
In the Matter of the Vocational Assistance of

Ketring, Ramona, Claimant

Contested Case No: H01-066

PROPOSED & FINAL ORDER

January 29, 2002

RAMON KETRING, Petitioner

LIBERTY MUTUAL INSURANCE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge Ella D. Johnson conducted a telephone hearing in this matter on August 28, 2001 which was continued to an in-person hearing on December 6, 2001 in Salem, Oregon. The record closed on December 6, 2001. Petitioner Ramon Ketring (claimant) represented himself *pro se*. Meg Carmen, Attorney at Law, represented respondent insurer Liberty Mutual Insurance (insurer). The Department of Consumer and Business Services, Workers' Compensation Division (the department or WCD) waived appearance at hearing. Claimant testified on his own behalf; the insurer called no witnesses. Claimant appeals an April 13, 2001 Director's Review and Order issued by WCD's Rehabilitation Review Unit (RRU) which affirmed the insurer's denial of claimant's request to receive one-year of vocational training at Emery-Riddle Aeronautical University (Embry) in Prescott, Arizona.¹

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUE

Whether RRU's decision that Liberty was not required to pay for the one-year course at Embry should be modified pursuant to ORS 656.283 because the decision allegedly violates ORS 656.340 and is characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

EVIDENTIARY RULING

WCD Exhibits 1 through 19, claimant's Exhibits A through Z, AA and BB, and insurer's Exhibits 1B, 1C, 20 were admitted into the record at hearing without objection. Claimant objected to the relevancy of insurer's Exhibits 1A and 21. Insurer's Exhibits 1A and 21 were admitted into the record over claimant's objections.

¹ Claimant requests the one-year Embry training in addition to the six-week training already approved by the insurer at the CATER.

FINDINGS OF FACT

Claimant graduated from high school in 1955. From 1956 through 1957, he attended the U.S. Air Force Flight Simulator School and remained in the air force until April 1962. Since 1965, he has been employed in the airline industry. From 1965 until 1984, claimant was employed by Bonanza Airlines (Bonanza) as an aircraft load control/station operations specialist. In 1984, he was furloughed by Bonanza. In 1986, Northwest Airlines (Northwest) purchased Bonanza. On January 24, 1989, claimant became a certified Advanced Instrument Ground Instructor. Claimant did not re-certify with Northwest and his Federal Aviation Administration (FAA) certification expired in 1996. From 1995 through January 1999, claimant worked in a variety of temporary customer service agent positions with Northwest. (Exs. B, 1B, U, 2, 3 and 15).

On January 2, 1999, claimant injured his low back while working as a temporary customer service agent for Northwest securing and forwarding unclaimed baggage. Liberty accepted his L4-5 disc herniation claim on March 18, 1999. His claim was closed by an August 1, 2000 Notice of Closure awarding temporary total disability and 25 percent (80 degrees) of permanent partial unscheduled disability. Claimant was found eligible for vocational assistance on August 11, 2000 and received a Notice of Entitlement to Training effective February 9, 2001. At the time of injury, he was paid \$18.07 per hour with a weekly wage of \$858.72. Under Northwest's current contract with customer service agents, claimant would have been paid \$19.91 per hour. . Due to his injury, claimant is now medically disqualified from working at Northwest as a customer service agent because he is unable to lift the required 72 pounds. (Exs. A, 1B, C, 2, 3, 6; 8; claimant's testimony).

Claimant's vocational interest is in airline transportation procedures, aircraft dispatch and advanced instrument instruction. His vocational goal is to become a ground instructor at Embry-Riddle Aeronautical University (Embry) in Prescott Arizona with an aircraft dispatcher certification through the Center for Aviation Training at Embry-Riddle (CATER), a subsidiary of Embry located in DeLand, Florida. He proposes attending the one-year Professional Aeronautics Program at Embry, which is equivalent to an Associates Degree in Professional Aeronautics followed by a six-week training course at CATER. (Ex. 13; claimant's testimony).

In order to qualify for certification as an airline dispatcher, which is necessary to obtain employment as a airline dispatcher, claimant must successfully complete the Federal Aviation Administration (FAA) examination which has both experience and knowledge requirements. Without additional training, claimant does not meet the regency of experience requirements under Federal Aviation Regulation (FAR) 65.57 and the regency of knowledge requirements under FAR 65.55. (Ex. S; claimant's testimony).

The six-week training course at CATER prepares the individual to take the FAA airline dispatcher certification examination. The cost of the six-week training at CATER is approximately \$3,000. The CATER training is sufficient to meet the "experience" requirement of the examination under FAR 66-57. In the past, claimant has taken the dispatcher certification examination and passed. (Exs. 5, 9, 18, 19; claimant's testimony).

Claimant has been accepted into Embry's Career Professional Aeronautics Program as a non-degree student. The Embry training is sufficient to meet the "knowledge" requirement of the dispatcher examination under FAR 65-55. The one-year Professional Aeronautics Program is not required to obtain certification as a airline dispatcher. The cost of the one-year program at Embry is \$22,000 in addition to the cost of books, fees, and living expenses. Completion of the Embry program would also provide claimant with the opportunity to enter Embry's fellowship program and work as a ground instructor, which pays at least \$18.00 per hour. Embry only hires instructors from within. (Exs. R, 13, 14, 18, 19; claimant's testimony).

Entry level airline dispatcher positions start at \$12.00 per hour (\$20,000 to \$30,000 per year) without regard to the individual's background. The entry-level positions are usually found in the smaller commuter airlines, such as Horizon Air (Horizon), because the large airline companies hire from within. (Exs. 11, 18). To be hired as a dispatcher at Horizon, the applicant must hold a dispatcher license and a higher school diploma or GED but college experience is preferred. The applicant must also have keyboarding skills and excellent verbal communication skills. New dispatchers are usually assigned to work swing or graveyard shift. (Ex. 17).

FINDINGS OF ULTIMATE FACT

Without the Embry training, claimant will not be able to obtain a suitable wage as close as possible to his wage at injury or wage paid for his regular employment.

CONCLUSIONS OF LAW AND OPINION

The issue is whether RRU's decision should be modified pursuant to ORS 656.283 because the decision allegedly violates ORS 656.340 and is characterized by an abuse of discretion. Jurisdiction lies with the director. ORS 656.340(4). I may modify the administrative order only if: (1) it violates a statute or rule; (2) exceeds the agency's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283 and OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence that was not before the department and make independent findings of fact. *Colclasure v. Washington County School District*, 317 Or 526 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proving any fact or position rests with its proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982).

Relying on OAR 436-120-0440(4), RRU found that claimant's request for an additional 12 months of training at Embry was unnecessary because the six-week training course at CATER was all that was needed to qualify claimant to obtain employment as an entry level airline dispatcher job at a small airline. At hearing, claimant contended that RRU's decision violated ORS 656.340² and was characterized by an abuse of discretion. In support of his contention,

² Claimant also argued that insurer violated ORS 656.012(2)(c) because it did not expeditiously handle his request for vocational assistance. ORS 656.012(2)(c) states that one of the objectives of the Workers' Compensation Law is

claimant argued that RRU's decision violated the statute and was characterized by an abuse of discretion because RRU determined that the six-week course for certification of airline dispatchers at CATER would result in suitable employment when the starting pay for entry level airline dispatchers at a small airline is \$12.00 per hour. Claimant credibly testified that, by completing the additionally year at, he would have the opportunity to enter Embry's fellowship program and become a ground instructor which pays at least \$18.00 per hour.

Although I find claimant's argument that the entry level airline dispatcher wage of \$12.00 is not suitable employment given the wage of his regular employment, he cites to the wrong standard. The definition of "suitable employment" requiring a wage of within 20 percent of the wage of his regular employment set forth in ORS 656.340(6)(b)(B) applies only to determination of whether the worker is eligible for vocational, not to whether the wage resulting from the vocational training is a suitable wage. *See* ORS 656.340(6)(b). However, I do find that RRU violated ORS 656.340(5) and OAR 436-120-0005(10)(b) in determining that the CATER training alone was sufficient.

ORS 656.340(5) states in relevant part:

"(5) The objectives of vocational assistance are to return the worker to employment which is as close as possible to the worker's regular employment at a wage as close as possible to the weekly wage currently being paid for employment which was the worker's regular employment even though the wage available following employment may be less than the wage prescribed by subsection (6) of this section. As used in this subsection and subsection (6) of this section, "regular employment" means the employment the worker held at the time of the injury or the claim for aggravation under ORS 656.273, whichever gave rise to the potential eligibility for vocational assistance; or, for a worker not employed at the time of the aggravation, the employment the worker held on the last day of work prior to the aggravation." (Emphasis added).

Additionally, OAR 436-120-0005(10) states:

"(10) "Suitable wage" means:

"(a) For the purpose of determining eligibility for vocational assistance, a wage at least 80 percent of the adjusted weekly wage.

"(b) For the purpose of providing and/or ending vocational assistance, a wage as close as possible to 100 percent of the adjusted weekly wage.

This wage may be considered suitable if less than 80 percent of the adjusted weekly wage, if the wage is as close as possible to the adjusted weekly wage."

to "restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable." (Emphasis added). Although from claimant's perspective it may appear that insurer has not handled his request for vocational assistance in an expeditious manner, unusually complex requests such as his take time to process. Moreover, I do not find his argument in that regard helpful or relevant to this inquiry.

Both the statute and rule require that the vocational assistance result in a wage as “close as possible to the wage paid by the worker’s regular employment. By determining that the six-week training at CATER by itself would result in a suitable wage at \$12.00 per hour, RRU violated subsection (5) of the statute and subsection 10 of OAR 436-120-0005. Claimant’s regular employment at the time of injury was as a customer service agent, which paid \$18.07 per hour when he was injured and now pays \$19.91 hour. While an entry level airline dispatcher at a large airline may pay close to that amount, the large airlines hire from within their organization. I am convinced by claimant’s extensive knowledge of the airline industry gained through over 35 years in the industry and his knowledge of his options within the industry that the only way he could hope to find a job which pays as close as possible to his regular work is to either be rehired by Northwest after completion of the CATER course or by completing both the CATER and Embry training and being hired as a ground instructor at Embry. As noted by RRU, there is very little chance at this point that Northwest will rehire claimant.

I also agree with claimant that RRU abused its discretion. Abuse of discretion exists when an agency “exercises its discretion to an end or purpose not justified by, and clearly against, reason and evidence.” *Far West Landscaping v. Modern Merchandising*, 287 Or. 653, 664 (1979); *Casciato v. Oregon Liquor Control Commission*, 181 Or. 707, 717 (1947). In this regard, I understand claimant’s argument to be that prior to making its decision, RRU was fully aware that the six-week course at CATER would result in employment with a small airline which paid only \$12.00 per hour, whereas the completion of both the CATER and Embry courses would result in a suitable wage which is as close as possible to the wage paid by claimant’s regular employment. Nonetheless, RRU declined to order the insurer to pay for training at both CATER and Embry that would result in a suitable wage. This decision was early against “reason and evidence.”

In reaching that decision, RRU relied upon OAR 436-120-0440 which states in relevant part:

“(4) The selection of plan objectives and kind of training shall attempt to minimize the length and cost of training necessary to prepare the worker for suitable employment.” (Emphasis added).

OAR 436-120-0440(4) requires only that RRU “attempt to minimize the length and cost of training,” but does not require it to do so. Moreover, even though it requires RRU to attempt to minimize the length and cost of the training, it also requires the training to prepare the worker for “suitable employment” which means *inter alia* employment that pays a suitable wage which is as close as possible to the wage paid for claimant’s regular employment. RRU’s attempts at minimizing the length and cost of training here undercuts the whole purpose of vocational assistance because it will not result in suitable employment for claimant.

Consequently, on this record I conclude that the insurer is liable for payment of the training at both CATER and Embry.

ORDER

IT IS HEREBY ORDERED that the insurer's denial of claimant's request to attend the one-year training at Embry is vacated. The insurer is directed to pay for the training programs at both CATER and Embry.

DATED this 29th day of January 2002.

Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel