
In the ORS 656.340 Vocational Assistance Dispute of
Victor L. Jones, Claimant

Contested Case No: 12-012H

PROPOSED & FINAL ORDER

September 14, 2012

VICTOR L. JONES, Petitioner
CHARTIS CLAIMS, Respondent

Before Robert Pardington, Administrative Law Judge

A hearing was held in the above-captioned case on May 2, 2012, in Portland, Oregon, before Administrative Law Judge Robert Pardington. Claimant was present and represented by his attorney Rex Smith. The employer, Beaverton Bakery, and its insurer/processor, Chartis Claims, were represented by their attorney, Trisha Hole.

The hearing was continued for the receipt of written closing arguments. The record closed on receipt of claimant's reply argument on August 23, 2012.

Exhibits 1 through 156, including A-E, 4A, 11A, 20A, 55A, 65A & B, 82A, 88A, 113A, (121, page 2), and 152A, were admitted.

ISSUE

Entitlement to Vocational Benefits. Claimant appeals the Workers' Compensation Division's (WCD's) December 9, 2011 Director's Review and Order on Remand. (Ex. 156).

FINDINGS OF FACT

Claimant, now age 51, worked for the employer as a truck driver, DOT 905.663-014. (Ex. 1). The work involved frequent pushing and pulling and occasional lifting, overhead reaching, and bending, stooping, and crouching. (*Id.*)

On December 14, 2009, claimant sustained a compensable injury when he fell from the back of a truck, landing on his right shoulder and back. (Ex. 2).

Claimant sought treatment that day at an emergency room. (Ex. 2). X-rays of the right shoulder and lumbar spine taken that day revealed degenerative changes, AC joint osteoarthritis, and multilevel lumbar spondylosis. (Exs. 3, 4).

The employer initially accepted the claim for (disabling) right shoulder strain, right elbow fracture, and lumbar strain conditions. (Ex. 27). The employer later included "acute partial thickness tear of the supraspinatus tendon of the right shoulder." (Ex. 134).

Two days later, on December 16, 2009, claimant was involved in a (apparently off work) rear-end motor vehicle accident (MVA). (Exs. 5, 6). He had neck pain and sustained thoracic and lumbar strains. (Ex. 7).

On January 29, 2010, claimant began treating with orthopedist Dr. Di Paola, who restricted him to light duty. (Exs. 17, 21).

A lumbar MRI scan on February 3, 2010 reportedly showed multilevel degenerative changes. (Ex. 24). An MRI arthrogram of the right shoulder that same day reportedly showed tendinosis or degeneration of the supraspinatus with a high-grade partial thickness tear and abnormal signal consistent with a labral tear. (Ex. 26).

Dr. Di Paolo stated on February 12, 2010 that claimant would need shoulder surgery. He continued the light duty restriction. (Ex. 29).

Dr. Di Paolo proceeded with arthroscopic surgery on claimant's right shoulder on March 31, 2010, including a rotator cuff repair. (Ex. 42).

As of May 3, 2010, claimant remained off work. Dr. Di Paola noted that claimant was unable to bend, squat, or kneel, as his delivery driver work required. (Ex. 58).

Dr. Di Paola continued to restrict claimant to light duty through the end of 2010. (Exs. 67, 70, 83, 84, 92, 94, 98, 99, 106, 107, 112, 113, 121, 122, 123).

Dr. Rosenbaum examined claimant on or around June 14, 2010. He informed Dr. Di Paola of his opinion that claimant would not benefit from surgery on the lumbar spine. (Ex. 80).

Dr. Di Paola noted on June 28, 2010, that claimant had significant low back pain but agreed that he was not a surgery candidate (for the back). Instead, he referred claimant for spinal injections, more physical therapy, and aquatic therapy. (Ex. 83).

On October 12, 2010, claimant underwent an epidural steroid injection on the left at L4-5 and L5-S1 by Dr. Rask for "lumbar radiculopathy." (Ex. 109).

Dr. Woodward examined claimant on January 14, 2011. (Ex. 125). He assessed as work-related diagnoses: right shoulder contusion, right elbow contusion, and lumbar strain, all resolved. He thought that claimant's right supraspinatus condition was degenerative and preexisting. He did not find a "combined condition." With respect to the conditions Dr. Woodward considered work-related, he said that claimant could "return to all the activities of which he was capable prior to [the December 14, 2009 accident]" and that claimant had no permanent impairment. (Ex. 125-14, -15).

On January 31, 2011, Dr. Di Paola reexamined claimant and reviewed Dr. Woodward's report. (Exs. 126, 127). He stated that he "otherwise" agreed with the report but disagreed regarding claimant's right supraspinatus tear. He explained that his findings were consistent with an acute tear. With respect to claimant's work restrictions, he stated: "Light duty – restrictions are outlined on a permanent basis as it relates to his [right] shoulder supraspinatus rotator cuff repair." (Ex. 127; *see* Ex. 128).

In a February 8, 2011 form, Dr. Di Paola checked a box stating that claimant was released to “full/partial duty.” (Ex. 129).

On February 15, 2011, claimant’s vocational counselor wrote Dr. Di Paola to request the permanent work restrictions the doctor mentioned on January 31, 2011. (Ex. 131).

On February 24, 2011, Dr. Di Paola indicated that claimant’s right supraspinatus tear was related to the December 14, 2009 work injury. He agreed that Dr. Woodward’s January 14, 2011 shoulder findings were valid for rating impairment and that they could be apportioned 50 percent to injury and 50 percent to preexisting conditions and “lack of effort.” He stated that he did not find any permanent restrictions associated with the acute partial thickness tear of the supraspinatus tendon, right shoulder. (Ex. 132, *see* Ex. 129).

The employer closed the accepted claim on March 3, 2011, awarding 9 percent whole person impairment for claimant’s right shoulder but no work disability. (Ex. 135). Claimant requested reconsideration with a medical arbiter (panel).

On March 7, 2011, the employer, through the vocational counselor, issued a Notice of Ineligibility for Vocational Assistance. The counselor reasoned that Dr. Di Paola had stated that claimant had no permanent restrictions based on the accepted claim. (Ex. 138). Claimant requested Director review.

The Director issued a Director’s Order and Review on May 24, 2011, affirming the March 7, 2011 Ineligibility Determination. The Director reasoned that Dr. Di Paola had agreed with Dr. Woodward’s January 14, 2011 IME report that “all of [claimant’s] accepted medical conditions had resolved without causing permanent impairment.” (Ex. 143A).

Drs. Harris, Rischitelli, and Murphy performed a medical arbiter examination on June 8, 2011. They attributed 100 percent of claimant’s shoulder findings and 25 percent of the low back findings to the December 14, 2009 compensable injury. (Ex. 144).

An Order on Reconsideration (from the Notice of Closure) issued on June 21, 2011, increasing claimant’s total whole person impairment to 17 percent. The Director considered the medical arbiter report the most persuasive evidence of impairment and awarded claimant impairment values for loss of right shoulder motion, a chronic condition limiting repetitive use of the right shoulder, and loss of lumbar motion, that loss apportioned per the arbiter panel report. The Director did not award work disability, finding that claimant had been released to regular work. (Ex. 149).

In an undated concurrence with an August 10, 2011 report, Dr. Di Paola confirmed his opinion that claimant was able to perform his regular job as a delivery driver without any permanent restrictions from the December 14, 2009 compensable injury and accepted conditions. (Ex. 152A).

In the meantime, claimant appealed the May 24, 2011 Director’s Review and Order. In an Opinion and Order dated October 11, 2011 and reconsidered on October 27, 2011, a prior

ALJ reversed the May 24, 2011 Review and Order and remanded for further proceedings to allow consideration of the June 21, 2011 Order on Reconsideration and reconciliation of prior findings regarding Dr. Di Paola's medical opinion regarding claimant's permanent restrictions. (Ex. 155).

In a December 9, 2011 Directors' Review and Order on Remand, the WCD concluded that claimant's accepted conditions do not prevent him from returning to regular employment and again affirmed the March 7, 2011 Determination of Ineligibility for Vocational Assistance. (Ex. 156). *See* OAR 436-120-0145(2).

Claimant requested this hearing.

CONCLUSIONS OF LAW AND OPINION

At this stage of review, the ALJ may modify a Director's order only if it: (a) violates a statute or rule; (b) exceeds the director's statutory authority; (c) was made upon unlawful procedure; or (d) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.340(16)(d); OAR 436-001-0225(3). New evidence may be admitted and considered. OAR 436-001-0225(3).

Claimant contends that the Director's Order on Remand violates ORS 656.340(6)(a), which 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.”

Nevertheless, claimant then proceeds to argue that the Director's order is not supported by substantial evidence or substantial reason, citing ORS 183.482(8)(c). Claimant specifically challenges the Director's evaluation of the medical opinions of both Dr. Woodward and Dr. Di Paola, based on the alleged bias of both physicians, and on the Director's alleged misapplication of the term “objective findings” in conjunction with Dr. Di Paola's reports. *See* ORS 656.005(19).

The “substantial evidence” standard is simply not the correct standard here, even if it may be eventually implicated in some form at the Court of Appeals. ORS 183.482(8)(c). Rather, as set forth above, the “abuse of discretion” standard applies. *See* ORS 656.340(16)(d). Although that standard has no “hard and fast” meaning, it has been defined as an action which “exceeds the bounds of reason” or is “clearly against reason and evidence.” *See Far West Landscaping, Inc. v. Modern Merchandising, Inc.*, 287 Or 653, 664 (1979) (Justice Denecke, dissenting); *Casciato v. OLCC*, 181 Or 707, 715-717 (1947). *Compare* ORS 183.482(8)(c); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). *See Liberty Northwest v. Jacobson*, 164 Or App 37, 45-46 (1999).

Claimant's contentions regarding the factual conclusions related to claimant's pre- and post-injury physical capabilities do not challenge the findings below as "clearly against reason and evidence."

Claimant's specific argument regarding "objective findings" raises the question whether that portion of the Director's Order on Remand might "violate a statute" under the review standard in ORS 656.340(16)(d). See ORS 656.005(19); *Caitlin Van Houtin*, 62 Van Natta 689 (2010) ("objective findings" is a legal term, as opposed to medical term); *Carmen Z. Garcia*, 61 Van Natta 283 (2009); *Sigifredo Garcia*, 7 CCHR 481, 485 (2002).

Nevertheless, the specific interpretation of Dr. Di Paola's use of the term "objective findings" does not necessarily affect the basic question relevant to claimant's entitlement to vocational benefits, whether claimant is able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury and whether claimant has a "substantial handicap to employment." ORS 656.340(6)(a). Claimant has not persuasively demonstrated how the alleged objective findings discrepancy fundamentally affects that basic question here in conjunction with this standard of review. ORS 656.340(16)(d). Compare *Garcia*, 7 CCHR at 484-486.

Finally, claimant cites to the findings of the medical arbiter panel, which were relied on by the Appellate Review Unit (ARU) in the June 21, 2011 Order on Reconsideration. (Exs. 144, 149). However, as was noted in the Review and Order on Remand, in making vocational decisions, the Director is not bound under the "law of the case" doctrine by the determinations of ARU. (Ex. 156-6). See, e.g., *Mark B. Hardman*, 7 CCHR 173, 178-179 (2002), amended to award attorney fee, 8 CCHR 127 (2003).

Moreover, while (as claimant accurately notes) the ARU relied on the arbiter's panel attribution of 100 percent of claimant's shoulder findings and 25 percent of the low back findings to the December 14, 2009 compensable injury, the ARU also found that claimant had been released to regular work and therefore did not award work disability. (Exs. 144, 149). See OAR 436-0120-0145(2)(c)(A) (worker must not be able to return to "regular employment" as a result of the limitations cause by the injury to be eligible for vocational assistance).

Accordingly, based on the above reasoning, I find that the Director's Order on Remand did not violate a statute or rule or exceed the Director's statutory authority and did not amount to an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.340(16)(d); OAR 436-001-0225(3).

ORDER

The December 9, 2011 Director's Review and Order on Remand is affirmed.