

In the Matter of the Vocational Assistance of

**Jolene M. Brill, Claimant**

Contested Case No: 15-065H

Administrative Order No: VO 15-058

**PROPOSED & FINAL ORDER**

March 22, 2016

JOLENE M. BRILL, Petitioner

SAIF CORPORATION, Respondent

Before Aliza Bethlahmy, Administrative Law Judge

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The above-entitled matter was heard and closed by the undersigned Administrative Law Judge in Portland, Oregon on February 22, 2016. Claimant appeared and was represented by Jodie Phillips Polich. The employer, Cascade Funeral Directors Inc., insured by SAIF Corporation was represented by Ben Stewart. Exhibits 1-30, including supplemental exhibit 21A, were received into evidence and the parties have copies.

### **ISSUES**

Claimant has appealed the September 24, 2015 Director's Order which affirmed SAIF's May 22, 2015 Notice of Ineligibility for Vocational Assistance.

### **FINDINGS OF FACT**

Claimant suffered a compensable injury on April 29, 2013. As a result of a trip and fall, Claimant injured her left foot. The insurer accepted a non-displaced fracture of the left fifth metatarsal base and a left ankle sprain. (See Ex. 7, pg. 1).

The insurer denied left Lis franc degenerative changes/degenerative joint disease and left degenerative changes/degenerative joint disease in second and third metatarsocuneiform joints on the basis that the conditions were not compensably related to her work injury. (See Ex. 12, pg. 6). Dr. Johansen, Claimant's attending physician, concurred with Dr. Mesnier, the IME physician, that Claimant's degenerative changes/degenerative joint disease claims were not related to Claimant's injury. (See Ex. 14). Dr. Toal, another IME physician, also diagnosed Claimant's preexisting left foot arthritis. (See Ex. 8, pg. 7).

On December 9, 2014, a Work Capacities Evaluation was done. The December 9, 2014 Work Capacity Evaluation concluded that Claimant was able to stand/walk one hour at a time, and she was found capable of standing and walking for a total of four to six hours in an eight hour day. (See Ex. 9, pg. 7).

At his January 6, 2015 closing exam, Dr. Johansen found Claimant's left ankle sprain as well as the non-displaced fracture of the left metatarsal base medically stationary.

On April 3, 2015, Dr. Johansen opined that Claimant was restricted from being on her feet for more than two hours in an eight hour day. He explained that his restriction on Claimant

being on her feet more than two hours in an eight hour day was not related to her injury. (See Ex. 14, pg. 2, #4).

On April 13, 2015, Dr. Johansen explained that he did not agree with the December 9, 2014 Work Capacities Evaluation concerning Claimant's work restrictions because he felt she could only stand/walk a maximum of two hours a day. He agreed with everything other than the standing/walking component of the evaluation. (See Ex. 15, pg. 1).

A Notice of Closure issued on April 29, 2015 awarding Claimant time loss benefits and a permanent partial disability award. (See Ex. 16, pg. 1).

A vocational eligibility evaluation was accomplished with respect to Claimant. Claimant was found to be ineligible for vocational assistance because the rehabilitation consultant concluded that Claimant had considerable transferrable skills as well as the physical capacities to obtain employment for a variety of suitable occupations with a reasonable labor market and a suitable wage. Claimant has an extensive and varied work history. Claimant was found to not have a substantial handicap to employment and was not eligible for vocational assistance. (See Ex. 17).

The Notice of Ineligibility for Vocational Assistance issued on May 22, 2015. (See Ex. 18).

On August 20, 2015, Claimant was seen by Dr. Hamilton for a Medical Arbitrator Examination. He issued a report on August 21, 2015. (See Ex. 20).

An Order on Reconsideration issued on September 15, 2015. Claimant's permanent partial disability award was reduced. (See Ex. 21A).

On September 24, 2015, the Director affirmed SAIF's May 22, 2015 decision finding Claimant ineligible for vocational assistance. (See Ex. 29).

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

The issue raised by this case is whether Claimant has a substantial handicap to employment and is entitled to vocational assistance.

OAR 436-001-0225 sets out the scope of review when an Administrative Law Judge is reviewing matters within the Director's jurisdiction.

OAR 436-001-0225(3) provides as follows:

“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) Is made upon unlawful procedure; or
- (d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

In this case, the Director’s Order did not violate a statute. There was no unlawful procedure, and the Director’s opinion did not exceed the Director’s statutory authority. The remaining question is whether there was a violation of a rule or if the Director’s Order is characterized by an abuse of discretion or an unwarranted exercise of discretion.

Claimant argues that there was a violation of a rule and that the question is whether Claimant’s limitation or restriction of being on her feet is per a twenty-four hour day or an eight hour work day.

OAR 436-030-0005 defines a “day” as a calendar day unless otherwise specified (e.g., “working day”). See OAR 436-030-0005(2).

Claimant argues that there was a violation of the rule when one looks at the definition of a day. Claimant argues that the Director should have used a 24 hour period of time rather than the eight hours period of time. I disagree. The Medical Arbiter Report as well as Dr. Johansen’s reports were quite clear in specifying that the two hour maximum standing/walking limitation was within an eight hour period. They specified the limitation as being within an eight hour period. I conclude that the “day” defined in OAR 436-030-0005 has been otherwise specified and the eight hour period is clear.

Pursuant to the insurer’s request, Dr. Mesnier examined Claimant and issued at February 11, 2015 report and a March 20, 2015 addendum. Dr. Mesnier did not see any problems due to the work injury which would restrict Claimant from being on her feet more than two hours in an eight hour day and did not see any problems due to the work injury that would restrict Claimant from performing her prior job. (See Ex. 11, pg. 23, #13).

Dr. Johansen opined that his restriction on Claimant being on her feet more than two hours in an eight hour day was not related to Claimant’s injury but explained that he felt the restriction was appropriate. (See Ex. 14, pg. 2, #4).

Based on Claimant’s verbal description of her symptoms and problems, the Medical Arbiter believed that Claimant was prevented from being on her feet more than two hours in an eight hour period. (See Ex. 20, pg. 4, #7).

All of the physicians specifically identified that they were speaking to an eight hour day. The definition of “day” as defined in OAR 936-030-0005 has been otherwise specified.

Finally, having considered all of the evidence, I conclude that the limitation on being on her feet more than two hours in an eight hour period is not related to Claimant’s injury. The question remains as to whether Claimant has a substantial handicap to employment. Claimant argues that it is not important whether or not Claimant is able to return to her job at injury. The question is whether Claimant has a substantial handicap to employment entitling her to

vocational assistance. Claimant argues there is a conflict in the evidence requiring a remand. I disagree. I believe that the evidence is persuasive that Claimant does not have a substantial handicap to employment.

Claimant argues that the matter should be remanded if I conclude that Claimant does not have a substantial handicap to employment. I am not persuaded that a remand is appropriate. There is sufficient evidence to make a decision in this case. I am not persuaded that there is a conflict in the evidence. I conclude that Claimant does not have a substantial handicap to employment warranting vocational assistance. I find no abuse of discretion. There was not an unwarranted exercise of discretion now was there a violation of a rule. There is no basis to modify the Director's Order. The Director's conclusion that Claimant is ineligible for Vocational Assistance is approved.

### **ORDER**

**IT IS HEREBY ORDERED** and this does order that:

- 1) The Director's September 24, 2015 Order affirming SAIF's May 22, 2015 Notice of Ineligibility for Vocational Assistance is approved;
- 2) Claimant's request for relief is denied.