

In the Matter of the Vocational Assistance Dispute of

**Ketring, Ramon D., Claimant**

Contested Case No: HH01-066

**FINAL ORDER**

May 23, 2002

RAMON D. KETRING , Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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The insurer found claimant eligible for vocational assistance and approved a six week training course at the Center for Aviation Training at Embry-Riddle (CATER) for claimant to become a commercial airline aircraft dispatcher. The insurer, however, declined claimant's request to receive one year of vocational training at Emery-Riddle Aeronautical University (Embry) in Prescott, Arizona. The Rehabilitation Review Unit (RRU) of the Department of Consumer and Business Services, Workers' Compensation Division (WCD) issued an administrative order on April 13, 2001 affirming the insurer's decision.

On August 28, 2001, Hearing Officer Ella Johnson conducted a telephone hearing, which was continued to an in-person hearing on December 6, 2001. Petitioner, Ramon Ketring (claimant), appeared *pro se*. Attorney Meg Carmen represented respondent Liberty Northwest Insurance Corporation (insurer). The WCD waived appearance. Petitioner Ketring was the only witness.

The respondent filed exceptions to Hearing Officer Johnson's January 2, 2002 Proposed and Final Contested Case Hearing Order that ordered the insurer to pay for training programs at CATER and at Embry. Before the Director, the issue is the extent of claimant's entitlement to vocational training. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered. The WCD did not respond to the exceptions.

**Findings of Fact**

Claimant graduated high school in 1955. From 1956 through 1957 he attended the US Air Force Flight Simulator School. (Ex. 6) He has worked in the airline industry since 1965. (Ex. B) Claimant earned a ground instructor certificate in 1989. (Ex. U). Claimant has taken and passed the FAA examination for airline dispatcher in 1988, 1990 and 1994. The aircraft dispatcher certificate is good for two years. (Exs. 14, 19).

Claimant injured his lower back in January 1999 while employed as an airline customer service agent with Northwest Airlines, Inc. (employer). The insurer accepted the claim for a L4-5 disc herniation. (Ex. 1c). The claim was closed in August 2000 with an award of 25 percent unscheduled permanent disability. (Exs. 2, 4). The insurer initially found claimant ineligible for vocational assistance because he was not available in Oregon. (Ex. G). The parties subsequently agreed that if claimant was found eligible, that he would make himself available in Oregon for

vocational assistance. (Ex. I).

In August 2000, the insurer determined claimant eligible for vocational assistance. (Ex. 3). Kathryn Heatherly was assigned as claimant's vocational counselor. (Ex. 5). Claimant wrote Ms. Heatherly on November 9, 2000 stating that he wished to become an Aircraft Dispatcher, but that he lacked "recency" of experience, training or knowledge requirements under Federal Aviation Regulations (FAR) sections 65.55 and 65.57. He further stated that he had been accepted to the one year Professional Aeronautics degree program at Embry. He felt he needed this training to receive the knowledge requirement under FAR 65.55. (Exs. J, R, S). Although the Embry program would give claimant the "knowledge" required by FAR 65.55, five of the 12 classes offered at Embry are not required for the "knowledge" requirement. (Exs. 18, P). The Embry program is not a prerequisite for entering the CATER program. (Ex. 5). The tuition for the Embry program is approximately \$22,000. (Ex. 18).

The six week CATER program is designed to prepare students to pass the aircraft dispatcher certification test. (Ex. 10). Upon completion of the CATER program, claimant would be eligible to take the aircraft dispatcher written, practical and oral exam with an FAA designated examiner. The approximate cost of the six week CATER program is \$3,000. (Ex. 6).

During vocational consultations, claimant reiterated his lone vocational interest as an airline dispatcher, but contended that the CATER course was insufficient to prepare him for the FAA certification examination. (Exs. 5, 9, 11). Ms. Heatherly conducted further research regarding the type and level of training needed to meet the FAR's "experience" and "knowledge" requirements. (Ex. 9). Ms. Heatherly confirmed that the Embry training prior to attending the CATER training was not required. The CATER training would qualify claimant to take the FAA certification exam. Passing the FAA exam would qualify claimant as an airline dispatcher. (Ex. 11). Research also indicated that the entry level airline dispatcher wages begin around \$24,000 to 30,000 a year, but can escalate to \$70,000 to 90,000 after five to eight years. (Ex. 6)

A January 10, 2001 letter from Ms. Heatherly to claimant advised him that research indicated that employment in airline dispatching was quite challenging with very few openings, so that any training plan should contain waivers addressing limited employment opportunities, the willingness to relocate and entry level wage acknowledgment. (Ex. 7). If claimant did not want to proceed with only the six week training course, then he should contact RRU for dispute resolution assistance. (Ex. 7).

Claimant requested RRU review contending that his vocational interest was to become an Advanced Instrument Ground Instructor/Aircraft Dispatcher certified. (Exs. 13, 14) RRU found that claimant wanted training as a commercial airline aircraft dispatcher with the primary goal of becoming an instructor with Embry. RRU also found that claimant was steadfast in his desire for this job goal, no other training options were explored. Relying on OAR 436-120-0440(4), RRU concluded that both training programs were not necessary to prepare claimant for suitable employment as an airline dispatcher. RRU reasoned that the six weeks course was sufficient to complete the FAA test and apply for entry level dispatcher jobs. RRU also found that the Embry training would not result in higher return-to-work wage. (Ex. 15).

The hearing officer found that the entry level airline dispatcher wage would not result in suitable employment, but that the training to become a ground instructor would result in a wage “as close as possible” to the wage paid by claimant’s regular work. The hearing officer, thus, concluded that RRU’s decision violated ORS 656.340(5) and OAR 436-120-0005(10)(b). The hearing officer also determined that RRU abused its discretion because its reliance on OAR 436-120-0440 to minimize the length and cost of the training “undercut the whole purpose of vocational assistance because it will not result in suitable employment for claimant.” The hearing officer therefore directed the insurer to pay for the training programs at Embry and at CATER.

### **Conclusions of Law and Opinion**

The director may modify RRU’s administrative order only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). The hearing officer may admit evidence and make independent findings of fact to determine whether any of the factors identified in ORS 656.283(2)(c) were violated. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The hearing officer has the responsibility to ensure that the record is fully developed so that it is sufficient for judicial review. ORS 183.415(10). The director reviews pursuant to ORS 656.283(2) under the record developed before the hearing officer. *Colclasure, supra*.

### **Violation of Statutes or Rules**

The hearing officer determined that RRU violated ORS 656.340(5) and 120-0005(10)(b) because the training would not result in a wage as “close as possible to the wage paid by the worker’s regular employment.” Because the aircraft dispatcher training would result in a \$12.00 per hour entry level wage, the hearing officer found that the only way claimant could find a job which paid a wage as close as possible to his at-injury wage was to either be rehired by his employer after completing the CATER course or by completing both the CATER and Embry training and being hired as a ground instructor, which paid at least \$18.00 per hour.

The issue of whether the vocational training would result in a suitable wage was not raised before RRU. The issue before RRU was whether claimant was entitled to receive the Embry training in addition to the CATER training to meet the vocational goal of aircraft dispatcher. At hearing, claimant contended that the CATER training alone would not result in suitable employment, because it would not result in a suitable wage. Rather, he argued that by obtaining the aircraft dispatcher certification, by completing the Embry Professional Aeronautics program, and by being accepted into Embry’s fellowship program,<sup>1</sup> he could become an instructor at Embry. His desire is to be hired by Embry as a ground instructor with a certified airline transport rating. Claimant further argued that the ground instructor position was suitable employment because it would pay around \$18 an hour. As the insurer correctly points out, the vocational goal of ground instructor has not been evaluated to determine whether it would be appropriate.

The issue, however, remains whether the training goal of aircraft dispatcher would enable

claimant to obtain suitable employment. This in turn, centers on the issue of whether the training would result in a suitable wage. The hearing officer found that the wage must be “as close as possible” to the current wage paid by claimant’s regular work. The hearing officer’s sole reliance on ORS 656.340(5) and OAR 436-120-0005(10)(b) is misplaced.

Claimant was making \$18.07 an hour when he was injured. For the purpose of determining eligibility for vocational assistance, a wage of \$14.45 an hour was used. (Ex. 6-5). Claimant’s time loss benefits were based on a weekly wage of \$858.72. (Exs. A, 15). Claimant testified that he would have been paid \$19.91 per hour under the employer’s current labor contract. Wage information indicated that entry level wages for an airline dispatcher start around \$24,000 to \$30,000 a year (approximately \$12 to \$15 an hour), but can rise to \$70,000 to \$90,000 a year after five to eight years of employment. (Ex. 6).

Within ORS 656.340, subsections (5), (6), and (14) refer to wages. ORS 656.340(5) provides that the “objectives of vocational assistance are to return the worker to employment ... at a wage as close as possible to the weekly wage currently being paid for the worker’s regular employment *even though* the wage available following employment may be less than the wage prescribed in subsection (6).” (Emphasis added). In turn, subsection (6) defines suitable wage as “a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment.”

ORS 656.340(14)(b) states:

“Training shall not be provided to an eligible worker solely because the worker cannot obtain employment, otherwise suitable, that will produce the wage prescribed in subsection (6) of this section unless such training will enable the worker to find employment which will produce a wage significantly closer to that prescribed in subsection (6) of this section.”

The statute and, in particular the rules implementing ORS 656.340, provide differing definitions of suitable wage depending on the circumstances. For example, for the purpose of determining eligibility for vocational assistance, a suitable wage is “a wage at least 80 percent of the adjusted weekly wage (AWW).”<sup>2</sup> For the purpose of providing vocational assistance, a suitable wage is “a wage as close as possible to 100 percent of the AWW. This wage may be

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<sup>1</sup> Claimant has been accepted into Embry’s Professional Aeronautics program, but he has not been accepted into its fellowship program. Claimant argued that he needs the prior program in order to qualify for and get into the fellowship program.

<sup>2</sup> OAR 43-120-0007 defines the methods for calculating AWW.

considered suitable if less than 80 percent of the AWW, if the wage is as close as possible to the AWW.” OAR 436-120-0005(10)(a)(b). OAR 436-120-0400(1)(c) states that training shall be selected as the category of vocational assistance “if the worker needs training in order to return to employment which pays a wage significantly closer to 100 percent of the adjusted weekly wage. ‘Significantly closer’ may vary depending on several factors, including, but not limited to, the worker’s wage at injury, adaptability, skills, geographic location, limitations and the potential

for the worker's income to increase with time as the result of training.”

Both OAR 436-120-0005(10)(b) and 436-120-0400(1)(c) strive for a suitable wage close to 100 percent of the AWW, but acknowledge that a suitable wage may also be less. In particular, OAR 43-120-0400(1)(c) allows consideration of several factors to determine how “close” the training wage should be to the AWW. Here, several factors affect the determination of whether the airline dispatcher training would result in a wage that is suitable: claimant had only expressed one vocational goal—airline dispatcher, the limited geographic and employment opportunities for airline dispatchers, and the potential increase in income over time. Thus, based on the facts of this case,<sup>3</sup> the training plan for airline dispatcher would result in a suitable wage. Therefore, the hearing officer erred in finding that RRU's decision violated the statute or rules.

The question remains whether the CATER training is sufficient, or whether claimant also needs the Embry training in order to obtain employment as an airline dispatcher. RRU relied on OAR 436-120-0440(4) to determine that the CATER training alone was sufficient. To be eligible for a dispatcher certificate, a person must pass the knowledge test prescribed by FAR sec. 65.55 and pass the practical test prescribed by sec. 65.59, and comply with sec. 65.57 requirements. (Ex. 19). Attending the Embry program is not a prerequisite to the CATER program. The CATER program is designed to prepare students to pass the written and practical test to earn a dispatcher certificate from the FAA. Upon completion of the CATER training, claimant would be eligible to take the dispatcher examination with an FAA designated examiner. After passing the FAA exam, claimant would be qualified to work as an airline dispatcher. (Exs. 9, 11). Therefore, the CATER program is sufficient training to obtain employment as an airline dispatcher. The cost of the CATER training is \$3,000 for the six week program. The Embry one-year program costs \$22,000. RRU did not abuse its discretion in approving only the CATER training.

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<sup>3</sup> Because of the factors listed in rule can vary depending on the facts of a particular case, if this issue to arise again, each case should be decided on a case-by-case basis.

**IT IS HEREBY ORDERED THAT:** The January 29, 2002 Proposed and Final Contested Case Hearing Order is reversed and RRU's April 13, 2001 administrative order is affirmed.

Dated this \_\_\_\_\_ day of May 2002.

**MARY NEIDIG, DIRECTOR  
DEPARTMENT OF CONSUMER  
AND BUSINESS SERVICES**

By: \_\_\_\_\_  
John Shilts, Administrator  
Workers' Compensation Division