
In the Matter of the Vocational Dispute of

Wilson, Monty P., Claimant

Contested Case No: H03-059

PROPOSED AND FINAL ORDER

August 28, 2003

TRAVELERS INDEMNITY COMPANY, Petitioner

MONTY P. WILSON, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Insurer appeals a March 28, 2003 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 set aside insurer's notice that claimant was ineligible for vocational assistance. The matter was referred to the Office of Administrative Hearings (formerly the Hearing Officer Panel) for hearing on June 3, 2003.

On July 24, 2003, Administrative Law Judge (ALJ) Ella D. Johnson conducted a telephone hearing in this matter in Salem, Oregon. Attorney Brad Scheminske represented petitioner, Travelers Indemnity Company (insurer or Travelers). Attorney Evohl Malagon represented respondent Monty P. Wilson (claimant). WCD waived appearance at the hearing. Insurer called vocational counselor Paul Morrison to testify. Claimant called no witnesses. The record closed following the hearing.

ISSUE

Whether RRU's decision that claimant has a substantial handicap to employment based on a 40 hour work week violates ORS 656.283(2) (c).

EVIDENTIARY RULING

The record consists of Exhibits 1 through 20,¹ which were admitted into the record without objection.

¹ The Director's Review and Order was offered at hearing by the ALJ as Exhibit 17 because the exhibits provided by the department had apparently failed to include the underlying administrative order as part of the record. However, on further examination of the record, I now note that Exhibits 17 through 21 were typed on the back of the Exhibit List and that the Director's Review and Order was included as Exhibit 20. Consequently, I now withdraw the ALJ's Exhibit 17 and admit Exhibits 17 through 21.

FINDINGS OF FACT

I affirm and adopt the Findings of Fact contained in the March 28, 2003 Director Review and Order, with the following supplementation.

(1) Claimant was compensably injured on August 29, 2000 when he fell off a catwalk and injured his left wrist. (Ex. 4.) At injury, claimant was employed by as a truck driver for Schneider National Carriers, Inc. (Ex. 2.) He worked 10 hours per day, six days per week. (Exs. 4, 13.) His weekly wage at injury was \$476.87 per week. (Exs. 4, 13.) Insurer set claimant's temporary total disability (TTD) rate at \$317.93. (Ex. 5.)

(2) Prior to working for employer as a truck driver, claimant was self-employed as a painter, and worked as a warehouse worker and as a ranch manger for his uncle's llama ranch. (Ex. 13.)

(3) An April 8, 2002 physical capacities evaluation (PCE) concluded that claimant was unable to return to his heavy work as a truck driver because it exceeded his physical capacities, which the PCE set at medium/heavy with maximum repetitive lifting limited to 50 pounds. The PCE recommended that claimant return to work as a truck driver but with modification of maximum repetitive lifting limited to 50 pounds, which would limit his ability to load and unload the truck. (Ex. 7.)

(4) On December 5, 2002, Jerry E. Nye, MD (Surgery) found claimant to be medically stationary. Dr. Nye recommended that, if there was no modified truck driver job available, consideration should be given to vocational assistance. (Ex. 9.) On December 20, 2002, insurer closed claimant's claim by Notice of Closure, awarding 15 percent (22.5 degrees) permanent partial disability. (Ex. 12.)

(5) Vocational consultant Paul Morrison evaluated claimant's eligibility for vocational assistance at the request of insurer and determined that claimant was ineligible for vocational assistance because he did not have a substantial handicap to employment. Mr. Morrison calculated claimant's adjusted weekly wage by multiplying his weekly wage of \$476 by 1.04 percent pursuant to the current cost-of-living adjustment matrices, determining the number hours per month at 60 hours per week and dividing the monthly wage by the monthly hours to equal \$8.28 per hour. He then multiplied that amount by 80 percent for an hourly wage of \$6.62, which Mr. Morrison concluded was the wage for determining claimant's vocational eligibility. Taking into consideration claimant's limitations, transferable skills and the job market, Mr. Morrison determined that claimant could perform the following work, which all paid in excess of claimant's wage of \$6.62 per hour used to determine eligibility: lot attendant, material handler, security officer, telephone solicitor, training specialist, forklift operator, inventory clerk and production warehouse worker. Mr. Morrison concluded that claimant did not have a substantial handicap to employment, inasmuch as Oregon had just raised the minimum wage to \$6.90 per hour and any or all medium to heavy jobs within his restrictions would be appropriate employment for claimant. (Ex. 13.)

(6) On January 2, 2003, Mr. Morrison notified claimant on behalf of insurer that he was

ineligible for vocational assistance because he did not have a substantial handicap to employment. (Ex. 14.) Mr. Morrison subsequently acknowledged to RRU's vocational consultant Allen Britton on February 13, 2003 that, if claimant's adjusted weekly wage was calculated on 40 hours per week, he would "definitely" be eligible for vocational assistance. (Ex. 16.)

(7) Mr. Britton determined that claimant's suitable wage was \$381.50 per week or \$9.54 per hour based on a 40 hour work week with a weekly wage at injury of \$476.87. He reviewed the jobs identified by insurer and available to claimant in Region 2 in the Portland metropolitan area and considered claimant's physical capacities, knowledge, skills and abilities and suitable wage. He found that none of the jobs identified by insurer paid a suitable wage, except for forklift operator which required experience and did not provide reasonable opportunities for employment in the Portland metropolitan area. Mr. Britton concluded that reasonable opportunities for employment for claimant did not exist in his geographic area. (Ex. 19.) On March 28, 2003, Mr. Britton issued a Director Review and Order finding claimant eligible for vocational assistance because he had a substantial handicap to employment. (Ex. 20.)

CONCLUSIONS OF LAW

RRU's decision that claimant has a substantial handicap to employment based on a 40 hour work week did not violate ORS 656.283(2)(c).

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).

Insurer denied claimant's eligibility for vocational assistance because Mr. Morrison opined that claimant did not have a substantial handicap to employment. RRU's decision set aside the insurer's denial because it concluded that claimant had a substantial handicap to employment. On appeal, insurer contends that the decision should be modified because RRU used a 40 hour work week in computing claimant's suitable wage, giving him a much higher AWW. Insurer argues that this interpretation of the term "suitable wage" violates ORS 656.283(2)(c) because RRU arbitrarily ignored the evidence and the fact that claimant worked 60, not 40, hours per week and failed to adjust the AWW accordingly.

Under ORS 656.340(1), an insurer is required to provide vocational services to workers who are eligible. ORS 656.340(6) states:

(a) A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury or aggravation, and the worker has a substantial handicap to employment.

(b) As used in this subsection:

(A) 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.

Additionally ORS 656.340(b)(B)(iii) defines "suitable employment" as:

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)² of this section. The director shall adopt rules providing methods of calculating the weekly wage currently being paid for the worker's regular employment for use in determining eligibility and for providing assistance to eligible workers. If the worker's regular employment was seasonal or temporary, the worker's wage shall be averaged based on a combination of the worker's earned income and any unemployment insurance payments. Only earned income evidenced by verifiable documentation such as federal or state tax returns shall be used in the calculation. Earned income does not include fringe benefits or reimbursement of the worker's employment expenses.

In order to determine whether the worker lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment, the vocational counselor must determine the worker's "suitable wage." Through OAR 436-120-0007(3), the director has adopted an administrative scheme for calculating current wage based on the temporary disability rate paid along with a cost-of-living conversion factor. Pursuant to OAR 436-120-005(13)(a), the worker's "suitable wage" is calculated under OAR 436-120-0007(4)(a) as follows:

When the job at injury was other than as described in section (3) of

² Section (5) states:

The objectives of vocational assistance are to return the worker to employment which is as close as possible to the worker's regular employment at a wage as close as possible to the weekly wage currently being paid for employment which was the worker's regular employment even though the wage available following employment may be less than the wage prescribed by subsection (6) of this section. 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, whichever gave rise to the potential eligibility for vocational assistance; or, for a worker not employed at the time of the aggravation, the employment the worker held on the last day of work prior to the aggravation.

this rule, use the weekly wage upon which temporary disability was used, and then convert to the adjusted weekly wage as described in section (6) of this rule.

Section (6) directs the vocational consultant to calculate the adjusted weekly wage by determining the percentage increase or decrease from the date of injury to the date of calculation by contacting the employer at injury and any applicable union to obtain any cost-of-living adjustments and collective bargaining adjustments pursuant to collective bargaining agreements and to determine whether the employer at injury is no longer in business and, if no longer in business, adjust the wage by the appropriate factor contained in the cost-of-living matrix.

In this case, claimant's regular job as a truck driver for Schneider National Carriers, Inc. has had no wage adjustments and his employer at injury is still in business. Therefore, his AWW is the same as the wage upon which his temporary disability was based. His temporary disability was based upon an AWW of \$476.87. Eighty percent of \$476.87 is \$381.50 per week or \$9.54 per hour. Consequently, I find that claimant's suitable wage is \$381.50 per week or \$9.54 per hour.

At hearing, insurer argued that there is no authority for RRU to use a 40 hour work week in calculating claimant's AWW when claimant worked a 60 hour work week. Insurer's argument requires me to interpret the department's above rules concerning calculation of a suitable wage. In interpreting the meaning of a rule, I apply the same method of analysis employed in determining the meaning of a statute, *viz.*, to determine the meaning of the words used, giving effect to the intent of the enacting body, which in this case is the department. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485 (1997). *See also PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993) (court's task in determining legislative intent first is to examine, including context in which the statute is found and, if intent is clear, to proceed no further with its analysis). Where an agency's interpretation of its own rule is plausible and not inconsistent with the wording of the rule itself, the rule's context, or with any other source of law, I must uphold the agency's interpretation. *Don't Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994). Agencies are given discretion in interpreting their rules, so long as the interpretations are reasonable. *Hadley v. CodyHindman Logging*, 144 Or App 157 (1996).

The administrative scheme whereby suitable wage is calculated according to the temporary disability rate with a cost-of-living conversion is plausible, reasonable and is not inconsistent with the statute. Moreover, the rule promulgated by the department takes into account situations involving workers who work both more and less than 40 hours per week. Claimant was not paid an hourly wage, but rather a weekly wage. Therefore, I find that RRU correctly calculated claimant's suitable wage as \$381.50 per week or \$9.54 per hour. Accordingly, I conclude that RRU correctly determined that claimant has a substantial handicap to employment and affirm RRU's order.

ATTORNEY FEES

Claimant has successfully defended RRU's decision that he is eligible for vocational

assistance and is therefore entitled to attorney fees. ORS 656.385(1). Applying the factors set forth in OAR 436-001-0265, I find that claimant's counsel is entitled to an assessed fee in the amount of \$2,000.

ORDER

IT HEREBY ORDERED that RRU's March 28, 2003 Director's Review and Order is affirmed. Insurer shall pay to claimant's attorney an assessed fee of \$2000.

Dated this 28th day of August 2003 at Salem, Oregon.

Ella D. Johnson, Administrative Law Judge
Office of Administrative Hearings