
In the Matter of the Vocational Assistance Dispute of

Lloyd, James, Claimant

Contested Case No: H02-081

PROPOSED & FINAL ORDER

December 13, 2002

JAMES LLOYD, Petitioner

AMERICAN MANUFACTURERS MUTUAL INSURANCE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge Paul Vincent conducted a telephone hearing in this matter on October 17, 2002. Petitioner James Lloyd (claimant) appeared with attorney Kristina Wolfe. Respondent SAIF Corporation (insurer) appeared through attorney Jerry Keene. The Workers' Compensation Division (WCD) waived appearance. The petitioner appeals an administrative order by the Workers' Compensation Division, Rehabilitation Review Unit (the director or RRU) finding claimant ineligible for vocational assistance. Testimony was taken from James L. Lloyd and Rosemary Lloyd.

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

The issue is whether claimant is eligible for vocational assistance under ORS chapter 656 and OAR chapter 436.

EVIDENTIARY RULINGS

WCD Exhibits 1-27 were admitted into the record without objection. Petitioner's Supplemental Exhibits 17a and 28 were admitted into the record without objection.

FINDINGS OF FACT

I adopt the findings of the Director's Review and Order issued by RRU in this matter on June 4, 2002. (Ex. 25). I make the following additional findings of fact:

Claimant suffered a compensable injury in 1994 while working for Gaard Automation, Inc. His accepted conditions include bilateral carpal tunnel syndrome, ulnar neuropathies and a low back strain, and bilateral medial and lateral epicondylitis. (Exs. 1 to 4; 17). The claim was closed on November 29, 1996. (Ex. 6). Claimant's aggravation rights expired on June 27, 1999. On August 21, 2000, a Board's Own Motion Order determined that claimant's compensable injury had worsened requiring surgery. The claim was reopened. (Ex. 9). The Board's Own Motion Claim was closed on April 19, 2001. (Ex. 16). Following closure, insurer continued to provide vocational assistance benefits to claimant, including a Vocational Eligibility

Evaluation performed by Bostwick, Carter, Petrick & Krier. (Exs. 18 to 21) The Vocational Eligibility Evaluation found claimant ineligible on the grounds that he did not possess a substantial handicap to employment. (Exs. 20, 21). The Notice of Ineligibility did not cite the unavailability of vocational services to a Board's Own Motion claim as a ground for denying eligibility. (Ex. 21).

FINDINGS OF ULTIMATE FACT

The claimant is not eligible for vocational assistance under ORS chapter 656 and OAR chapter 436.

OPINION AND CONCLUSIONS OF LAW

Standard of Review

I may modify the director's 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 an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). In determining whether one of those criteria exists, I may admit evidence, which was not before RRU, and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); see also *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proof rests on the proponent of that fact or position. ORS 183.450(2).

This case involves claimant's appeal of an eligibility evaluation which concluded that claimant was ineligible for vocational assistance because claimant did not have a substantial handicap to employment. Insurer's vocational consultant (and later RRU), determined that the claimant did not have a substantial handicap to employment. Claimant contends that the evaluation's determinations were in error because he is incapable of performing the jobs identified by insurer as suitable for his abilities. Claimant disagrees with the factual findings that led both insurer and RRU to these conclusions. However, because I find insurer's argument that claimant has no legal entitlement to vocational assistance persuasive, I do not reach the factual issues.

Insurer argues that this case falls under the retroactive ambit of amendments to ORS 656.278.¹ This statute has been amended to provide that all re-openings for new or omitted

¹ 656.278 states in relevant part:

(1) Except as provided in subsection (7) of this section, the power and jurisdiction of the Workers' Compensation Board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified in those cases in which:

(a) There is a worsening of a compensable injury that results in the inability of the worker to work and requires hospitalization or inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work. In such cases, the payment of temporary disability compensation in accordance with ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary;

medical conditions brought after aggravation rights have expired are to be processed and dealt with as boards own motion claims. See James J. Kemp, 54 Van Natta 491 (2002); Duane L. Leafdahl, 54 Van Natta 1796 (2002)(subject to provisions of ORS 656.278(2)(a) and (3), vocational assistance not available for claims in boards own motion status). Insurer argues that the amended statute is retroactive in effect. While the director has not examined the retroactivity of the amended statute, the Workers' Compensation Board's reasoning in the cited cases is persuasive:

Our first task is to determine when the legislature intended the amendments to ORS 656.278 and section 10 to take effect. In making that determination, we apply the methodology established by the Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). Under that methodology, we first examine the text and context of a statute because a statute's wording "is the best evidence of the legislature's intent." *Id.* at 610. Related to that principle is a rule of textual construction that governs the scope of our first-level inquiry. That rule limits our role in construing a statute "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted [.]" ORS 174.010; *PGE*, 317 Or at 611.

The context of a statute relevant at the first level of analysis may include other provisions of the same statute and related statutes, *id.* at 610- 11, prior enactments and judicial interpretations of those and related statutes, *Owens v. Maass*, 323 Or 430, 435 (1996), and the historical context of the relevant enactments, *Goodyear Tire & Rubber Co. v. Tualatin Tire and Auto*, 322 Or 406, 415 (1995), on recon 325 Or 46 (1997).

If, but only if, the intent of the legislature is not clear from the first level of analysis may legislative history be considered. *PGE*, 317 Or at 611. If that inquiry

(b) The worker submits and obtains acceptance of a claim for a compensable new medical condition or an omitted medical condition pursuant to ORS 656.267 and the claim is initiated after the rights under ORS 656.273 have expired. In such cases, the payment of temporary disability compensation in accordance with the provisions of ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary, and the payment of permanent disability benefits may be provided after application of the standards for the evaluation and determination of disability as may be adopted by the Director of the Department of Consumer and Business Services pursuant to ORS 656.726; or

(c) The date of injury is earlier than January 1, 1966. In such cases, in addition to the payment of temporary disability compensation, the payment of medical benefits may be provided.

(2) Benefits provided under subsection (1) of this section:

(a) Do not include vocational assistance benefits under ORS 656.340.

fails to yield an unambiguous result, then consideration may be given to pertinent maxims of construction. *Id.* at 612.

Regarding the effective date of the amendments in question, the legislature provided that the amendments to ORS 656.278 and section 10: (1) "become operative on January 1, 2002[;]" and (2) "apply to all claims regardless of date of injury." Or Laws 2001, ch 865, §21, 22(2). The language used by the legislature regarding the effective date of the amendments consists of words of common usage. See PGE, 317 Or at 611 (words of common usage should be given their "plain natural and ordinary" meanings). Nothing about either provision suggests that the legislature's usage differs from common usage.

The context of Oregon Laws 2001, chapter 865, sections 21 and 22(2), which deal with the effective dates of the amendments to ORS 656.278 and section 10, includes the emergency clause enacted by the legislature, which provides that the 2001 Act takes effect on its passage. Passage occurred on July 30, 2001. Or Laws 2001, ch 865, §24. [FN6] To differentiate between the July 30, 2001 "effective date" in the emergency clause, which generally refers to the entire 2001 Act, the legislature explicitly provided in section 22 that amendments to ORS 656.278 and section 10 "become operative on January 1, 2002."

The context of Oregon Laws 2001, chapter 865, section 22(2), which states that amendments to ORS 656.278 "apply to all claims regardless of date of injury [,]" also includes ORS 656.202(2). ORS 656.202(2) was not amended by the 2001 legislature and provides that "[e]xcept as otherwise provided by law, payment of benefits for injuries or deaths under this chapter shall be continued as authorized, and in the amounts provided for, by the law in force at the time the injury giving rise to the right to compensation occurred." (Emphasis added). In providing that the amendments to ORS 656.278 and section 10 "apply to all claims regardless of date of injury[,]" the 2001 legislature provided an exception to the more general provisions of ORS 656.202(2). Thus, the context of the relevant applicability statutes does not affect the interpretation of the legislature's language.

The only plausible interpretation of this language is that the amendments to ORS 656.278 and section 10 are operative on January 1, 2002 and apply to all claims regardless of the date of injury. In other words, the changes to ORS 656.278 and section 10 are effective as of January 1, 2002 and apply to all claims regardless of the date of injury. Because there is only one plausible interpretation, the terms of the statutes are not ambiguous. See *Young v. State*, 161 Or App at 34 (PGE requires a finding of at least two plausible interpretations before ambiguity may be deduced).

Thus, the legislature intended the amendments to ORS 656.278 and section 10 to apply retroactively to pending Own Motion claims. Furthermore, as explained above, the explicit language of sections 21 and 22(2) makes it clear that

the legislature intended that the amendments to section 10 and ORS 656.278 are to apply to all claims as of January 1, 2002.

Given that the changes to ORS 656.278(1) are retroactive, I find that insurer is correct in arguing that the order should be affirmed on different grounds because claimant was not entitled to vocational assistance benefits. Claimant's original claim was closed in 1996 and he was provided with vocational benefits on that claim. Claimant's entitlement to vocational benefits can now rest only on the current Own Motion Claim. ORS 656.728(2) explicitly states that Boards Own Motion benefits provided under ORS 656.728(1) do not include vocational assistance benefits under ORS 656.340. Given this explicit prohibition, claimant was ineligible for benefits.

Claimant argues that insurer cannot seek to apply ORS 656.278(2) during the contested case because it was not raised in the notice of ineligibility. However, claimant has offered no authority for this proposition. As indicated above, ORS 656.283(2)(c) governs the scope of review at this contested case. It provides that I may modify the director's order if it violates a statute or rule or exceeds the statutory authority of the agency. Here, insurer has clearly shown that claimant denied entitlement to vocational benefits by statute. It would be error to make a determination of benefits where there is no statutory entitlement. Accordingly, I modify the order and affirm it on different grounds.

ORDER

IT IS HEREBY ORDERED that the RRU order in this matter, dated June 4, 2002, is affirmed.

DATED this 13th day of December, 2002.

By: _____
Paul Vincent, Hearing Officer
Hearing Officer Panel