

In the Matter of the Vocational Dispute of

Hord, Gary, Claimant

Contested Case No: H02-068

PROPOSED AND FINAL ORDER

November 4, 2003

GARY HORD, Petitioner

LIBERTY NORTHWEST AND THE FINISHERS CORP., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Gary Hord, petitioner, appeals an April 24, 2002 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division, Department of Consumer and Business Services (WCD or the department) which concluded that Mr. Hord is not eligible for additional vocational assistance. The matter was referred to the Office of Administrative Hearings (formerly, the Hearing Officer Panel) (OAH) on June 26, 2002 to hold a hearing and to issue a proposed and final contested case order.

On December 10, 2002 Administrative Law Judge Paul Vincent conducted a hearing in this matter by telephone in Salem, Oregon. The hearing continued¹ and concluded on July 16, 2003. Mr. Hord represented himself *pro se*. Attorney Meg Carmen represented respondent insurer Liberty Northwest Insurance Corporation and its insured employer, The Finishers Corporation (LNW or insurer). WCD waived appearance at the hearing. The employer called Rehabilitation Counselor Kathryn Heatherly,² Robert Earle, Director of Northwest Technical Institute, Mike Francis, Glen Spicer, Kay Crisman, and James Hill. The record closed on July 16, 2003, following the hearing.

The OAH assigned the matter to Administrative Law Judge Ray Myers to review the record and to write this order. The record of this proceeding, consisting of tape recordings 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

Did RRU correctly determine that Mr. Hord was not entitled to additional vocational services because he had already received adequate training?

¹ On April 17, 2003, a continued hearing convened before Administrative Law Judge Coburn. Mr. Hord requested a continuance to obtain an attorney and ALJ Coburn granted the motion.

² The tape of the hearing does not include the beginning of Ms. Heatherly's testimony or the fact that she was sworn into evidence. Upon review of the tape, I conclude that it does include the substance of Ms. Heatherly's testimony. I infer that she was sworn in before giving her testimony.

EVIDENTIARY RULING

Exhibits 1 through 66, as identified in LNW's Master Exhibit List dated April 30, 2003, were admitted into the record.

FINDINGS OF FACT

I adopt the Findings of Fact set forth in the April 24, 2002 Director Review and Order, with the following supplementation:

1. Ms. Heatherly performed an evaluation to determine Mr. Hord's eligibility for vocational services. She recommended that LNW find him eligible on April 23, 1999. (Ex. 10.) During a meeting with Ms. Heatherly in September 1999, Mr. Hord considered retraining options in cabinetry, jewel making, cost estimating and truck driving. He rejected all those options. (Ex. 22-2.) Mr. Hord and Ms. Heatherly decided to explore a training program in plant propagation or nursery management at that time. (Ex. 22-3.)

2. In January 2000, Mr. Hord was working on obtaining his GED. Ms. Heatherly and Mr. Hord were exploring electronics technology, landscape occupations, horticultural occupations and computer aided drafting as potential training areas. Mr. Hord rejected the electronics technology program. Ms. Heatherly felt that the landscape occupations were too heavy considering Mr. Hord's physical limitations. She reported that horticultural occupations tend to pay low. She expressed concern about Mr. Hord's ability to pass the placement exam for the computer aided drafting program. (Ex. 26-2.) Nonetheless, she agreed to perform a labor market study on that occupation. (Ex. 26-3.)

3. On March 10, 2000, Ms. Heatherly informed Mr. Hord that he needed to choose a vocational goal by March 30, 2000. She reported that of all the jobs she and Mr. Hord had explored, the most appropriate would be cost estimating, welding or truck driving. She informed Mr. Hord that he needed to choose one of these occupations or offer a suitable alternative by March 30, 2000. (Ex. 29.) In April 2000, Mr. Hord agreed to pursue training in cost estimating, after he secured his GED. (Ex. 30-3.)

4. After obtaining his GED, Mr. Hord began the five month program at Northwest Technical Institute on April 9, 2001. Even before he started the program, Mr. Hord refused to comply with the school's dress code. Ultimately, the school agreed that he could attend school without wearing a tie. (Ex. 40.) On June 29, 2001, Ms. Heatherly reported that Mr. Hord was receiving exceptionally high grades and had been absent very little. By then, he was questioning the validity of his grades and indicating that he was not really interested in pursuing cost estimating as a career. (Ex. 42.) On July 30, 2001, Ms. Heatherly and Mr. Hord met because Mr. Hord wanted to retake the last portion of the class because Mr. Hord felt he had not fully understood the content of the course. Ms. Heatherly noted that Mr. Hord had missed a number of classes recently. She gave him formal warning that vocational assistance would end if he did not return to school. (Ex. 43.) Mr. Hord continued to miss classes, but Northwest Technical Institute allowed him to continue taking classes. As of September 27, 2001, Northwest Technical Institute considered Mr. Hord fully trained and employable as a cost estimator. (Ex.

45.)

CONCLUSIONS OF LAW

RRU correctly determined that Mr. Hord was not entitled to additional vocational services because he had already received adequate training.

OPINION

I may modify the department's vocational assistance order if it: (1) violates a statute or rule; (2) exceeds the statutory authority of the agency; (3) was made upon unlawful procedure; or (4) was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c); OAR 436-001-0225(5). In determining whether one or more of those criteria exist, I may admit evidence, which was not before the department, and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or at 537; *Joseph A. Richard*, 1 WCSR 3 (1996). The burden rests on the proponent of that fact or position. See ORS 183.450(2).

Mr. Hord contends that LNW should provide him with further training pursuant to OAR 436-120-0440 (14), which states:

The insurer shall not provide any further training to a worker who has completed one training plan unless the worker has sustained a compensable aggravation or newly accepted condition which renders the worker incapable of obtaining suitable employment, or the previous plan was inadequate to prepare the worker for suitable employment because of an error or omission by the insurer.

Mr. Hord contends that the program at Northwest Technical Institute was inadequate to prepare him for suitable employment. He contends that LNW's error or omission was in forcing him to attend this program, which was an inadequate program. As the proponent of that position, Mr. Hord bears the burden of proof. ORS 183.450(3). I conclude that he has failed to sustain that burden.

Mr. Hord testified that he worked with Kathryn Heatherley to develop a job, but she shut down every suggestion he made except the cost estimating program at Northwest Technical Institute. His testimony is inconsistent with the written record. It is clear from Ms. Heatherly's reports that she considered every suggestion that Mr. Hord made about possible training areas. She did several labor market surveys. After working with Mr. Hord to develop a program for nearly a year, Ms. Heatherly finally gave Mr. Hord a choice of three programs they had explored that she deemed suitable. In addition, she allowed him to name some other suitable program. He then chose the cost estimating program. I conclude that he has failed to prove that he was forced to take the cost estimating program. Ms. Heatherly was reasonable in her work with Mr. Hord and gave him sufficient opportunity to help find a program. He ultimately chose the cost estimating program and was not coerced into taking it.

I also conclude that Mr. Hord has failed to prove that the Northwest Training Institute's program was inadequate to prepare him for suitable employment. Mr. Hord testified that he is simply not smart enough to learn the cost estimating occupation. That assertion is undermined by the fact that he was obtaining very high grades before he began to miss a lot of classes.

Mr. Hord also points to dissatisfaction on the part of some other students as proof that the program was inadequate. LNW, however, offered the testimony of numerous other students who were highly satisfied with the program. I find the evidence offered by LNW that the students were satisfied to be at least as persuasive as the evidence offered by Mr. Hord to the contrary. Considering that Mr. Hord has the burden of proof, I conclude that he has failed to sustain it.

Based on my review of the record, I find that Mr. Hord has failed to sustain his burden of proving that his training was inadequate or that it was inadequate as a result of any act or omission on LNW's part. If anything, what the evidence establishes is that Mr. Hord got part way through the program and decided he did not like it; therefore, he quit making an effort. That is his doing, not Northwest Technical Institute's nor LNW's.

ORDER

IT HEREBY ORDERED that RRU's April 24, 2002 Director's Review and Order is affirmed.

Dated this 4th day of November, 2003 at Salem, Oregon.

Ray Myers, Administrative Law Judge
Office of Administrative Hearings