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In the ORS 656.340 Vocational Assistance Dispute of

**Derrick M. Berg, Claimant**

Contested Case No: 15-072H

Administrative Order No: VO15-080

**PROPOSED & FINAL ORDER**

April 18, 2016

DERRICK M. BERG, Petitioner  
SAIF CORPORATION, Respondent

Before Jill M. Riechers, Administrative Law Judge

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The hearing convened before Administrative Law Judge Jill M. Riechers on March 17, 2016, in Portland, Oregon. Claimant was present and represented by Martin L. Alvey. The employer, Don Tankersley Construction (“Tankersley”), and its insurer, SAIF Corporation, were represented by Elaine Schooler. At hearing, Exhibits 1 through 22, 2A through 2D and 4A were offered and admitted. The record closed on the date of hearing, after the parties presented the case and recorded closing arguments.

### ISSUES

Claimant challenges a December 3, 2015 Director’s Review and Order, VO 15-080, which affirmed SAIF’s October 15, 2015 Notice of Ineligibility for Vocational Assistance (Exs 16, 20).

### FINDINGS OF FACT

On the date he was injured, March 16, 2011, claimant was employed as a seasonal construction laborer. On that day, claimant fell about eight feet after a plank he was standing on gave way. His workers’ compensation claim was accepted for comminuted and depressed fracture of the tibial plateau and proximal metaphysis, mildly displaced fracture of the proximal metaphysis of the fibula and right lateral meniscus tear. The claim was initially closed on April 3, 2012, with an award of eight percent whole person impairment and twelve percent work disability, totaling \$21,656.74 in permanent partial disability compensation. Claimant was determined to be capable of “medium” level work. (Exs 1, 2, 2A).

On April 24, 2012, Colleen Cormack, a rehabilitation consultant, concluded that claimant was not eligible for vocational assistance. (Ex 2A). Ms. Cormack found that claimant’s average weekly wage (“AWW”) was \$503.39, and that there was employment available to claimant in the “medium” physical capacity category that would pay within 80 percent of his AWW. Because claimant was capable of obtaining employment at this “suitable wage” in several occupations in the “medium” work category, he was found to lack a substantial handicap to employment and was consequently deemed ineligible for vocational assistance. (Ex 2A-3, -12, -13). On April 26, 2012, SAIF notified claimant of his ineligibility. (Ex 2C). An August 23, 2012 Director’s Review and Order affirmed the April 26, 2012 ineligibility determination. (Ex 4A).

Claimant filed an aggravation claim in August 2012, which SAIF accepted in October 2012. (Exs 3, 5). Claimant was employed at Tankersley during the 52-week period prior to his aggravation. (Exs 6, 7-2, 15-3). SAIF subsequently accepted “osteomyelitis right proximal tibia secondary to fracture injury of March 16, 2011” and “post-traumatic arthritis right knee” as additional compensable conditions in claimant’s claim. (Exs 8, 10).

On December 19, 2014, claimant changed his attending physician to Amir Mirza, M.D. (Ex 9).

On May 11, 2015, Elyse Berkovitch, P.T. performed a work capacity evaluation (“WCE”). (Ex 11). Ms. Berkovitch concluded that claimant’s functional abilities were in the “medium” category, and that claimant had additional functional deficits relating to static standing and walking on uneven surfaces, and limitations in crawling and crouching. (Ex 11-4, -5).

On May 12, 2015, James Baldwin, M.D. performed an independent medical examination (“IME”). (Ex 12). Dr. Baldwin recommended that claimant work primarily light duty, but with mixed sedentary work. (Ex 12-16). Claimant could work an eight-hour day, and could stand and walk approximately six hours per day, and sit two hours per day. Claimant could climb stairs occasionally, and lift up to 50 pounds infrequently and 25 pounds occasionally. (Ex 12-17). Claimant was able to lift 10 pounds on a regular basis. Dr. Baldwin recommended that claimant avoid squatting and crawling, and kneeling on the right side. Dr. Baldwin also recommended that claimant not work at heights or in conditions that required balance and agility.

On August 21, 2015, Dr. Mirza advised that claimant was medically stationary, and that the May 11, 2015 WCE best represented claimant’s loss of motion and strength. (Ex 13-2). Dr. Mirza concurred with the work capacities and abilities documented in the WCE and the IME. Dr. Mirza later opined that claimant was capable of working at the sedentary or light work level. (Ex 14-2).

On October 14, 2015, Ms. Cormack performed another eligibility evaluation. (Ex 15). Based on the findings of the WCE, IME and Dr. Mirza’s concurrence, claimant was considered to be in the full range of “light” duties with permanent restrictions, resulting in placement in the “sedentary-light” work category. (Ex 15-2, -3). It had been determined that claimant could stand and walk for six hours per day, sit two hours per day, and perform full-time work eight hours per day. Claimant’s AWW of \$194.91 was calculated based on his earnings during the 52 weeks prior to the date of aggravation.<sup>1</sup> (Ex 15-3, -4). Eighty percent of that AWW was the “suitable wage” – \$155.93 per week, or \$9.25 per hour, 17 hours per week.

Ms. Cormack determined that there were a number of positions in the “sedentary” or “light” categories that claimant could perform that would be within his physical restrictions. One of the jobs Ms. Cormack identified was a cashier position, which was in the “light” category, but she noted there were cashier positions available in which the individual could work without being on his feet, and could sit on a stool or chair while working. (Ex 15-11). Some examples were parking lot cashier positions, and gas station and ticket taker positions. Ms.

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<sup>1</sup> See ORS 656.340(5) and OAR 436-120-0007(3).

Cormack concluded that claimant had the skills and physical capacities to obtain employment in a variety of suitable occupations within a reasonable labor market, at the suitable wage of \$155.93 per week. (Ex 15-13). Suitable employment for claimant was 17 hours per week at \$9.25 an hour. Based on that analysis, Ms. Cormack concluded that claimant did not have a substantial handicap to employment, and was therefore not eligible for vocational assistance. (Ex 15-14).

On October 15, 2015, SAIF issued a Notice of Ineligibility for Vocational Assistance. (Ex 16).

Claimant's claim was closed on November 23, 2015. (Ex 18). He received an award of temporary disability for the period of August 21, 2012 through August 21, 2015. Claimant was awarded 12 percent whole person impairment, and 18 percent work disability, resulting in a total permanent partial disability award of \$32,485.11. (Ex 18-1, -3). Claimant's residual functional capacity was determined to be in the "sedentary-light" category. (Ex 18-3).

On December 3, 2015, the Workers' Compensation Division issued the Director's Review and Order ("DRO") that is the subject of the present case. (Ex 20). The director noted that claimant had been employed part-time by his employer at injury until his aggravation. (Ex 20-3). In the case of an aggravation, the rules required the insurer to calculate the suitable wage using earnings from the 52 weeks prior to the aggravation.

The director focused on the cashier position identified in Ms. Cormack's October 14, 2015 report. (Ex 20-3). The director concluded that the AWW at aggravation was \$204.19 per week, and that the suitable wage, based on 80 percent of the AWW, was \$163.35 per week, or \$9.25 per hour working 18 hours per week. Thus, it was concluded that claimant could be suitably employed earning \$163.35 per week. (Ex 20-4). The director found that most cashier jobs required frequent standing and walking, but that claimant needed only 18 hours of work per week to earn the suitable wage, and that he would not need to work an eight-hour day. The director therefore concluded that claimant could return to suitable employment as a cashier, had no substantial handicap to employment and was ineligible for vocational assistance. (Ex 20-5).

Claimant appealed the December 3, 2015 DRO, and the matter was referred to the Workers' Compensation Board. (Ex 21).

At hearing, claimant testified that he is able to perform activities such as grocery shopping and going to his health club to exercise, but if he is up and around for too long, he has problems with his knee. Then, he needs to ice his leg and take pain-relieving medication. Claimant did not believe he could be on his feet for eight hours per day, Mondays, Wednesdays and Fridays, with Tuesdays and Thursdays off. Claimant testified that he wanted vocational assistance so that he could obtain a position paying a livable wage. He stated that he could not afford to work at a part-time job paying only the minimum wage.

Colleen Cormack testified on behalf of employer/SAIF. Ms. Cormack confirmed that she had performed the recent vocational eligibility evaluation, and that in doing so, she reviewed all available records, claimant's permanent restrictions, his vocational and employment history, and

she identified his transferable skills. She then looked up occupations which claimant would be able to perform, given his skills and his restrictions. Ms. Cormack also assessed whether there was a suitable labor market and whether the wage was a suitable wage, using the wage at the time of aggravation as the standard.

Ms. Cormack recalled there were several opportunities she had identified. Focusing on the cashier job that the director relied on in the DRO, Ms. Cormack explained how she came to the conclusion that this would be suitable employment. Claimant met the SVP and educational requirements. The job was in the “light” category, but there were cashier positions that did not require as much standing as other positions. The cashier positions that allowed the workers to sit included some gas station cashier positions and convenience store positions. There was a sufficient labor market for the positions, including part-time positions. After Ms. Cormack performed her study, the labor market had improved such that there were currently more available positions. Ms. Cormack agreed that if a worker was required to miss, for example, three days of work per month, she would advise the worker that it was probably not in his best interests to do that. The cashier position jobs that allowed sitting would permit the job to be classified as “sedentary/light.”

By their demeanor and manner of testimony, I found both claimant and Ms. Cormack to be credible witnesses.

### **CONCLUSIONS OF LAW AND OPINION**

Claimant contends that the December 3, 2015 DRO that upheld SAIF’s vocational eligibility denial should be reversed, and that claimant should be found eligible for vocational assistance services. Employer/SAIF maintain that the December 3, 2015 DRO correctly determined that claimant was ineligible for vocational services, and that it consequently should be affirmed.

ORS 656.340(16)(d) provides, that at a contested case hearing regarding a director’s order concerning vocational services, the decision of the director’s 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.<sup>2</sup>

Claimant contends that he would likely have to miss work two to three times per month performing the cashier position that SAIF and the director determined was suitable. Claimant’s credible testimony left me with no doubt that he might well have difficulty sustaining even part-time work at one of the cashier positions that allows sitting. The attending physician, however, has released claimant to essentially a “sedentary/light” employment category, the category into

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<sup>2</sup> See also OAR 436-001-0225(3)(a) through (d), WCD Admin. Order 15-065, which set forth the same requirements as contained in this statute.

which the identified cashier positions fall. See OAR 436-035-0012(8)(e) and (l).

With respect to the criteria set forth in ORS 656.340(16)(d)(A) through (D), claimant does not contend that the director's decision violates a statute or rule, or exceeds the statutory authority of the agency, or that the decision was made upon unlawful procedure. I do not see any evidence of abuse of discretion in the director's order. Nor is the order characterized by an unwarranted exercise of discretion, given Dr. Mirza's release, which was based on the work capacity evaluation that he indicated best identified claimant's permanent loss of motion and strength, and on his concurrence with Dr. Baldwin's conclusions regarding claimant's current work abilities. Dr. Baldwin released claimant to full-time work, primarily at light duty, but with mixed sedentary work, including sitting two hours per day.

Therefore, I conclude that claimant has not established any of the prerequisites for modification of the DRO that are contained in the statute. The DRO consequently may not be modified.<sup>3</sup>

### **ORDER**

IT IS THEREFORE ORDERED that the Director's Review and Order, No. VO 15-080, dated December 3, 2015, is affirmed.

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<sup>3</sup> One might reasonably question whether the provisions that require that the "suitable wage" for purposes of determining vocational eligibility be based on the wage at aggravation, rather than on the wage at injury, comport with the objectives of the Act set forth in ORS 656.012(2). That policy question, however, is a matter for the legislature, and is not within an ALJ's authority to consider.