
In the Matter of the Vocational Dispute of

Moore, Jimmie D., Claimant

Contested Case No: H02-116

PROPOSED AND FINAL ORDER

April 23, 2003

FREMONT INDEMNITY COMPANY, Petitioner

JIMMIE D. MOORE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Insurer appeals an October 9, 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 set aside insurer's decision that claimant was ineligible for vocational assistance and not entitled to additional training. The matter was referred to the Hearing Officer Panel (Panel) for hearing on December 4, 2002.

On March 21, 2003, Administrative Law Judge Ella D. Johnson conducted a telephone hearing in this matter in Salem, Oregon. Attorney Mathew Denley represented the petitioning insurer Fremont Indemnity Company and its third party administrator Cambridge Integrated Service Group (Fremont or insurer). Attorney Philip Garrow represented respondent Jimmie D. Moore (claimant). WCD waived appearance at the hearing. Insurer called rehabilitation counselor Bill Sakagawa and claimant testified on his own behalf. The record closed on March 21, 2003 following the close of the 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 claimant was eligible for vocational assistance and entitled to additional training.

EVIDENTIARY RULING

The record consists of WCD's Exhibits 1 through 46 and claimant's Supplemental Exhibits 39A, 42A, 44A and 47, which were admitted into the record without objection.

FINDINGS OF FACT

I adopt the Findings of Fact set forth in the October 9, 2002 Director's Review and Order, with the following supplementation:

(1) On May 28, 1999, Mr. Moore suffered a compensable injury while working as a truck driver. (Ex. 1.) Freemont accepted his claim for closed head injury with left temporal hemorrhagic contusion, scalp laceration, moderate cognitive deficits, mood/anxiety disorder, traumatic brain injury, sleep apnea, monocular quadratic field deficit of the left eye, cervical strain, right scapular fracture, right radial fracture and right knee contusion. (Ex. 44a.) His claim was closed by a Notice of Closure issued on July 16, 2002 awarding 34 percent (108.8 degrees) unscheduled permanent partial disability (PPD) for his brain injury. (Ex. 36.) Mr. Moore no longer holds a commercial driver's license but does have a regular driver's license. (Moore's stipulation.)

(2) Mr. Moore's attending physician, Genevieve Reid, MD, released Mr. Moore to light duty work with the following residual functioning limitations: able to stand and walk one hour at a time for four hours in a day; sit two hours at a time for six to seven hours in a day; use left hand repetitively but not right hand; able to push and pull and grasp; able to bend intermittently; able to frequently reach above shoulder; and restricted from climbing, crawling, squatting, balancing and kneeling. Dr. Reid also noted that Mr. Moore had memory problems. She also noted that he needed a low stress job and his right knee and arm were impaired. Because he was restricted from driving, he could not return to his job at injury. (Ex. 5.)

(3) Light duty requires lifting, carrying, pushing and/or pulling 20 pounds maximum and frequently lifting and carrying up to 10 pounds, while medium work requires lifting up to 50 pounds and heavy work requires lifting up to 100 pounds. (Ex. 2.)

(4) Freemont's vocational assistance provider, Aspen Associates, Inc., found Mr. Moore eligible for vocational assistance on September 20, 2000. (Exs. 3-4.) Bill Sakagawa became his rehabilitation consultant. (Ex. 5.) Mr. Moore and Mr. Sakagawa met with Bill Huber to explore training with the US Department of Forestry (USDF). (Ex. 8.) On February 22, 2001, Mr. Sakagawa developed a one-year authorized professional skills training program (ATP) with USDF and Portland Community College (PCC) to begin March 12, 2001 with the vocational objective of gaining skills to be employed as a maintenance repairer and/or groundskeeper. The ATP plan noted that Mr. Moore was aware that he would not obtain his wage at injury upon completion of the training but that he was willing to sacrifice a higher wage in order to live in Burns, Oregon. (Ex. 10.) Mr. Moore thought the proposed jobs were full-time but they were part-time. (Test. of Sakagawa and Moore.) On February 27, 2001, Mr. Moore signed a Written Statement of Informed Consent acknowledging his consent to the lower salary and approved the plan. Mr. Sakagawa developed a job analysis for the USDF maintenance repairer/groundskeeper job and Dr. Reid approved it also on February 27, 2001. (Ex. 10.)

(5) The goal of the training for the building maintenance worker/groundskeeper was for Mr. Moore to acquire knowledge and proficiency in several different trades, including electrical, plumbing, carpentry, painting, heating, and air conditioning. He was to learn to do routine maintenance and repair tasks independently at a sub-journeyman's level with little or no assistance. (Ex. 10 at page 8.)

(6) Mr. Huber became Mr. Moore's trainer for his ATP with USDF. (Exs. 18, 19, 20, 24, 26.) During his ATP, Mr. Moore performed painting, lawn work, some plumbing and electrical

work, picked up trash and cleaned bathrooms and learned how to use the computer to access the Internet. (Ex. 15.) Mr. Moore did well in his training program but needed constant supervision and had to write down everything that he had to do at the beginning of each day. He needed frequent, detailed instructions and worked very slowly. He was rated only five to ten percent in his performance the areas of the curriculum completed. (Exs. 18, 24, 26, 33, 42.)

(7) In January and February 2002, Mr. Huber informed Mr. Moore and Mr. Sakagawa that the USDF had no funding for even a temporary position with the agency and was experiencing a 40 percent reduction in funding, but indicated that there was funding for a number of laborer positions throughout Western Oregon or Western Washington. (Exs. 27, 28.)

(8) On March 1, 2002, Mr. Sakagawa notified Mr. Moore of the end of his training program, effective March 19, 2002. (Ex. 29.) Mr. Moore's performance was rated from 60 to 100 percent but noted no opportunity to perform electrical work, such as wire replacement, splicing, soldering, and insulating or removal and replacements of outlets, switches, fixtures and circuit breakers. (Exs. 30, 42.) Mr. Sakagawa opined that Mr. Moore did not meet the training goal for maintenance repairer but did meet the goal for groundskeeper. (Test. of Sakagawa.)

(9) Mr. Moore received very little of the training listed in the curriculum for the building maintenance repairer. He received very little electrical systems training and no practical experience. He received no training in mechanical systems and no practical experience. Mr. Moore cleaned windows but did not repair them; he built and installed shelving, did a great deal of painting, tightened carpets with nail strips, and re-roofed a 10' X 10' shed. Mr. Moore performed only the laborer part of the groundskeeper curriculum. He dug ditches and filled them back in. He did not mix chemicals, perform the calculations for spreading fertilizer, herbicides or pesticides and did not perform tasks related to irrigation and sprinkling systems. (Ex. 37; test of Moore.)

(10) Mr. Huber opined that it would take another year of training for Mr. Moore to qualify as a "Wage Grade I" level worker for USDF, which is an entry-level job for forestry workers or its equivalent in the private sector. Mr. Huber also noted that Mr. Moore had an aptitude for small engine repair and thought that it would take nine months to one year of training to become employable in that field. (Ex. 42.)

(11) The DOT specific vocational preparation (SVP) code for building maintenance repairer is "7" requiring two to four years of training and/or relevant work. (Ex. 39A.) The SVP code for groundskeeper is "3" requiring one to three months of training. Small engine repair has a SVP code of "4" requiring two years of training. (Test. of Sakagawa.)

(12) The job of forestry laborer is medium level work requiring lifting up to 50 pounds and similar skills to that of groundskeeper. (Test. of Sakagawa.)

CONCLUSIONS OF LAW

RRU correctly determined that claimant was eligible for vocational assistance and entitled to additional 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 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996). The burden rests on the proponent of that fact or position. See ORS 183.450(2).

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

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.

Additionally, *former* OAR 436-120-440(14) states in pertinent part:

The insurer shall not provide any further training to a worker who has completed one training plan **unless the * * * previous plan was inadequate to prepare the worker for suitable employment because of an error or omission by the insurer. (Emphasis added.)**

"Suitable employment" means employment for which the worker has the "necessary physical capacity, knowledge, skills and abilities." *Former* OAR 436-120-0005(11)(a).

RRU set aside insurer's notification of the end of claimant's vocational assistance because it concluded that the ATP was inadequate to provide claimant with the skills and knowledge for him to be suitably employed because the insurer gave inadequate consideration to claimant's cognitive deficits and attempted to train claimant in one year for an occupation that required at least two years of preparation. I agree.

Insurer argued that the one-year ATP provided to claimant was sufficient and that RRU's decision reflected an abuse of discretion because it was based on an erroneous description of the laborer job as heavy labor which insurer determined was suitable employment for claimant following completion of the ATP.

Abuse of discretion exists when an agency "exercises its discretion to an end or purpose not justified by, and clearly against, reason and evidence." *Far West Landscaping v. Modern*

Merchandising, 287 Or. 653, 664 (1979); *Casciato v. Oregon Liquor Control Commission*, 181 Or. 707, 717 (1947). I find no abuse of discretion.

To begin, the evidence establishes that Dr. Reid released claimant to light duty and the laborer job was at least medium duty. Light duty requires lifting, carrying, pushing and/or pulling 20 pounds maximum and frequently lifting and carrying up to 10 pounds, while medium work requires lifting up to 50 pounds and heavy work requires lifting up to 100 pounds. Although Dr. Reid subsequently approved the job analysis for maintenance repairer and/or groundskeeper which appeared to require occasional lifting up to 50 pounds, that does not supercede the restrictions that she placed on claimant when she released him to work. The jobs selected by insurer's rehabilitation counselor were beyond claimant's limitations physically based upon his attending physician's release.

Furthermore, based on the persuasive evaluation by claimant's trainer, Mr. Huber, the jobs were also beyond claimant's cognitive abilities. Mr. Huber reported that claimant needed constant supervision and had to write down everything he had to do at the beginning of each day. Mr. Huber felt that claimant needed frequent, detailed instructions and worked very slowly. At one point in the training, Mr. Huber rated claimant's performance at only five to ten percent in the areas of the curriculum completed.

Insurer's rehabilitation counselor made much of the fact that claimant received good initial evaluations in the ATP and points to them as proof that the ATP was sufficient for claimant to become suitably employed. However, I do not find Mr. Sakagawa's testimony persuasive because I find that he is highly motivated by his pecuniary interest to defend the ATP program he developed inasmuch as insurer may not hire him or his firm again if the ATP is found insufficient. I find more persuasive the final evaluation by Mr. Huber that it would take another year of training for claimant to qualify for employment, even at USDA's entry level job. I find his report concerning claimant's performance and needs to be the most persuasive because, as claimant's trainer, he was in the best position to assess claimant due to the time he spent with claimant over the period of the one-year ATP. I also find persuasive claimant's affidavit that he received very little of the training listed in the curriculum for the building maintenance repairer and that he performed only the laborer part of the groundskeeper curriculum. Based on this evidence, it is clear that the training that claimant received during the one-year training program was insufficient to provide him the necessary knowledge, skills and abilities to be suitably employed.

Consequently, I find that insurer has failed to meet its burden of proving that RRU's order should be modified for abuse of discretion. I conclude that RRU correctly found that insurer's ATP training was insufficient in many respects and did not prepare claimant for suitable employment. Therefore, claimant is entitled to additional training that is consistent with his physical and cognitive limitations due to the errors made by insurer. Accordingly, RRU's order is affirmed.

ATTORNEY FEES

Claimant has successfully defended RRU's decision that he is entitled to vocational assistance and is therefore entitled to an attorney fee. 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 \$3,593.75.

ORDER

IT HEREBY ORDERED that RRU's October 9, 2002 Director's Review and Order is affirmed. Insurer shall pay claimant's attorney an assessed fee of \$3,593.75.

Dated this 23rd day of April 2003 at Salem, Oregon.

Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel