

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Faust, Ronald C., Claimant

Contested Case No: H03-003

PROPOSED AND FINAL ORDER

March 11, 2003

RONALD C. FAUST, Petitioner

LUMBERMAN'S MUTUAL INSURANCE CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a November 6, 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 (department or director). On February 28, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Attorney David A. Vinson represented petitioner Ronald C. Faust (claimant). Responding insurer, Lumberman's Mutual Insurance Corporation (insurer) failed to appear. 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.

ISSUE

Whether RRU correctly determined that insurer is not liable for claimant's educational expenses at the University of Oregon in Spring Term, 2002.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 11 as well as claimant's Supplementary Exhibit 12 were admitted into the record without objection.

FINDINGS OF FACT

On November 5, 1998, claimant suffered a lumbar injury while working as a manufacturing account engineer. Insurer accepted L5-S1 and L4-5 disc herniations as compensable conditions. (Exs. 1, 2, and 3.)

- (1) On February 28, 2000, the claim was closed with a 17 percent unscheduled permanent partial disability award. (Ex. 2.)

- (2) On October 23, 2001, claimant and insurer entered into a Return-to-Work Plan specifying that claimant would undergo formal training at the University of Oregon from January 7, 2002 through September 5, 2003. The agreement states, “Worker will attend all classes as scheduled and complete all assignments on time. Counselor will be notified within 1 working day if training is missed for any reason.” Above claimant’s signature, the agreement further states, “I understand my responsibilities under this plan and have received a copy of the plan support and both sides of this form. I understand that the Worker’s Compensation Division may review the plan. My signature authorizes the training facility to release grades to my counselor and insurer.” The Return-to-Work Plan is also signed by Anami Ridge, Plan Developer and Paula J. Blanchette, insurer’s claims manager. (Ex. 4.)
- (3) On March 14, 2002, claimant registered for classes. On March 31, 2002, claimant purchased books and supplies for Spring Term from the University of Oregon bookstore. On April 1, 2002, claimant began attending classes. (Testimony of claimant.)
- (4) On March 25, 2002, claimant’s tuition and matriculation fees became due and payable. (Ex. 11-5.)
- (5) For Spring Term, 2002, claimant incurred \$1,480.52 in educational expenses consisting of \$1,055.90 tuition, \$224.62 books and supplies and \$200 matriculation fee. Claimant charged the books and supplies on his personal credit card. (Exs. 11 and 12; testimony of claimant.)
- (6) On April 11, 2002, the Workers’ Compensation Board received a Claims Disposition Agreement (CDA) executed by the parties. On April 18, 2002, the Board approved the CDA. (Ex. 6.)
- (7) On May 31, 2002, insurer cancelled payment of \$1,055.90 of claimant’s fees. On April 15, 2002, insurer cancelled payment of \$311.10 of claimant’s fees. (Ex. 12.)
- (8) On July 1, 2002, claimant paid the tuition and matriculation fees to the University of Oregon in order to protect his personal credit. (Testimony of claimant.)
- (9) To date, insurer has paid none of claimant’s Spring Term educational expenses. (Testimony of claimant.)

CONCLUSION OF LAW

RRU incorrectly determined that insurer is not liable for claimant’s educational expenses at the University of Oregon for Spring Term, 2002.

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if it: (1) 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; 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 the 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).

Where respondent failed to appear at hearing after being duly notified of the time of the hearing, and his failure to appear is not due to circumstances beyond his reasonable control. I may issue a default order upon a showing of a *prima facie* case made upon the record. OAR 137-003-0670(2). Here, insurer was notified by certified mail of the hearing date. Insurer failed to appear and offered no explanation of any circumstances that would constitute circumstances beyond its reasonable control. Therefore, I find that a default order is appropriate.

RRU determined that insurer was not liable for claimant's Spring Term educational expenses because the parties entered into a CDA during Spring Term. In contrast, claimant contends that payment of the educational expenses was not stayed because they became due and payable before WCB received the CDA. I agree.

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to eligible injured workers. This obligation includes payment of approved educational expenses. Additionally, ORS 656.236 governs CDA's and provides:

(1)(a) Any disposition shall be filed for approval with the board.
*** Submission of a disposition shall stay all other proceedings
and payments obligations, except for medical services on that
claim. ***

The plain meaning of the statute indicates that payment obligations are stayed on the date the CDA is submitted to the board for approval. RRU mistakenly found that educational expenses are due at the end of the school term, or in June for Spring Term. I find that this error constitutes abuse of discretion and therefore, I modify the underlying administrative order.

Here, claimant's educational expenses became due on March 25, 2002 at the beginning of Spring Term. Also, it was necessary for claimant to purchase books at the beginning of Spring Term. However, the CDA was submitted to the board several weeks later, on April 11, 2002. Inasmuch as the educational expenses were not stayed until after they became due, insurer is liable for them. Accordingly, insurer is liable to claimant for \$1,480.52.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Applying the factors listed in OAR 436-001-0265, I find that \$2,125 is a reasonable fee for claimant's attorney's services in this case.

ORDER

IT IS HEREBY ORDERED

The Director's Review and Order dated November 6, 2002 is reversed.

DATED this 11th day of March 2003.

Catherine P. Coburn, Administrative Law Judge
Hearing Officer Panel