured right hand was contrary to the job description which required grasping and fine manipulation of both hands. (Ex. 28-4). Moreover, the prior ALJ noted that, having considered that requirement, Dr. Holmboe did not release claimant to regular work using both hands. That order has become final. (*See also* Ex. 32A).

On February 10, 2011, Mr. Gonzalez again issued a Notice of Ineligibility for Vocational Assistance effective February 10, 2011. (Ex. 29). In doing so, Mr. Gonzalez noted that Dr. Holmoe opined that claimant could perform his duties as a Fabricator. (Ex. 29-2; *see also* Ex. 30).

On March 10, 2011, the Director's EST issued a Director's Review and Order which noted the issues were whether claimant was ineligible for vocational assistance because he was able to return to regular work, suitably employed for 60 days, and whether he had a substantial handicap to employment. (Ex. 33-2, -4). In the order, it was determined that claimant was not able to return to regular employment, that claimant did not return to "suitable employment" because claimant's return to his Fabrication job without modification was outside his limitations, and finally, it was determined that there was insufficient evidence to determine whether claimant had a substantial handicap to employment. (Ex. 33-6). The employer was directed to perform a "substantial handicap to employment" evaluation. (Id.)

On March 16, 2011, the Director's EST issued an Amended a Director's Review and Order. This amended order is substantially similar to the March.10, 2011 order and was modified to include a statement that it was setting aside the October 11, 2010 and February 10, 2011 Notices of Ineligibility for Vocational Assistance. (Ex. 34). The employer requested a hearing. (Ex. 35).

On May 5, 2011, the employer agreed to perform an evaluation to determine whether claimant has a substantial handicap to employment and to determine eligibility to vocational assistance based on that information. (Ex. 36).

## CONCLUSIONS OF LAW AND OPINION

### Vocational Assistance

Because this matter is an appeal from an March 16, 2011 Amended Director's Review and Order, ORS 656.283(2)(c) governs. It 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."

Based on the following reasoning, the March 16, 2011 Amended Director's Review and Order is modified.

In setting aside the employer's October 10, 2010 and February 10, 2011 determination of ineligibility for vocational assistance, the Director applied OAR 436-120-0145 which states, in relevant part:

"2) A worker is eligible for vocational assistance if all the following conditions are met:

\* \* \* \* \*

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

- "(A) Is not able to return to regular employment;
- "(B) Is not able to return to suitable and available work with the employer at injury or aggravation; and
- "(C) Has a substantial handicap to employment and requires assistance to overcome that handicap.

"(d) The worker was not employed in suitable employment for at least 60 days after the injury or aggravation."

The Director resolved subsection (A) in claimant's favor finding that Dr. Holmboe, ultimately, did not return claimant to his regular work as outlined in the job analysis. The prior All, reviewing claimant's permanent impairment, arrived at the same conclusion. The employer disagrees stating that although claimant was restricted in the manner he performed his duties, he was not restricted in performing the job duties.

The cases which the employer reference conclude that an injury-related modification of the manner of performing work does not support a work disability award, provided the worker is able to perform the *duties required* by the job at injury. See *Jessica A. Phares*, 60 Van Natta 3082 (2008) (no work disability awarded -- despite the claimant's injury-related reduced typing speed -- because she was released to her regular work and the job did not require a certain typing speed); compare *Teri A. Campbell*, 62 Van Natta 648 (2010) (the

employer did not establish that an Order on Reconsideration erred in awarding work disability, because, although the claimant returned to her "pre-injury" bus driving job, she was unable to assist disabled bus passengers on and off buses due to her injury and such assistance was a job duty).

However, as noted by the prior All, the job analysis indicates that the job duties involve bilateral hand manipulation. I would agree with this analysis. Moreover, Dr. Holmboe indicated claimant could return to regular work when presented with a letter indicating that claimant was not precluded from performing his duties with one hand.<sup>3</sup> He never lifted the working restrictions on the left hand. Because claimant's affidavit and the job analysis indicate that both hands are required to perform his Fabrication duties, claimant was not able to return to his regular employment. Thus, I would agree that subsection (A) has been met.

Regarding subsection (B), the Director combined this requirement with subparagraph (d) which requires that claimant was not able to return to "suitable and available work with the employer at injury," "for at least 60 days after the injury." The employer asserts that the determination claimant did not return to work for less than 60 days is unsupported by the record.

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<sup>3</sup> In its brief, the employer repeatedly references that the Director, here the Employment Services Team of the Workers' Compensation Division (WCD), abused its discretion by giving its own medical deference over that of Dr. Holmboe in contradiction to the court's holding in *SAIF v. Calder*, 157 Or App 244 (1998) (the Board is not qualified or permitted to make medical determinations as it is not an agency with specialized medical expertise). However, the WCD has previously referenced its authority in relation to the *Calder* decision, as stated in *Terrell L. Humphrey*, 7 CCHR 397 (2002):

"ORS 183.450(4) states:

"The hearing officer and agency may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency. Parties shall be notified at any time during the proceeding but in any event prior to the final decision of material officially noticed and *they* shall be afforded an opportunity to contest the facts so noticed. \*\*\*"

"As such, an administrative agency may take judicial notice of facts 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' *SAIF v. Calder*, 157 Or App 244 (1998). Oregon courts have approved reference works, such as scientific articles and medical dictionaries, and public records, such as court judgments, as 'sources whose accuracy cannot reasonably be questioned.' *Arlington Educ. Assn 'n v. Arlington School Dist. No. 3*, 177 Or App 658, 667 (1984). Because the WCD has a certain amount of medical expertise relating to the provision of medical services, it may take official notice of technical facts within its specialized knowledge."

Because the Director's Review and Order is being modified on other grounds, I do not address the employer's argument in this regard.

Thereafter, the employer notes that claimant returned to work on October 7, 2010 until he was laid off in "early December."

Although these dates would come close to 60 days, and potentially beyond 60 days, there is insufficient evidence to conclude that claimant, in fact, returned to work for 60 days. Here, it is necessary for the employer to prove there was an error. Because the record does not support a conclusion that claimant returned to work for 60 days, this finding is not modified.

However, regarding subsection (C), the Director's EST concluded that the evidence was insufficient to determine whether claimant had a substantial handicap to employment. Thus, the matter was remanded to the employer to perform a substantial handicap evaluation. See OAR 436-120-0340. Indeed, after the amended order issued, the employer has agreed to conduct such an evaluation. (Ex. 36).

To establish eligibility to vocational assistance, however, all of the requirements of OAR 436-120-0145(2) must be met. Where the evidence supporting one element of OAR 436-120-0145(2) cannot be established, eligibility for vocational assistance has not been established.<sup>4</sup>

In *Delare D. Holte*, 14 CCHR 94, it was determined that the Director did not err in finding that the claimant was ineligible for vocational assistance. In doing so, the ALI explained this was because there was no persuasive evidence that the claimant was "not able to return to regular employment[,]" which is a condition for qualifying for vocational services. OAR 436-120-0320(11)(c)(A).<sup>5</sup> *Id.* at 97. Thus, in *Hoite*, where the requirements for vocational assistance weren't met, claimant had not established entitlement to vocational assistance, and the Director's order was affirmed.

Here, the Director's EST determined that there was insufficient evidence to support that claimant has a substantial handicap to employment. Despite that conclusion, the Director's EST set aside the employer's ineligibility determination. While the Director's EST may have had authority to request such evidence in the process of rendering its decision, it, nonetheless, rendered a determination without such evidence.

It does not serve to reason that a decision maker could render a determination on the issues in a given matter and then subsequently require the parties to then seek the evidence to support that decision. To do so was an abuse of discretion. Consequently, the March 10, 2011 Amended Director's Review and Order is modified. The employer's October 10, 2010 and February 10, 2011 determinations of ineligibility for vocational assistance are reinstated.

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<sup>4</sup> The Director's EST has authority to require vocational tests be performed during the process of the administrative review process. OAR 436-120-0008(1)(b). The Director's EST can issue an Order of Temporary Deferral of the administrative review and identify the conditions under which the review would be resumed, and, indeed, such deferral occurred in this case. However, no such deferral was made to conduct an evaluation for determining whether claimant had a "substantial handicap to employment."

<sup>5</sup> OAR 436-120-0320(11)(c)(A) through (C) was renumbered to OAR-120-0145(2)(c)(A) through (C) effective January 1, 2010. See WCB Admin. Order 09-061.

**ORDER**

IT IS HEREBY ORDERED that the March 10, 2011 Amended Director's Review and Order is modified. The employer's October 11, 2010 and February 10, 2011 Notices of Ineligibility for Vocational Assistance are reinstated.

IT IS FURTHER ORDERED THAT the attorney fee awarded in that order is reversed.