

In the Matter of the Vocational Assistance of

**Spring, Daniel D., Claimant**

Contested Case No: HH02-051

**PROPOSED & FINAL ORDER**

August 16, 2002

DANIEL D. SPRING , Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Claimant appeals a March 18, 2002 Director' s Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services. On July 23, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Attorney Charles R. Mundorff represented petitioner Daniel D. Spring (claimant). Attorney Meg Carman represented respondent Liberty Northwest Insurance Corporation (insurer). WCD waived appearance at hearing. Claimant testified on his own behalf and the record closed on the date of hearing.

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.

**ISSUES**

1. Whether RRU correctly determined that claimant is ineligible for vocational assistance because he lacks a substantial handicap to employment.
2. Whether RRU correctly determined that claimant is ineligible for vocational assistance because he is unavailable in Oregon.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 14 were admitted into the record without objection. Insurer's Supplementary Exhibits 1a, 1b, 1c, 3a and 5a were also admitted into the record without objection.

**FINDINGS OF FACT**

- (1) On April 8, 1996, claimant slipped and fell while working as a pole barn builder. Claimant lived and worked in Oregon. (Ex. 1).
- (2) Insurer accepted a lumbar strain as a compensable condition. (Ex. 3-1).

- (3) On July 22, 1996, the claim was closed without permanent partial disability. (Ex. 2).
- (4) From December 23, 1998 through February 26, 1999, claimant worked as a courier for a parcel delivery service in Santa Clara, California, earning \$2,386. (Exs. 5-2, 6-1 and 7-5).
- (5) On December 30, 1998, claimant filed an aggravation claim. (Ex. 3-1).
- (6) By stipulation dated October 19, 1999, insurer accepted the aggravation claim. (Ex. 3-3).
- (7) During the 52-week period prior to the aggravation, claimant collected no unemployment insurance payments. (Ex. 5).
- (8) In June 2001, Robert S. Millard, MD, San Jose, California imposed physical restrictions and requested vocational retraining on claimant's behalf. (Ex. 4-1).
- (9) In July 2001, claimant submitted a Work/Educational History Form to insurer. (Exs. 5 and 6).
- (10) On September 3, 2001, claimant declined a job offer made by the employer at injury. (Ex. 5a).
- (11) On December 12, 2001, insurer issued a Notice of Ineligibility for Vocational Assistance. (Ex. 7).
- (12) At hearing, claimant testified by telephone from Alaska. (Testimony of claimant).

### CONCLUSIONS OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance because he lacks a substantial handicap to employment.

RRU correctly determined that claimant is ineligible for vocational assistance because he is unavailable in Oregon.

### OPINION

Jurisdiction over this vocational assistance dispute 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) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of the evidence).

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. RRU determined that claimant is ineligible for two reasons. First, claimant lacks a substantial handicap to employment. Second, he is unavailable for work in Oregon. I agree on both points.<sup>1</sup>

### Substantial handicap

ORS 656.340(6)(a) lists the criteria for eligibility including the requirement of a substantial handicap to employment. ORS 656.340(6)(b)(A) defines the term “substantial handicap”<sup>2</sup> and provides:

A “substantial handicap to employment” exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

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<sup>1</sup> I also note that claimant declined a job offer made by the employer at injury. *See OAR 436-120-0350(5)*.

<sup>2</sup>OAR 436-120-0005(8) provides:

“Substantial handicap to employment” means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. “Knowledge,” “skills,” “abilities” have meanings as follows:

a) “Knowledge means an organized body of factual or procedural information derived from the worker’s education, training or experience.

(b) “Skills” means the demonstrated mental and physical proficiency to apply knowledge.

(c) “Abilities” means the mental and physical capability to apply the worker’s knowledge and skills.”

ORS 656.340(6)(b)(B) provides in part:

(B) “Suitable employment” means:

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(iii) Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular

employment as defined in subsection (5) of this section.

ORS 656.340(5) provides in part:

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<sup>3</sup>, whichever gave rise to the potential eligibility for vocational assistance\*\*\*\*\*.

OAR 436-120-0007 prescribes the method for calculating suitable wage. OAR 436-120-0007(3) and (5) provide:

(3) When the job at injury or the job at aggravation was temporary or seasonal, and the worker received unemployment insurance payments during the 52 weeks prior to injury or aggravation, calculate the weekly wage as follows, then convert to the adjusted weekly wage as described in section (7)<sup>4</sup> of this rule.

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(5) When the job at aggravation was other than as described in section (3) of this rule, calculate the worker’s weekly wage using the methods described for determining temporary total disability in OAR 436-060<sup>5</sup>, and then

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<sup>3</sup> ORS 656.273(1) provides in part:

After the last award or arrangement of compensation, an injured worker is entitled to additional compensation for worsened conditions resulting from the original injury.

<sup>4</sup> OAR 436-120-0007(7) prescribes the formula for calculating adjusted weekly wage after arriving at the weekly wage.

<sup>5</sup> OAR 436-060-0025(5)(a)(A) delineates temporary total disability calculations for injured workers employed varying hours shifts or wages and provides:

convert to the adjusted weekly wage as described in section (7) of this rule.

RRU calculated claimant’s suitable wage pursuant to OAR 436-120-000(5), determined that claimant lacks a substantial handicap to employment and concluded that he is ineligible for vocational assistance. Claimant contends that the suitable wage should be calculated according to subsection (3) rather than (5), and therefore, he is

eligible for vocational assistance. Claimant's argument is not persuasive. Subsection (3) is inapplicable because claimant did not receive unemployment insurance payments during the 52 weeks prior to the aggravation in December 1998. Therefore, RRU correctly applied subsection (5) and determined that claimant lacks a substantial handicap to employment. Accordingly, claimant is ineligible for vocational assistance.

### **Outside state**

OAR 436-120-0320(9)(b) provides:

(9) A worker entitled to an eligibility evaluation is eligible for vocational services if all of the following additional conditions are met:

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(b) The worker is available in Oregon for vocational assistance. The insurer shall consider the worker available in Oregon if the worker lived within commuting distance of Oregon or documents, in writing, willingness to relocate to or within commuting distance of Oregon within 30 days of being found eligible. The worker is responsible for costs associated with being available in Oregon. The requirement that the worker be available in Oregon for vocational assistance does not apply if the Oregon subject worker neither worked nor lived in Oregon at the time of the injury.

RRU determined that claimant is ineligible for vocational assistance because he is unavailable in Oregon. Inasmuch as claimant lived and worked in Oregon on the date of injury, availability in Oregon is a condition of eligibility. At the time of the aggravation, claimant lived in California. At hearing, claimant testified by telephone from Alaska and

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(A) Insurers shall use the worker's average weekly earnings with the employer at injury for the 52 weeks prior to the date of injury. \*\*\*\*\* For workers employed less than 52 weeks or where extended gaps exist, insurers shall use the actual weeks of employment (excluding any extended gaps) with the employer at injury \*\*\*\*\*.

offered no evidence that he would willingly relocate to Oregon at his own expense. Therefore, claimant is ineligible for vocational assistance.

In conclusion, I agree with RRU's determination that claimant is ineligible for vocational assistance because he lacks a substantial handicap to employment and because he is unavailable in Oregon. Accordingly, I affirm.

**ATTORNEY FEES**

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

**ORDER**

IT IS HEREBY ORDERED

The Director's Review and Order dated March 18, 2002 is affirmed.

DATED this \_\_\_\_ day of August 2002.

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Catherine P. Coburn, Administrative Law Judge  
Hearing Officer Panel