

Defendant's Ex. 4: Letter from Frank Dawson dated April 30, 1993.

Defendant's Ex. 5: Letter from Donald Heise dated April 13, 1993.

In addition, the claimant requested an opportunity to submit the entire Department of Labor and Industry file as evidence. The hearing officer indicated that he would review the file for information such as medical records which is relevant to the issue in dispute. Mr. Talbott had no objection to this procedure.

Findings

1. Reference is made to the previous decision of the Vermont Department of Labor and Industry in this matter, Opinion # 1-92WC, which issued on February 25, 1992. The Department has previously established the following facts:

- a. The claimant Frank Dawson suffered a compensable injury to his right shoulder in 1983 while employed at the Price Chopper supermarket in Bennington, Vermont.
- b. The claimant reached a medical end result on January 23, 1991. He received a 15 % permanent partial disability rating for impairment of the right upper extremity. On January 23, 1991, he was released for light duty work.

2. The claimant's employment at Price Chopper ended in August 1986. From August to October 1986 the claimant was employed at Harwood Hill Orchards as an apple grader. He then worked for a month for Ames Department Store in Bennington as a clerk. He worked for Bennington College in Food Service and Maintenance from October 1986 until July 1988.

3. From December 1992 until July 1993 the claimant was employed by MSI -Mace Co. in Bennington, Vermont as a fabricator assembling hand-held mace gas units. This was a part-time temporary position.

4. The claimant earned \$5.00 per hour at Price Chopper. At MSI, he started at \$5.00 per hour with a raise to \$5.50 per hour.

5. The claimant is capable of light duty work. On March 20, 1991, Robert Block, M.D., claimant's treating physician, saw the claimant and wrote that "he has plateaued in his progress at this point. Is capable of light duty work."

6. The claimant is under a 15 pound lifting restriction with respect to his right arm. This restriction prevents him from returning to work as a stock clerk.

7. The claimant's employment at MSI and at other places of employment as well as his recreational activities as a softball umpire make it clear that he retains the capacity to work in a light duty position which would not require heavy lifting or other heavy use of his right arm and shoulder. This ability is consistent with Dr. Block's observations on March 20, 1991.

8. The claimant has identified the travel industry as the field in which he wishes to seek employment. His preferred method of entry into this field is through a 15 week course of study with The Boyd School in Pittsburgh, Pennsylvania.

9. The claimant has worked with both a private rehabilitation specialist and with an employee of the Vermont Division of Vocational Rehabilitation in an effort to reenter the work force.

10. The claimant has rejected two opportunities to receive on-the-job training in the travel industry. He rejected an essentially free course of study with Liberty Travel at their New Jersey training site because he wished to retain the freedom to

select the area in which he would work following his training. He rejected a potential opportunity with Woodside Dorp, a travel agency located in the Albany, New York area because he did not wish to relocate to Albany and because the wage offered was low, \$4.50 per hour.

11. Entry level wages in the travel industry are relatively low -- \$4-7.00 per hour. For many travel agency employees, the opportunities for inexpensive or free travel make up for the low level of compensation.

12. Don Heise, the private vocational rehabilitation counsellor assigned to the claimant's case by Price Chopper's insurance carrier, conducted an extensive search of travel agency opportunities in the Bennington, Vermont and Albany, New York areas on behalf of the claimant. He found very few openings. Approximately two-thirds of the agencies he contacted required experience in the travel industry (in hotels, for example) or provided on-the-job training. Only about one-third of the agencies sought travel school graduates. Entry into the field is typically achieved by getting a bottom-rung, starting position and working up from there.

Conclusions

13. Under the Vermont workers compensation system, the claimant bears the burden of establishing his entitlement to the benefits he seeks. Goodwin v. Fairbanks, Morse & Co., 123 Vt. 161 (1962).

14. Under the vocational rehabilitation provision of the Vermont Workers Compensation Act, 21 V.S.A. § 641(b), the claimant must establish:

- a. that he is unable to perform work for which he has previous training and experience due to a compensable injury; and

- b. that the vocational rehabilitation services which claimant seeks are reasonably necessary to restore him to suitable employment.

15. Workers Compensation Rule 12(c), the rule in effect at the time of Mr.

Dawson's injury, provides specific criteria for the award of workers compensation:

The Commissioner may order an employer to pay for, and may order a disabled worker to accept, reasonable and necessary V.R. services including retraining and job placement, if the Commissioner finds that:

- (1) The worker, as a result of compensable injury or occupational disease, is unable to perform suitable work for which he has previous training or experience.
- (2) The worker is physically and mentally able to undertake retraining or rehabilitation.
- (3) A qualified physician or appropriate facility has recommended in writing a program of rehabilitation or retraining.
- (4) Upon completion the worker is likely to be able to find suitable employment in the area in which he has received retraining or rehabilitation.
- (5) Employment opportunities exist in the area of retraining at a place located at or near the worker's residence or future residence.
- (6) The retraining period or rehabilitation can be completed within a one-year period, or if the program cannot be completed within a one-year period, that there is no other suitable program available which the worker can complete within a year.

16. The new Workers Compensation Rules 26 and 27 (effective September 1, 1993) provide similar guidelines:

"Suitable employment" is defined as employment that is both:

- (1) Reasonably comparable to the claimant's pre-injury job after consideration of wages, potential for advancement, commuting distance, shift and/or other relevant factors; and

- (2) Reasonably attainable given current regional labor market conditions in light of the claimant's age, temperament, education, training, work experience, physical capacities and vocational aptitudes.

Worker's Compensation Rule 26(e).

Vocational rehabilitation shall be provided by an employer when, as a result of a compensable injury or occupational disease, an injured worker requires vocational rehabilitation services in order to return to suitable employment.

Worker's Compensation Rule 27.

17. The claimant has failed to demonstrate under the worker's compensation statute that the benefits he seeks (tuition and other expenses at the 15 week Boyd School program) are reasonably necessary to restore him to suitable employment.

18. The claimant's medical condition does not prevent him from obtaining light duty employment in the Bennington area at a rate of pay comparable to his position at Price Chopper.

19. The travel school is not necessary to obtain an entry-level position in the travel industry. A majority of the potential employers surveyed did not find a travel school certificate to be necessary to obtaining employment. Many employers preferred their own training programs or required other travel-related experience.

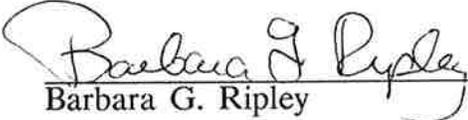
20. There is no evidence that the program which the claimant seeks is likely to result in employment. The claimant's unwillingness to enroll in the Liberty Travel program or to pursue the possibility of employment with the Woodside Dorp employer indicate that he is likely to have great difficulty with the low wages and relocation requirements of the travel industry even after completion of the Boyd program.

21. Applying the criteria of Worker's Compensation Rule 12(c), there is no evidence that upon completion of The Boyd School training that the claimant will find suitable employment or that employment opportunities exist near the claimant's residence or future residence. Opportunities are scarce in the travel industry in the depressed economy around Bennington, Vermont. The claimant's likelihood of obtaining suitable employment in the travel field will not be greatly enhanced by the educational program he seeks.

ORDER

Based on the foregoing Findings and Conclusions, the claim for vocational rehabilitation benefits is **DENIED**.

DATED at Montpelier, Vermont this 25th day of October, 1993.



Barbara G. Ripley
Commissioner