

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Nolan, Timothy S., Claimant

Contested Case No: H03-006

PROPOSED AND FINAL ORDER

March 18, 2003

TIMOTHY S. NOLAN, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a November 18, 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 March 7, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Attorney Margaret F. Weddell represented petitioner Timothy S. Nolan (claimant). Attorney Mary Goebel-Adams represented respondent SAIF Corporation (insurer). WCD waived appearance at hearing. No witnesses testified 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 claimant is not entitled to redetermination of his eligibility for vocational assistance pursuant to OAR 436-120-0360(4).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 11 were admitted into the record without objection.

FINDINGS OF FACT

- (1) On July 2, 2001, claimant suffered injury while working as a laborer, delivering a cement fountain. (Ex. 1.) Insurer accepted lumbosacral strain and left shoulder strain as compensable conditions. (Ex. 3-4.)
- (2) On March 26, 2002, insurer notified claimant that he was ineligible for vocational assistance because he lacked a substantial handicap to employment. Claimant did not appeal and the notice became final by operation of law. (Ex. 2.)

- (3) On April 30, 2002, insurer issued a Notice of Closure awarding zero unscheduled permanent partial disability (PPD). (Ex. 3-1.) On July 22, 2002, WCD issued an Order on Reconsideration awarding 14 percent PPD. (Ex. 4-3.)
- (4) On August 15, 2002, claimant requested insurer to evaluate his vocational eligibility. Insurer denied the request because the earlier denial had not been appealed timely. (Exs. 5 and 6.)

CONCLUSION OF LAW

Claimant is entitled to redetermination of his eligibility for vocational assistance pursuant to OAR 436-120-0360(4).

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).

RRU determined that claimant is barred from seeking vocational eligibility because he failed to appeal a notice of ineligibility timely. RRU further determined that claimant is not entitled to a redetermination of his vocational eligibility pursuant to OAR 436-120-0360. Claimant first contends that RRU misinterpreted OAR 436-120-0360 and that subsection (4) of the rule entitles claimant to a redetermination, notwithstanding the earlier untimely appeal. In the alternative, claimant cites ORS 656.726(4)(a) and requests promulgation of a temporary rule allowing claimant to seek redetermination of his vocational eligibility. In contrast, insurer contends that RRU's interpretation of OAR 436-120-0360 is plausible and therefore, the administrative law judge is obligated to defer to the agency's interpretation. Insurer further contends that promulgation of a temporary rule is not appropriate.

Pursuant to ORS 656.340(1)(a), an insurer is obligated to provide vocational assistance to eligible injured workers. Additionally, OAR 436-120-0360(4) provides:

If a worker was **previously found ineligible** or the worker's eligibility ended **for any of the reasons specified below**, upon notification of a **change of circumstances** the insurer **shall redetermine eligibility**. The insurer shall complete the eligibility

evaluation within 35 days of one of the following:

(4) The worker was not awarded permanent disability and the worker is later awarded permanent disability.

(Emphasis added.)

In construing 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 WCD. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485 (1997); *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611 (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 is not inconsistent with the wording of the rule itself, the rule's context, or with any other source of law, there is no basis for asserting that the rule has been misinterpreted by the agency. *Don't Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994).

The plain meaning of OAR 436-120-0360(4) requires an insurer to redetermine eligibility upon notification of a change in circumstances, including a subsequent PPD award. Here, claimant was rated at zero PPD in the March 26, 2002 Order on Reconsideration and he was awarded 14 percent PPD in the July 22, 2002 Order on Reconsideration. The subsequent PPD award constitutes a change in circumstances within the meaning of the rule, triggering insurer's obligation to redetermine claimant's eligibility. Additionally, the rule requires redetermination notwithstanding a previous unappealed zero PPD award; the rule imposes a new obligation upon insurer to determine whether claimant is eligible given the new circumstances. Furthermore, in the administrative order, RRU found, "None of the conditions under OAR 436-120-0360 apply." This reasoning is not supported by the record because the rule lists a subsequent PPD award as a change in circumstances requiring redetermination and claimant had a subsequent PPD award. Accordingly, I find that this constitutes abuse of discretion and I modify the administrative order.

Also, I find that the agency's interpretation of OAR 436-120-0360(4) is inconsistent with two other administrative rules, and therefore, I do not defer. Under the heading "Determining Eligibility for Vocational Assistance", OAR 436-120-0320(9)(b)(C)¹ lists "substantial handicap to employment" as a requirement for eligibility. Additionally, under the heading "Determining

¹ OAR 436-120-0320(9)(c)(C) provides:

(9) A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

(c) As a result of the limitations caused by the injury or aggravation, the worker:

(C) Has a substantial handicap to employment and requires assistance to overcome that handicap.

Substantial Handicap”, OAR 436-120-0340(2)(d)² lists permanent disability as a factor. Pursuant to the latter rules, permanent limitations are a factor considered in determining whether an injured worker has a substantial handicap and ultimately, whether he is eligible for vocational assistance. Here, claimant was previously found ineligible because he lacked a substantial handicap, as reflected in the Notice of Ineligibility dated March 26, 2002. Later, in the July 22, 2002 Order on Reconsideration, he was awarded PPD. Therefore, pursuant to OAR 436-120-0360(4), insurer is required to redetermine his vocational eligibility, including any substantial handicap, by taking into account the subsequent PPD award. Finally, because I am persuaded by claimant’s first argument, I do not reach his alternative argument requesting promulgation of a temporary rule.

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 \$1,500 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 18, 2002 is reversed.

DATED this 18th day of March 2003.

Catherine P. Coburn, Administrative Law Judge
Hearing Officer Panel

² OAR 436-120-0340(2)(d) provides:

To complete the substantial handicap evaluation the vocational counselor shall submit a report documenting the following information:

(d) Permanent limitations due to the injury;