
In the Matter of the Vocational Assistance Dispute of

Stengel, Robert, Claimant

Contested Case No: H01-097

PROPOSED & FINAL ORDER

March 7, 2002

ZURICH AMERICAN INSURANCE CO., Petitioner

ROBERT STENGEL, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge Paul Vincent conducted a hearing in this matter on January 9, 2002. Petitioner Zurich American Insurance Co. (Zurich or insurer) appeared through attorney Bradley Scheminske. Respondent Robert Stengel (claimant) appeared with attorney Roger Ousey. The Workers' Compensation Division (WCD) waived appearance. The petitioner appeals an administrative order by the Workers' Compensation Division, Rehabilitation Review Unit (RRU) requiring insurer to determine claimant's eligibility for vocational assistance. Petitioner called Ann McKinney, Cassandra Moore and Robert Stengel as witnesses. Respondent called Robert Stengel as a witness.

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 RRU correctly determined that SAIF was required to determine claimant's eligibility for vocational assistance.

EVIDENTIARY RULINGS

WCD Exhibits 1-22 were admitted without objection. Petitioner's Exhibits 11A, 15A, 15B, 13A, 13B, 18 and 18A were admitted without objection. Respondent's Exhibits 1A, 1B, A, 1B-H, 2A, 3A-E, 5A were admitted without objection.

STIPULATIONS

The parties stipulated to the following findings of fact at hearing:

If Mr. Ousey were called as a witness in this matter he would testify that he did not receive the Notice of Ineligibility for Vocational Services (NOI) until some time in the month of July 2000. See Ex. 19-3.

If Mr. Scheminske were called as a witness, he would testify that he was never personally contacted by Heather Grogan in regards to the investigation that led to this order. See Ex. 19-1, 2nd paragraph.

Mr. Scheminske contacted Heather Grogan on January 8, 2002, and was told she would not voluntarily testify at this contested case hearing. Mr. Scheminske contacted Grogan's supervisor, Teddy Forester, and she indicated that if Grogan were subpoenaed DOJ would seek to quash the subpoena.

FINDINGS OF FACT

The claimant injured his left arm and thumb while working as a permanent, year-round truck driver for employer Combined Transport (Combined). Claimant is left handed. Insurer accepted the conditions of C5-6 herniation, left side with left carpal tunnel syndrome. To date, he has received 8 percent scheduled permanent partial disability (PPD) for his left thumb and 50 percent PPD for his cervical spine. His total disability was based on a weekly wage of \$757.73. (Exs. 9, 10, 12).

At the time of injury, claimant lived and worked in Arizona. As a long haul truck driver, claimant's job took him all over the contiguous 48 states of the United States and into Canadian provinces. Less than 10 percent of his annual mileage driving for the company was driven within the state of Oregon. Claimant drove fewer miles in Oregon than he did in Arizona. The majority of claimant's time driving was spent on long-haul trips outside of the state of Oregon. (Testimony of Claimant, Testimony of Ann McKinney, Testimony of Cassandra Moore).

Following his injury, Ann McKinney, Vocational Counselor for Intracorp, was hired by employer to provide vocational services to claimant. In January 2000, McKinney spoke to claimant in regard to her and the employer's dissatisfaction with claimant's progress in treatment that was being delivered in Arizona¹. Claimant was told by McKinney that he had to be in Oregon for medical treatment and light duty work. Claimant moved temporarily to Oregon to obtain medical treatment because of McKinney's statements. Claimant's airfare was paid by the employer and he was housed in Oregon at the employer's expense. (Testimony of claimant; Testimony of Ann McKinney).

While living in Oregon, claimant began a romantic relationship that eventually led to his marriage to a Medford resident in August 2000. The marital household was established in Medford. After his marriage, claimant no longer intended to live temporarily in Oregon but rather intended to live permanently in Oregon with his wife. Claimant's marriage later faltered, and claimant returned to Arizona when he and his wife separated. Claimant returned to Arizona due to marital problems. (Testimony of Claimant).

On June 7, 2000, consulting physician Louis E. Murdock, MD, declared claimant's carpal tunnel syndrome medically stationary. (Ex. 2).

On June 19, 2000, employer wrote a job offer letter for a modified position as a driver trainer/evaluator. "Our goal is to place you as a regular duty truck driver (within your Dr.'s modifications). Until that is possible the job of driver/trainer is available effective June 19, 2000." Mr. Stengel accepted this job on June 20, 2000. (Ex. 3; Testimony of Claimant).

¹ Employer and claimant's present different versions of this discussion. I find claimant to be an accurate historian and truthful witness. Accordingly, I accept his version of this event.

On September 8, 2000, a physical capacity evaluation (PCE) reported claimant could work in light/medium work. He could lift up to 35 pounds occasionally, 23 pounds frequently and 10 pounds constantly. He was limited as to occasional reaching and crawling. He could do simple grasping, fine finger work push/pull and low speed assembly. (Ex. 4).

On September 21, 2000, attending physician Ronald Henderson, MD, declared claimant medically stationary and concurred with the physical restrictions of the PCE. (Ex. 5).

On March 15, 2001, Intracorp on behalf of Zurich prepared a Notice of Ineligibility for Vocational Assistance (NOI) which noted:

“The reasons for your inability to return to work is that your employer offered you suitable employment which you performed for a six month period. Upon being declared medically stationary, you were offered a permanent position as a driver/trainer/evaluator at a suitable wage from which you were terminated for reasons unrelated to your injury with Combined....” (Ex. 13).

Claimant did not receive a copy of the March 15, 2001 NOI, nor was it mailed to claimant.² (Exs. 13, 13A; Testimony of Claimant; Testimony of Ann McKinney; Stipulation of Parties).

On June 20, 2001, claimant requested administrative review of insurer’s failure to determine claimant’s eligibility for vocational assistance. (Ex. 14).

On June 25, 2001, insurer sent a second NOI which listed the possible provisions under which a claimant might be found ineligible for vocational assistance, but did not specify which provision applied to claimant. (Ex. 15).

On July 2, 2001, claimant’s attorney objected to insurer’s NOI and requested administrative review by RRU. (Ex. 16).

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

² Insurer presented testimony by McKinney that she prepared the NOI and placed it “in the mail” with proper certification and postage. However, she testified that the mailing was not in fact delivered to the custody of the US postal office, but instead was left at a mail drop at her place of business. This testimony, combined with the testimony of claimant and his attorney that neither received the mailing, lead me to the conclusion that the mailing was never properly mailed in the sense that it never entered into the custody of the US Postal Service. In particular, I note that the “certification” relied upon by employer lacks any official postal marking.

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).

436-120-0004(1)(b)

Insurer argues that RRU erred in finding that claimant's request for administrative review was timely on June 20, 2001. Pursuant to OAR 436-120-0004, RRU concluded that the NOI prepared by insurer on March 15, 2001 was never received by claimant or his attorney and therefore claimant's request for administrative review was timely. OAR 436-120-0004(1)(b) states in relevant part:

(b) All notices and warnings except those notifying a worker of eligibility or entitlement to training shall contain the worker's appeal rights in bold type, as follows:

"If you disagree with this decision, you should contact (person's name and insurer) within five days of receiving this letter to discuss your concerns. If you are still dissatisfied, you must contact the Workers' Compensation Division within 60 days of receiving this letter or you will lose your right to appeal this decision. A consultant with the division can talk with you about the disagreement and, if necessary, will review your appeal. The address and telephone number of the division are: (address and telephone number of the Workers' Compensation Division)."

First, I note that factually the insurer contended at hearing that the NOI was properly mailed on March 15, 2001 and is therefore in effect with no timely review requested. As indicated in my fact findings above, I have concluded that the preponderance of evidence presented at hearing leads to the conclusion that not only was the March 15, 2001 NOI not received by either claimant, his counsel, or RRU, but that a preponderance of the evidence leads to the conclusion that it was not mailed at all in that it was not delivered to the US Postal Service.

Second, I find that the respondent's position on this issue is persuasive. Respondent contends that the Agency's interpretation of "send" in OAR 436-120-0004 to require receipt by the intended recipient is a plausible construction of its own rule and should therefore be deferred to. As pointed out by claimant, a second rule, OAR 436-120-0008(1)(a), states that a "worker's request for review must be mailed or otherwise communicated to the department no later than the 60th day after the date the worker received written notice of the insurer's action; or, if the worker was represented at the time of the notice, within 60 days of the date the worker's representative received actual notice." Read together with OAR 436-120-0004(1)(b), it would be implausible not to accept the agency's interpretation of its rules to require receipt or actual notice by claimant and his counsel before the sixty day time period begins to run.

Agency interpretations of their own rules are appropriately given a degree of assumptive

validity if the agency has expertise based upon qualifications of its personnel because of its experience in the application of the statute to varying facts. *Springfield Education Association v. Springfield School District No. 19*, 290 Or 217, 227-228 (1980). Here, the rule is being interpreted by the agency that adopted it and the interpretation is a plausible one. Accordingly, I defer to the agency on this issue.

436-120-0350(4) & (5)

Insurer argues that RRU erred in finding that claimant had not been employed for more than 60 days in suitable employment and therefore remained eligible for vocational assistance under OAR 436-120-0350. RRU found against insurer on this issue in its administrative order as follows:

OAR 436-120-0350 provides the conditions when a worker is ineligible for vocational assistance and includes:

(3) The worker has been employed for at least 60 days in suitable employment after the injury...

(4) The worker, prior to beginning an authorized return-to-work plan, refused an offer of suitable employment, or left suitable employment after the injury...for a reason unrelated to the limitations due to the compensable injury.

Because I found the driver/trainer/evaluator position was not suitable, I conclude that [claimant] did not leave suitable employment for reasons unrelated to the limitations of his injury. (Ex. 19-4).

RRU had previously concluded in its order that claimant was not engaged in "suitable employment" as that term is defined in OAR 436-120-005(9) because the employment was not permanent:

Zurich did not submit any evidence that the driver/trainer/evaluator position was a permanent, year-round job. Combined's job offer letter clearly stated the intent of the modified position was to return Mr. Stengel to his regular work as a truck driver. I therefore conclude that the job with Combined was not suitable because it was not a permanent, year-round position. [Claimant] was living in Arizona when he was injured. I further conclude the job was not suitable because it was not located where he customarily worked. (Ex. 19-4).

While insurer argues that there is no evidence in the record that the driver/trainer/evaluator position was a permanent, year-round job, I find RRU's interpretation of the letter plausible and reasonable. The letter clearly states that the job is only available until such time as he could be placed in a "regular duty truck driver" position within his doctor's prescribed limitations. It was reasonable for RRU to interpret this language as indicating that the

job was not a permanent one and I make the same finding.³³

Availability in Oregon for Vocational Assistance – OAR 436-120-0320(9)

Insurer argues that RRU erred in finding that claimant was not precluded from receiving vocational assistance by OAR 436-120-0320(9). The administrative order stated:

OAR 436-120-0320 provides the conditions for a worker to be determined eligible for vocational assistance and includes....

(9)(b) The worker is available in Oregon for vocational assistance...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.

Mr. Stengel neither worked nor lived in Oregon at the time of his injury. I therefore conclude he is not required to be in Oregon to receive vocational assistance. (Ex. 19-4).

Insurer's contention is that claimant worked in Oregon at the time of his injury because a portion of his mileage was incurred within the State of Oregon. However, claimant resided in the state of Arizona at the time of injury, he received his dispatches in Arizona and more than 90% of his mileage was incurred out-of-state with more miles incurred in Arizona than in Oregon. Under these facts, I find the Agency's interpretation the phrase "worked...in Oregon" not applicable to claimant to be a reasonable one. Again, I must find that the agency's interpretation of its own rule should be given a degree of assumptive validity if the agency has expertise based upon qualifications of its personnel because of its experience in the application of the statute to varying facts. *Springfield Education Association v. Springfield School District No. 19*, 290 Or 217, 227-228 (1980). Here, the rule is being interpreted by the agency that adopted it and the interpretation is a plausible one. Accordingly, I defer to the agency on this issue.

Abuse Of Discretion / Clearly Unwarranted Exercise Of Discretion

Insurer argues that RRU's actions in the investigation of this dispute and preparation of the administrative order are characterized by an abuse of discretion or clearly unwarranted exercise of discretion. The insurer contended at hearing that the record shows that the RRU vocational consultant who prepared the order was either "grossly incompetent," "biased" or guilty of "intentional falsehood." I find none of these present in the record. Simply put, I find that none of particulars cited by insurer rise to the level of an abuse of discretion or unwarranted exercise of discretion; they show only that the insurer disagrees with the factual conclusions

³ Because I find that RRU's interpretation of evidence was reasonable and supported by a preponderance of evidence presented at hearing, I do not reach the claimant's contention that the facts at hearing also show that the driver/trainer/evaluator position was not within claimant's physical capabilities.

reached by RRU or the phrasing of the order.

ORDER

IT IS HEREBY ORDERED that the RRU's order in this matter, dated August 24, 2001, is affirmed.

DATED this 7th day of March, 2002.

By: _____
Paul Vincent, Hearing Officer
Hearing Officer Panel