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In the ORS 656.340 Vocational Assistance Dispute of

**Tyler Van Cleave, Claimant**

Contested Case No: 08-150H

**PROPOSED & FINAL ORDER**

January 12, 2009

Tyler Van Cleave, Petitioner

Les Schwab Tire Centers Inc., Respondent

Before John P. McCullough, Administrative Law Judge

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A hearing in the above-captioned case was held in Salem, Oregon on November 25, 2008 before the undersigned Administrative Law Judge. Claimant was present and represented by his attorney, Phil Garrow. The employer, Les Schwab Warehouse Center, and its workers' compensation claims administrator, ESIS, were represented by their attorney, Scott Monfils.

This case involves claimant's September 16, 2002 injury claim with the employer and ESIS. On August 22, 2008, ESIS filed a request for hearing with the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services, appealing a June 25, 2008 "Director's Review and Order" that determined that claimant was eligible for vocational assistance. Pursuant to ORS 656.704(2)(a) and OAR 436-001-0019, WCD referred this matter to the Workers' Compensation Board, Hearings Division, on August 27, 2008.

The issue, as framed by the parties at the hearing, is the propriety of WCD's decision in the June 25, 2008 Order that claimant is eligible for vocational assistance.

At the hearing, Exhibits 1-27, including A, 3A, 3B, 3C, 3D, 3E, 4A, 5A, 6A, 6B, 6C, 6D, 7A, 7B, 8A, 9A, 9B, 9C, 9D, 9E, and 10A, were admitted in evidence. Those exhibits are identified in the "ALJ's Master Exhibit List" contained in WCB file number 08-00150H.

Following the hearing, the record was kept open for the submission of written closing arguments. ESIS' initial written closing argument was received on December 8, 2008. Claimant's written response argument was received on December 15, 2008. ESIS' written reply argument was received on December 22, 2008. The record was closed on that date.

**FINDINGS OF FACT**

On September 16, 2002 claimant injured his shoulders as a result of his employment with Les Schwab Warehouse Center. Thereafter, he filed a workers' compensation claim, and the claim was accepted by ESIS, the employer's workers' compensation claims administrator, for left shoulder bicep tendinitis and bilateral subacromial chronic impingement.

Claimant's claim was closed by a Notice of Closure issued by ESIS on September 8, 2003. He was awarded temporary disability compensation for various periods from October 25, 2002 through August 17, 2003. He also was awarded 17 percent permanent partial disability for the right and left shoulders. His permanent disability award was increased to 19 percent by a September 29, 2003 Order on Reconsideration.

From August 2003 until October 2006 claimant worked as a project manager for a construction company in Salem. From October 2006 until February 2007 he worked as an estimator for a roofing company in Salem.

In February 2007 claimant's claim was reopened for an aggravation. The claim was reclosed by a Notice of Closure issued on June 21, 2007. No additional permanent disability was awarded. The Notice of Closure was set aside by an Order on Reconsideration issued by the Workers' Compensation Division (WCD) on September 14, 2007.

In February 2008 Jackson Littrell, a vocational consultant with VERK Consultants, performed an eligibility evaluation for vocational services for claimant. Littrell met with claimant and obtained a job analysis of his most recent job as a roofing estimator. He sent the job analysis to claimant's treating physician and obtained a response that indicated that claimant would not be able to perform the job's overhead lifting requirement, in terms of frequency during a work day. Thereafter, Littrell performed a "substantial handicap" evaluation, as required by OAR 436-120-0320(11)(c)(C), to determine claimant's eligibility for vocational assistance. Littrell contacted six general contractors and construction contractors in the Salem area to ascertain whether claimant's past work experience as a cost estimator would meet their requirements for a cost estimator position: all six responded affirmatively. Littrell then gathered statistical information regarding wages and job openings for cost estimator positions in Marion, Polk and Yamhill counties and in Multnomah, Washington and Clackamas counties. He obtained this information through the Oregon Employment Department's Oregon Labor Market Information System (OLMIS). Based on the information he gathered, Littrell determined that claimant did not have a substantial handicap to employment. Based on that determination, he concluded that claimant was not eligible for vocational assistance. Claimant was notified of that decision by VERK on March 7, 2008.

On April 21, 2008 claimant, through his attorney, sent a letter to WCD, appealing the ineligibility determination. Thereafter, Andre Allen, a vocational consultant with WCD, conducted an investigation regarding claimant's appeal. On May 22, 2008 he met with claimant, claimant's attorney's legal assistant, ESIS' claims representative, and Littrell. On June 20, 2008 Allen contacted the six employers Littrell had contacted when doing his vocational evaluation. Allen also contacted two other construction contractors regarding the cost estimator position. On June 23, 2008 Allen reviewed all 18 job orders for cost estimators that were posted with the Oregon Employment Department from November 2005 to March 2008. Allen also obtained information through OLMIS regarding projected annual openings for cost estimators in the Marion/Polk/Yamhill region. Based on his investigation, Allen concluded that claimant had a substantial handicap to employment because reasonable employment opportunities were not available for residential and nonresidential construction cost estimators in claimant's local area. Based on that conclusion, Allen, on behalf of WCD, issued an Order on June 25, 2008 that determined that claimant was eligible for vocational assistance.

## OPINION AND CONCLUSIONS

The issue in this case is whether claimant is eligible for vocational assistance. Pursuant to OAR 436-120-0320(11), a worker is eligible for vocational services if the worker: is authorized to work in the United States; is available in Oregon for vocational assistance; and as a result of limitations cause by the injury or aggravation, is 1) not able to return to regular employment, 2) not able to return to any other suitable and available work with the employer at injury or aggravation, and 3) has a substantial handicap to employment and requires assistance to overcome that handicap. Based on both VERK Consultants' and WCD's vocational eligibility evaluations, and based on the contentions stated by the parties at hearing and in their written closing arguments, the only eligibility requirement in dispute in this case is whether claimant has a substantial handicap to employment. Jackson Littrell, a vocational consultant with VERK Consultants, concluded that claimant does not have such a substantial handicap (Ex. 13, p. 10). Andre Allen, WCD's vocational consultant, concluded to the contrary (Ex. 24, p. 7).

My review of WCD's June 25, 2008 Order is governed by ORS 656.283(2) and OAR 436-001-0225(3), which provide that such an order may be modified 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.

Per its opening statement at the hearing and written closing arguments, ESIS contends that Allen, on behalf of WCD, abused his discretion in determining that claimant has a substantial handicap to employment, because he failed to consider cost estimator job opportunities within a reasonable commuting distance of claimant's residence, as required by OAR 436-120-0005(12)(b). Specifically, ESIS contends that Allen should have considered Multnomah, Clackamas and Washington counties in his cost estimator employment availability analysis, and not just Marion, Polk and Yamhill counties.

Under OAR 436-120-0005(11) and (12), when identifying "suitable employment" for the purpose of determining whether a "substantial handicap to employment" exists, a vocational consultant must consider employment located where the worker customarily worked, or within reasonable commuting distance of the worker's residence -- defined as no more than 50 miles one way.

In his March 7, 2008 report, Littrell stated that based on information he obtained through the Oregon Employment Department's Oregon Labor Market Information System (OLMIS), employment projections for cost estimators for Marion, Polk and Yamhill counties were 11 annual openings, 53 annual openings for Multnomah and Washington counties, and 16 annual openings for Clackamas county (Ex. 13, p. 9). Allen also used information from OLMIS and,

like Littrell, determined that there were 11 annual openings for cost estimators in the Marion, Polk and Yamhill county region. However, his evaluation does not indicate that he gave any consideration to projected annual openings in Washington, Multnomah and Clackamas counties (Ex. 24, pgs. 4 and 6).

It is possible that if Allen had looked at cost estimator employment opportunities in Multnomah, Clackamas and Washington counties, he would have found no suitable jobs in those counties within 50 miles of claimant's residence in Salem, or at least not a sufficient number of such jobs for him to reach a conclusion different from that stated in WCD's June 25, 2008 Order. However, the Order does not indicate that Allen considered Multnomah, Clackamas and Washington counties at all. I conclude that his failure in that regard was an abuse of discretion or, in the alternative, a violation of a rule: namely OAR 436-120-0005(12)(b).

Based on the evidence in the record and for the foregoing reasons, I conclude that WCD's June 25, 2008 Order must be set aside. Based on OAR 436-001-0170(4), I also conclude that it is appropriate to remand this matter to WCD to re-determine the "substantial handicap to employment" question, after considering cost estimator labor market information, per the methods set forth in OAR 436-120-0340(2)(g), for Marion, Polk and Yamhill counties, and for Multnomah, Clackamas and Washington counties regarding employment locations within a "reasonable commuting distance" as defined by OAR 436-120-0005(12)(b).

### **ORDER**

**IT IS THEREFORE ORDERED** that the June 25, 2008 Director's Review and Order is set aside.

**IT IS FURTHER ORDERED** that this matter is remanded to the Workers' Compensation Division for a re-determination, in the above-described manner, of the "substantial handicap to employment" question concerning claimant's eligibility for vocational assistance.