

In the Matter of the ORS 656.340 Vocational Rehabilitation Dispute of

Fossum, Janean, Claimant

Contested Case No: H03-025

PROPOSED AND FINAL ORDER

November 7, 2003

LIBERTY NORTHWEST INSURANCE, Petitioner

JANEAN FOSSUM, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Liberty Northwest Insurance (Insurer) appeals a Director's Review and Order issued on February 24, 2003 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division, Department of Consumer and Business Services.

Hearing in this matter was held via telephone on May 29, 2003, with ALJ Paul Vincent presiding. Petitioner Liberty was represented by attorney Darren Lee. Respondent Janean Fossum (Claimant) was present and represented by her attorney, Tom Cary. The evidentiary record closed on May 29, with the entire record closing upon receipt of Mr. Cary's statement of services on June 3, 2003.

After the record closed in this matter, ALJ Vincent began working for a different section of the Office of Administrative Hearings and this matter was transferred to the undersigned. I have listened to the tape of the May 29 hearing, including the arguments of the parties, and I have read and reviewed all of the exhibits in the record before making the decision that follows.

ISSUE

Whether RRU's determination that claimant was eligible for vocational services was correct.

EVIDENTIARY RULINGS

Workers' Compensation Division (WCD) Exhibits 1 through 13 were admitted into evidence. Claimant's objection to the relevance of portions of Exhibit 8 was overruled. Additional exhibits 8A and 14 through 17 were admitted without objection. Claimant did not object to Exhibit 14, but clarified that she did not concede the accuracy of the amounts noted in that document.

FINDINGS OF FACT

(1) Claimant suffered an injury to her right hand, arm and shoulder on November 13, 1998, while working as a nurse for McKenzie-Willamette Hospital. The employer filled out the 801 form, including information concerning claimant's work schedule, and provided that

document to its insurer. The employer indicated that claimant worked from 8am to 5pm, Monday through Friday, at \$22.82 per hour. (Ex. 1). Insurer accepted the claim.

(2) Based upon the information provided by the employer, insurer determined that claimant's weekly wage was \$912.80, and paid compensation based upon that wage. (Ex. 2). On December 13, 2001, insurer declared claimant ineligible for vocational assistance because it was concluded that claimant could return to her customary nursing duties. (Ex. 3). Claimant contested the insurer's decision. On April 29, 2002, the Director found that claimant was eligible for vocational assistance because the work she could return to would not pay a suitable wage (i.e. within 80 percent of the wage at injury. (Ex. 4). Insurer did not appeal the Director's decision.

(3) On May 8, 2002, a Notice of Eligibility was sent to claimant and she began the process of evaluation with Sturges Vocational Consulting. (Ex. 5, 7). On November 7, 2002, insurer wrote a letter to claimant contending she had been overpaid in temporary disability. The amount claimed by insurer as an overpayment was \$56,009.07. (Ex. 8). On December 23, claimant signed the Return to Work Training Plan, which included a plan for formal academic training. (Ex. 9 p 1).

(4) On January 1, 2003, insurer sent a notice to claimant that the training plan was not approved, and returned claimant to a status of vocational evaluation with an emphasis on direct employment. (Ex. 10). Insurer had determined that the wage at injury and the resultant temporary disability rate were incorrect, and that a "suitable wage" for vocational rehabilitation purposes would be less than previously determined. Claimant contested insurer's decision by letter dated January 15, 2003. (Ex. 11). On February 24, 2003, a Director's Review and Order set aside insurer's notice and concluded that claimant was entitled to training. (Ex. 12). Insurer requested a contested case hearing on February 27, 2003. (Ex. 13).

CONCLUSIONS OF LAW

The Director's Review and Order correctly determined that claimant was eligible for vocational services.

OPINION

Jurisdiction over this vocational matter rests with the Director. ORS 656.340. ORS 656.283(2)(c) provides that a Director's administrative review may only be modified if it violates a statute or rule, exceeds the agency's authority, was made upon unlawful procedure, or was characterized by an abuse of discretion. Consequently, review of the Director's decision will be limited to those factors.¹

In this case, insurer contends that it had new information (i.e. information received after calculation of the adjusted weekly wage) which enabled it to recalculate claimant's weekly wage amount downward, constituting a change in circumstances and leading to the conclusion that claimant was not entitled to vocational services as a result. Insurer argues that the Director erred

¹ At hearing, insurer's contentions were limited to the position that the Director violated a statute or rule or exceeded the statutory authority of the agency. Consequently, I will limit my review to just those factors.

in not making the decision based upon the recalculated temporary disability rate rather than the one initially used.

Nature of the Director's Decision

The Director had three reasons for deciding that insurer's attempt to recalculate the adjusted weekly wage must fail. Since my review in the case is limited to matters enumerated in the statute as applied to the Director's decision, I will identify those three reasons by quoting from the "Conclusion" portion of that decision.

Timeliness Issue. First is a statement about the timeliness of insurer's new information:

Liberty cited OAR 436-120-0400(3) as the reason for changing Ms. Fossum's category of assistance. This rule states:

The insurer shall reconsider the category of vocational assistance within 30 days of the insurer's knowledge of a change in circumstances including, but no (sic) limited to, the following:

(c) The category of vocational assistance proves to be inappropriate.

Liberty sent Ms. Fossum a letter on November 7, 2002, stating they had discovered an overpayment of time loss because they had miscalculated her average weekly wage.

Although RRU did not flesh out its conclusions about the timeliness of the report of a change in circumstances, the facts of the case show why the issue was brought up. OAR 436-120-0400(3) states:

The insurer shall reconsider the category of vocational assistance within 30 days of the insurer's knowledge of a change in circumstances including, but not limited to, the following:

(a) A change in the workers' permanent limitations;

(b) A change in the labor market; or

(c) The category of vocational assistance proves to be inappropriate.

(Emphasis added). The importance of this rule is found in the timing of the insurer's actions in the case. On November 7, when insurer wrote to the claimant and advised of the overpayment of temporary disability, it had within its possession the information which should have pointed to the change in circumstances.² Under the 30-day rule quoted above, insurer had until December 7 to advise claimant of the change in circumstances. Although the rule does not contain a consequence for failing to meet the deadline, the logical consequence would be that the category of assistance could not thereafter be changed.

² November 7, the date of the overpayment letter, is the date insurer is shown to have had the information. The actual date of knowledge, obviously before November 7, is not clear from this record.

Rule Interpretation Issue. RRU also concluded that the administrative rule required that the AWW be based upon the weekly wage in the case.

OAR 436-120-0007(4) provides the conditions to establish the adjusted weekly wage and states:

*When the job at injury was other than as described in section (3) of this rule, **use the weekly wage upon which temporary disability was based** [emphasis added], and then convert the weekly wage to the adjusted weekly wage as described in section (6) of this rule.*

I find the insurer audited Ms. Fossum's claim file and discovered an error in the wage calculation. However, the rules governing vocational assistance clearly state that the wage upon which time loss is based is used in determining a suitable wage for a permanent employee. I therefore conclude Liberty is required to use Ms. Fossum's time loss wage in determining her AWW.

(Bold emphasis in original; other emphasis added). RRU concluded that it must, by rule, use the weekly wage upon which the temporary disability was based. While this conclusion begs the question somewhat, since insurer was at that time contesting what that wage should be, the pendency of those proceedings made the Director's conclusion here necessary and appropriate.

Preclusion Issue. The portion of the RRU decision which claimant supports most strongly is that of claim and issue preclusion. The Director stated:

In addition, the Director's Review and Order of April 29, 2002, determined Ms. Fossum's AWW to be \$1047.53. I find Liberty did not appeal this Order. I therefore conclude the correct wage for Ms. Fossum's vocational assistance is \$1047.53. The Director's calculation of Ms. Fossum's AWW is a fact by operation of law.

(Ex. 12 p 3; emphasis added). In essence, RRU has made its decision based upon the doctrine of issue preclusion.

In the previous litigation about claimant's entitlement to vocational assistance, Liberty denied vocational assistance on the basis that claimant did not have a substantial handicap to reemployment. In that case, the Director concluded that there was a handicap based upon the high adjusted weekly wage which claimant had. The Director stated:

OAR 436-120-0005(10) defines suitable wage for the purpose of determining eligibility for vocational assistance, as a wage which is at least 80 percent of her adjusted weekly wage (AWW) calculated as described in OAR 436-120-0007. Ms. Fossum's AWW equals \$912.00 times McKenzie's 14.76 percent COLA increase which is \$1047.53. Suitable wage is \$838.02 per week or \$20.95 per hour.

(Ex. 14 p 2; emphasis added). A specific finding of fact was made concerning claimant's adjusted weekly wage with the employer at injury. That fact was pivotal to the conclusion reached in the first Director's Review and Order—a decision which was not appealed.

Echoing the Director, claimant contends that insurer is precluded from challenging the adjusted weekly wage at this late date. Citing *In re Drews*, 310 Or 134, 795 P2d 531 (1990), claimant contends that the doctrines of claim preclusion and issue preclusion apply to prevent insurer from going back and redetermining claimant's adjusted weekly wage. Because I conclude the Director was relying on issue preclusion (and not claim preclusion), I will address only issue preclusion.

Issue Preclusion. The doctrine of issue preclusion, formerly known as collateral estoppel, will preclude future litigation on an issue only if it was actually litigated previously and if that issue was essential to the decision reached in the previous litigation. *Drews, supra.*, at 139; *North Clackamas School Dist. v. White*, 305 Or 48, 53, 750 P2d 485, *modified*, 305 Or 468, 752 P2d 1210 (1988).

Claimant argues that, since the amount of the adjusted weekly wage was instrumental in the earlier Director's decision, insurer is bound by that finding in the earlier proceeding. Claimant is correct. Although it appears that both parties in the prior litigation made assumptions about claimant's adjusted weekly wage, there can be no question that the parties would have been able, had they so desired (and had insurer received the information from its insured), to present evidence on claimant's earnings. To "actually litigate" an issue means to have it presented in a "proceeding that afforded the parties an opportunity to litigate that issue in a forum that rendered a final determination." *Evangelical Lutheran Good Samaritan Society v. Bonham*, 176 Or App 490, 495, 32 P3d 899 (2001). The earlier Director's decision afforded such an opportunity.

Based upon the Director's previous decision, the amount of claimant's adjusted weekly wage for vocational rehabilitation purposes was set. The Director's decision became final without an appeal. Insurer may not now try to present new evidence on the issue.

Analysis Under ORS 656.283(2)(c)

As shown above, the Director had three reasons for concluding that claimant was entitled to vocational rehabilitation. None of the reasons violated a statute or rule, nor did they exceed the agency's authority. Furthermore, although no allegations were made to this effect, the Director's decision was not made upon unlawful procedure and was not characterized by an abuse of discretion. The Director's Review and Order will be affirmed.

ATTORNEY FEES

Having prevailed in this vocational matter, claimant's attorney is entitled to an attorney fee paid by the insurer. ORS 656.385(1). Claimant's attorney submitted a fee request shortly after the hearing was held, requesting an assessed fee in the amount of \$3600.00. No objections

were made to the amount of the fee requested. I have considered all of the factors listed in OAR 436-001-0265, especially the time devoted to the case, the complexity of the issue, the quality of the legal representation and the value of the interest involved, and I conclude that claimant's attorney shall be paid a fee of \$3600.00.

ORDER

IT IS HEREBY ORDERED that:

1. The Directors Review and Order dated February 24, 2003 is affirmed.
2. Insurer shall pay claimant's attorney a fee of \$3600.00.

DATED this 7th day of November, 2003.

Rick Barber
Administrative Law Judge
Office of Administrative Hearings