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In the ORS 656.340 Vocational Assistance Dispute of

**Shannon M. Rushton, Claimant**

Contested Case No: 12-039H

**PROPOSED & FINAL ORDER**

September 24, 2012

SAIF CORPORATION, Petitioner  
SHANNON M. RUSHTON, Respondent

Before Darren Otto, Administrative Law Judge

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A hearing was scheduled to be heard in the above-entitled matter on August 8, 2012 in Bend, Oregon before Administrative Law Judge Darren Otto of the Workers' Compensation Board. The parties, however, asked that the matter be decided based on the written record, and that request was granted. Claimant is represented by her attorney, Phillip Garrow. The employer, Fox Hollow Bend-Bend Assisted Living, and its insurer, SAIF Corporation, are represented by their attorney, Kathryn Olney. On August 23, 2012, SAIF filed its initial written closing argument. On August 31, 2012, claimant filed her written response. The hearing concluded on September 10, 2012 with SAIF's reply. Exhibits 1 through 20, 6A, 14A, 18A, and 18B, are received into evidence.

**ISSUES**

SAIF appealed the April 17, 2012 Director's Review and Order, VO 12-044, which ordered SAIF to conduct a vocational evaluation for claimant because the reviewer found that claimant had not been released to return to regular work as a result of her accepted injury. The issue is whether the finding that claimant was not released to regular work as a result of her work injury was (a) inconsistent with the "law of the case" or precluded by principles of issue preclusion, or (b) was not supported by sufficient evidence in the record, and therefore constituted an abuse of discretion.

**FINDINGS OF FACT**

Claimant was 47 years old at the time of hearing (Ex. 1). On January 16, 2008, she began working for the employer as a caregiver in its assisted living business (Exs. 1 & 3). The job required continuous lifting of up to 50 pounds and frequent lifting up to 75 pounds while assisting in the transfer of residents (Ex.3-3).

On October 1, 2008, claimant injured her low back while transferring a resident from a bed to a wheelchair at work (Ex. 1). During that maneuver, she heard a snapping sound in her low back and had the immediate onset of low back pain (Ex. 8-2).

A few days after the industrial injury, claimant sought medical attention for persistent low back and right leg pain (Ex. 8-2). Eventually, she came under the care of Chae Gregory Ha, M.D., who recommended physical therapy (Ex. 8-2). Five subsequent epidural steroid injections, however, were ineffective. *Id.* An MRI scan was therefore obtained which showed a

herniated disc at L5-S1. *Id.* On November 24, 2010, Dr. Ha performed a left-sided L5-S1 discectomy to repair that herniated disc. *Id.* Claimant did fairly well after the surgery but continued to experience low back and left leg pain. *Id.*

On May 5, 2011, claimant underwent a Work Capacity Evaluation which concluded that she was capable of sedentary-light work with lifting and carrying up to 20 pounds (Ex. 4-2). Based on that evaluation, it was felt that claimant would have difficulty performing the essential duties of a caregiver (Ex. 4-5). On May 24, 2011, Dr. Ha concurred with the findings and conclusions of the Work Capacity Evaluation (Ex. 5). That concurrence, however, was inconsistent with Dr. Ha's May 12, 2011 opinion that claimant was released to return to regular work (Ex. 4-1).

On June 8, 2011, a Notice of Closure awarded claimant 10% loss of the whole person for impairment to her lumbosacral spine (Ex. 6). Claimant did not receive an award for work disability based on Dr. Ha's May 12, 2011 release to return to regular work (Ex. 6-2). The Updated Notice of Acceptance at Closure included lumbar strain, L4-5 annular tear, L5-S1 annular tear, and L5-S1 disc herniation (Ex. 6-4).

On July 26, 2011, Robert Andrews, M.D., agreed with Dr. Ha that claimant was capable of performing her regular work as a caregiver, including transferring patients with assistance, assisted devices, and proper lifting techniques, up to 50 to 75 pounds (Ex. 6A-1).

On September 2, 2011, a Director's Review and Order determined that SAIF was not required to determine claimant's eligibility for vocational assistance at that time (Ex. 7). Claimant contended that she was entitled to an eligibility evaluation because she could not return to regular work (Ex. 7-4). SAIF contended that claimant's accepted condition did not prevent her from returning to regular work, and therefore, it was not required to determine her vocational eligibility. *Id.* The vocational reviewer rejected claimant's contention, concluding that her inability to perform all of her regular job duties was due to pre-existing conditions and other non-work related factors and was not due to her accepted conditions (Ex. 7-5). However, the reviewer noted that, if the upcoming medical arbiter panel provided additional medical information that indicated claimant was likely eligible for vocational assistance, then SAIF "will be required to determine her eligibility." *Id.* Claimant appealed that order (Ex. 13).

On October 7, 2011, claimant was examined by the medical arbiter panel of James Harris, M.D., Gary Rischitelli, M.D., and Robert Tatsumani, M.D. (Ex. 8). Based on their review of the medical record as well as the examination, the medical arbiter panel believed that claimant was significantly limited in the repetitive use of her lumbar spine due to the newly accepted conditions (Ex. 8-3). The panel felt that claimant's functional residual capacity was limited to lifting or carrying 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly (Ex. 8-4). The panel believed that 50% of claimant's impairment was related to the accepted conditions and 50% was related to her pre-existing lumbar conditions. *Id.*

On October 25, 2011, an Order on Reconsideration awarded claimant total whole person impairment of 9%, a decrease of 1% from the Notice of Closure (Ex. 9-4). Again, claimant was

not awarded work disability benefits based on the conclusion that Dr. Ha released her to return to regular work. *Id.*

On January 25, 2012, claimant requested vocational assistance (Ex. 10). Again, SAIF refused to determine eligibility at that time, arguing that claimant was released to regular work at closure and her eligibility was previously determined under the opening of the claim. *Id.* Claimant requested review of SAIF's refusal to determine her eligibility for vocational assistance, contending that the medical arbiter panel found claimant's physical capacity to be medium with significant repetitive use limitations in the lumbar spine due to the accepted conditions of the work injury and claimant's job at injury required lifting up to 75 pounds frequently. *Id.*

Claimant requested review of the September 2, 2011 Director's Review and Order and, on March 16, 2012, ALJ Fulsher affirmed that Order based on the conclusion that the record did not support claimant's contention that her inability to return to regular work was a result of her accepted conditions (Ex. 13-4). Therefore, the ALJ concluded that the Director did not abuse his discretion in determining that SAIF was not required to determine claimant's eligibility for vocational assistance. *Id.*

Claimant requested reconsideration of the October 25, 2011 Order on Reconsideration and, on March 26, 2012, ALJ Fulsher modified that Order on Reconsideration by awarding claimant 18% whole person impairment (Ex. 14A-4). Claimant was not awarded any work disability benefits, however, based on the conclusion that she was released to return to her regular work by her attending physician (Ex. 14A-3).

On April 17, 2012, a Director's Review and Order, VO 12-044, addressed claimant's second request that SAIF determine her eligibility for vocational assistance (Ex. 18). Claimant contended that, based on the findings of the October 7, 2011 Medical Arbiter Report, she was unable to return to regular work and was therefore likely eligible for vocational assistance (Ex. 18-3). SAIF asserted that it was not required to determine claimant's eligibility because she was not likely eligible, as her accepted conditions did not prevent her from returning to regular work. *Id.* The reviewer concluded that claimant was unable to return to regular work because of her accepted conditions and was therefore entitled to an eligibility evaluation. *Id.* In arriving at that conclusion, the reviewer found that Dr. Ha's regular work release was not supported by a preponderance of the medical evidence, including the Work Capacity's Evaluations determination that claimant was incapable of lifting and carrying greater than 20 pounds occasionally and the medical arbiter panel's finding that claimant could lift and carry no more than 50 pounds occasionally (Ex. 18-5). SAIF requested reconsideration of the Director's Review and Order, but on April 26, 2011, that request was denied (Exs. 18A & 18B).

On June 5, 2012, the Director issued a Final Order regarding claimant's challenge to SAIF's refusal to determine her eligibility for vocational assistance (Ex. 20). The Final Order affirmed ALJ Fulsher's March 16, 2012 Proposed and Final Order that affirmed SAIF's decision to refuse a determination of vocational eligibility. *Id.* Thus, the September 2, 2011 Director's Review and Order and March 16, 2012 Proposed and Final Order were affirmed based on the

conclusion that they did not violate any statute or rule, exceed the agency's authority, rely on an unlawful procedure, or manifest an abuse of discretion (Ex. 20-4).

### FINDINGS OF ULTIMATE FACT

Following the initial September 2, 2011 Director's Review and Order, SAIF received new information from the October 7, 2011 medical arbiter panel that changed the eligibility determination.

The evidentiary record contained sufficient evidence to support the Director's decision as not being unreasonable or an abuse of discretion.

### CONCLUSIONS OF LAW AND OPINIONS

SAIF asserts that the April 17, 2012 Director's Review and Order should be reversed for two reasons. First, the Director's Review and Order, which found that claimant was not released to return to regular work, was contrary to the "law of the case" laid down in a June 5, 2012 Final Order which found that claimant had been released to return to regular work. Second, SAIF contends that the April 17, 2012 Director's Review and Order did not consider all of the evidence and the determination that claimant was not released to return to regular work with regard to her accepted injuries was not supported by the evidence. Claimant asserts that the "law of the case" doctrine does not apply in this situation because there has never been a final determination that claimant was "not likely eligible" for vocational assistance. Claimant also asserts that issue preclusion does not apply because new evidence established that claimant was not able to return to her regular work based on the industrial injury. Finally, claimant asserts that the Director considered all the evidence in reaching its conclusion and there was not abuse of discretion.

SAIF objects to the Director's Review and Order and seeks reversal of the conclusion that it is required to determine claimant's vocational eligibility. Therefore, it is SAIF's burden to prove that the Order should be reversed. *See Larry J. Morgan*, 51 Van Natta 1448 (199); *Roberto Rodriguez*, 46 Van Natta 1722 (1994).

OAR 436-001-0225(3) provides,

In vocational assistance disputes under ORS 656.340, new evidence may be admitted and considered. Under ORS 656.340(16), the administrative law judge may modify the 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.

When dealing with an abuse of discretion, the legal issue is not whether the decision maker reached the only possible decision, or even the correct decision. Instead, the legal issue is whether the evidentiary record contains sufficient evidence to support the decision as not being unreasonable or an abuse of discretion. See *SAIF v. Kurcin*, 334 Or 399, 405-06 (2002). Also, as the court stated in *McCollum v. Kmart Corp.*, 228 Or App 101, 113-114 (2009), “[a]buse of discretion,’ as a legal term of art, means that the court’s action or decision was not ‘within the range of legally correct discretionary choices’ and did not produce a ‘permissible legally correct outcome.’”

The “law of the case” is “a general principle of law and one well recognized in this state that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation, and upon the appellate court itself in any subsequent appeal or other proceeding for review.” *Hayes Oyster Co. v. Dulcich*, 199 Or App 43 (2005). The doctrine is inapplicable in light of new facts or evidence bearing on the legal issue in question. *Huszan v. Certified Realty Co.*, 272 Or 517, 523 (1975). Prior acceptances, prior litigation, and prior permanent disability awards must be considered in determining whether opinions are founded on accurate administrative, legal and medical “facts.” See *Queener v. United Employer’s Insurance*, 113 Or App 364 (1992); *Arlene J. Koitsch*, 45 *Van Natta* 13, 15 (1993); *Delaris A. Peacock*, 44 *Van Natta* 2072 (192). In *Kuhn v. SAIF*, 73 Or App 768 (1985).

“The doctrine of the “law of the case” precludes re-litigation or reconsideration of a point of law decided at an earlier stage in the same case. The rationale is that a court should adhere to a previous ruling on an identical matter, whether rightly or wrongly decided.” *Koch v. Southern Pacific Transportation Company*, 274 OR 499, 511-12 (1976).

SAIF contends that the April 17, 2012 Director’s Review and Order was incorrect because the Director was precluded from finding that claimant was not released to regular work based on issuance of a subsequent June 5, 2012 Final Order which found that claimant was released to regular work. Those two parallel orders will be examined to understand how they relate to one another.

On June 8, 2011, claimant began the whole process of seeking vocational assistance by asking SAIF to determine her eligibility (Ex. 7-3). On June 10, 2011, SAIF vocational coordinator, Melissa Kam, notified claimant that SAIF was not required to determine her eligibility because claimant was released to return to her regular work at claim closure. *Id.* Ms. Kam noted, however, that, if the medical arbiter panel provided medical information indicating that claimant was “likely eligible” for vocational assistance, then SAIF would be required to re-determine her eligibility. *Id.*

On September 2, 2011, a Director’s Review and Order, VO 11-130, concluded that SAIF was not required to determine claimant’s eligibility for vocational assistance “at this time” (Ex. 7-5).

Following the September 2, 2011 Director's Review and Order, a medical arbiter panel concluded that claimant's accepted conditions resulted in 50% of her impairment documented on examination (Ex. 8-4).

Based on the medical arbiter panel's conclusions that claimant's accepted condition resulted in permanent impairment, claimant again asked SAIF to determine her vocational eligibility (Ex. 10). On January 25, 2012, however, SAIF refused to determine eligibility, stating that claimant was released to regular work at closure and her eligibility for vocational assistance was previously determined (Ex. 10). Those arguments were contrary to the earlier statements of SAIF's own vocational consultant who acknowledged that the medical arbiter's findings of permanent impairment due to the industrial injury would require a re-determination of vocational eligibility (Ex. 7-3). Claimant appealed SAIF's second refusal to determine her vocational eligibility, thus beginning a second track based on additional facts, including the medical arbiter panel's examination findings and conclusions.

Claimant's appeal of the initial September 2, 2011 Director's Review and Order, which did not include the medical arbiter panel report, resulted in a March 16, 2012 Proposed and Final Order wherein ALJ Fulsher determined that claimant was released to return to regular work and the Director did not abuse its discretion in affirming SAIF's refusal to determine her vocational eligibility (Ex. 13). Claimant took exception to the ALJ's Proposed and Final Order and, on June 5, 2012, that Proposed and Final Order was affirmed by the Director (Ex. 20).

While claimant's initial request for a determination of her vocational eligibility was proceeding to the June 5, 2012 Final Order, which denied her request, claimant was also moving forward with her subsequent request for a determination of eligibility for vocational assistance based on the new evidence provided by the medical arbiter panel. On January 25, 2012, SAIF denied claimant's second request for a determination of her vocational eligibility and claimant requested Director's review of that decision. On April 17, 2012, the Director reversed SAIF's decision and concluded that claimant was indeed entitled to a determination of her vocational eligibility based, in part, on the new evidence provided by the October 7, 2011 medical arbiter report (Ex. 18). The reviewer stated,

In summary, I find that Dr. Ha's "regular work release" is not supported by a preponderance of medical evidence, including Ms. Kadlecik's [WCE] finding the [claimant] could lift and carry no more than 20 pounds; and the [medical arbiter] panel's finding that she could lift and carry no more than 50 occasionally. I therefore conclude that [claimant] cannot return to regular work as a result of the limitations caused by her work injury.

[Claimant's] eligibility status is undetermined at this time. Therefore, I find that the insurer is now required to complete the eligibility evaluation process by determining whether [claimant] is able to return to suitable modified employment with the employer-at-injury and if not, whether she has a substantial handicap to employment.

(Ex. 18-5).

SAIF's contention that the Director was precluded from finding in claimant's favor because the "law of the case" established that claimant had been released to return to regular work is not persuasive because it is not based on the same factual transaction. *See Huszan v. Certified Realty Co. supra*. The factual foundation underlying the September 2, 2011 Director's Review and Order, which affirmed SAIF's refusal to determine claimant's vocational eligibility, was different than the April 17, 2012 Director's Review and Order, which reversed SAIF's refusal to determine claimant's vocational eligibility. Seven months separated those two orders and, during that time, claimant underwent a medical arbiter evaluation on October 7, 2011. It was the medical arbiter panel's impression that claimant's accepted conditions resulted in permanent impairment and 50% of all impairment was related to those accepted conditions (Ex. 8-4). As the reviewer clearly explained in the initial September 2, 2011 Director's Review and Order,

\*\*\*I conclude that SAIF is not required to determine [claimant's] eligibility *at this time*. However, if the upcoming medical arbiter panel provides additional medical information that indicates [claimant] is likely eligible for vocational assistance, then SAIF will be required to determine her eligibility (*Emphasis added*).

(Ex. 7-5). SAIF's own vocational consultant agreed with the Director's understanding that a second eligibility evaluation might be appropriate and that is exactly what happened. The medical arbiter panel determined that claimant was likely eligible for vocational assistance. Therefore, SAIF was required to determine her eligibility. The Director's findings in that regard did not violate any "law of the case."

SAIF also asserts that issue preclusion precludes claimant from re-litigating her determination of vocational eligibility. Issue preclusion precludes future litigation on an issue only if the issue was "actually litigated and determined" in a setting where its determination was essential to the final decision reached. *Drews v. EBI Cos.*, 310 Or 134, 139 (1990). For issue preclusion to apply, five requirements must be met: (1) the issue in the two proceedings must be identical; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard; (4) the party sought to be precluded was a party or was in privity with a party in the prior proceeding; and (5) the prior proceeding was the type of proceeding to which a court will give preclusive effect. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104 (1993).

First, claimant contends that a re-determination of her eligibility for vocational assistance was exactly what the September 2, 2011 Director's Review and Order anticipated would occur because that Order determined claimant's eligibility only "at this time" and anticipated that the medical arbiter panel report could require re-determination of eligibility (Ex. 7-5). Claimant is correct. The Order is limited to the evidence available to the Director at that time. Also, inasmuch as the evidence changed between the September 2, 2011 Director's Review and Order and the April 17, 2012 Director's Review and Order, there was a different set of operative facts underlying the basis for each opinion. Thus, the issues in the two proceedings were not

identical. Therefore, issue preclusion does not apply. Also, given the Director's anticipation of a second determination of eligibility in its September 2, 2011 Order, that prior proceeding was not the type of proceeding to which a court will give preclusive effect.

ORS 656.340(1)(c) provides, "Eligibility may be re-determined by the insurer or self-insured employer upon receipt of new information that would change the eligibility determination." Inasmuch as ORS 656.340(1)(C) provides that eligibility may be re-determined by the insurer upon receipt of new information that would change the eligibility determination, principles of issue preclusion do not apply in this case. This statutory exception is similar to the exception codified in ORS 656.267, which provides that "[n]otwithstanding any other provision of this chapter, the worker may initiate a new medical or omitted condition claim at any time." In *Evangelical Lutheran Good Samaritan Soc. v. Bonham*, 176 Or App 490, 497-498(2001), the court held that ORS 656.267 "bars the application of claim preclusion principles to new medical condition claims" because of the statute's unambiguous phrasing. The same rationale applies to the unambiguous language contained in ORS 656.340(1)(c).

SAIF next argues that the Director did not consider all the evidence in reaching his conclusion. In essence, SAIF asserts that because "all of the previous reviewers had reached the opposite conclusion on the ultimate fact in questions-and because in the interim that ultimate fact has become the law of the case-Ms. Anderson's ruling [in the April 17, 2012 Director's Review and Order] is an unwarranted exercise of her discretion, at the least." (August 21, 2012 SAIF Closing Argument, pg. 6).

OAR 436-120-0115 provides the conditions under which SAIF was required to evaluate claimant's eligibility for vocational assistance, including when conditions in ORS 656.340(1) are met.

ORS 656.340(1)(a) provides that the "insurer or self-insured employer shall cause vocational assistance to be provided to an injured worker who is eligible for assistance in returning to work. ORS 656.340(1)(b) further provides,

For this purpose the insurer or self-insured employer shall contact a worker with a claim for a disabling compensable injury or claim for aggravation for evaluation of the worker's eligibility for vocational assistance within five days of:

(A) Having knowledge of the worker's likely eligibility for vocational assistance, from a medical or investigation report, notification from the worker, or otherwise; or

(B) The time the worker is medically stationary, if the worker has not returned to or been released for the worker's regular employment or has not returned to other suitable employment with the employer at the time of injury or aggravation and the worker is not receiving vocational assistance.

OAR 436-120-0005(10) defines “[l]ikely eligible” as meaning “the worker will be unable to return to regular or other suitable work with the employer-at-injury or aggravation or is unable to perform all of the duties of the regular or suitable work and it is reasonable to believe that the barriers are caused by the accepted conditions.”

Finally, ORS 656.340(1)(c) provides, “Eligibility may be re-determined by the insurer or self-insured employer upon receipt of new information that would change the eligibility determination.”

Thus, there were two issues in the dispute before the Director: (1) Whether the October 7, 2011 medical arbiter panel report provided evidence that claimant was “likely eligible” for vocational assistance; and (2) Whether claimant was able to return to regular work. With regard to the first issue, the Director found that the medical arbiter panel concluded that claimant had limitations caused by her accepted conditions that restricted her from performing her regular job (Ex. 18-4). Therefore, the Director concluded that claimant was likely eligible for vocational assistance. The Director’s findings were supported by sufficient evidence in the record and did not amount to an abuse of discretion.

The Director also concluded that Dr. Ha’s “regular work release” was not supported by a preponderance of the medical evidence, including Ms. Kadlicek’s May 5, 2011 finding that claimant could lift and carry no more than 20 pounds and the medical arbiter panel’s finding that claimant could lift and carry no more than 50 pounds occasionally (Ex. 18-5). Therefore, the Director concluded that claimant could not return to regular work as a result of the limitations caused by her work injury. *Id.* Again, there was sufficient evidence in the record to support the Director’s findings on this issue and there is no evidence that the Director abused his discretion or violated a statute or rule in holding that claimant was entitled to a determination of her vocational eligibility. Therefore, SAIF’s request that the April 17, 2012 Director’s Review and Order be reversed is denied. The Order will be approved.

Claimant seeks an assessed attorney fee from SAIF pursuant to ORS 656.385(1) in the amount of \$3,157. That statute provides that in all cases involving a dispute over compensation benefits pursuant to 656.340, where a claimant finally prevails after a proceeding has commenced, the ALJ shall require the insurer to pay a reasonable attorney fee to the claimant’s attorney. The maximum attorney fee allowed absent a showing of extraordinary circumstances is \$3,157. Based on the time devoted to the issues, the complexity of the issues, the value of the interest involved, and the risk that claimant’s counsel may go uncompensated, the maximum fee of \$3,157 is appropriate and will be assessed.

## ORDER

**IT IS HEREBY ORDERED** that the April 17, 2012 Director’s Review and Order is approved in its entirety.

**IT IS FURTHER ORDERED** that Fox Hollow Bend-Bend Assisted Living and SAIF Corporation are assessed a reasonable attorney fee pursuant to ORS 656.385(1) in the amount of \$3,157 to be paid directly to claimant’s attorney.