
In the ORS 656.340 Vocational Services Dispute of

THOMAS BENNET Claimant

Contested Case No: H04-141

PROPOSED AND FINAL ORDER

December 28, 2004

THOMAS BENNET, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on August 3, 2004 by the Rehabilitation Review Unit (RRU), Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On September 14, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On December 3, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Attorney Randall G. Rice represented petitioner, Liberty Northwest Insurance Corporation and its insured, Bend Pawn and Trading Company (insurer). Attorney Philip H. Garrow represented respondent Thomas Bennett (claimant). No witnesses testified and the record closed on the date of hearing.

ISSUE.¹

Whether RRU incorrectly determined that Optional Services insurer provided from September 26, 2002 through January 5, 2004 are exempt from the maximum spending limits specified in OAR 436-120-0720.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 31, as well as insurer's Supplementary Exhibits 10A through 21A and claimant's Supplementary Exhibits 25A through 27A were admitted into the record without objection.

¹ Following the annual cost-of-living increase that took effect July 1, 2004, the parties settled all issues concerning insurer's reimbursement of direct worker purchases for a computer and child care expenses. See OAR 436-120-0720(1).

FINDINGS OF FACT

(1) On November 17, 1999, claimant suffered a compensable back injury while working as a pawn shop clerk. (Ex.1.) Insurer accepted a left L5-S1 herniated nucleus pulposus. (Ex. 24-2.) Claimant underwent lumbar surgeries in February and September 2000. (Ex. 6-2.) On November 14, 2001, claimant's condition became medically stationary. (Ex. 4-1.)

(2) On February 26, 2002, insurer notified claimant that he was eligible for vocational assistance. (Ex. 3.) On March 8, 2002, the claim was closed with a permanent partial disability award. (Ex. 4.) On April 22, 2002, insurer notified claimant that he was eligible for a training program. (Ex. 5.) On May 29, 2002, claimant agreed to participate in a medical transcription training program. (Ex. 6.) The vocational consultant projected training plan costs of \$16,151.15 (\$5,060.00 vocational Services and \$5,661.15 direct worker purchases). (Ex. 6-9.) In the summer of 2002, claimant enrolled in Central Oregon Community College as a full-time student and completed five classes. (Exs. 6-15 and 7-1.)

(3) Claimant enrolled in fall term classes but was unable to complete them due to medical problems. (Exs. 6-15, 9 and 10.) Insurer issued a Notice of Training End, effective September 26, 2002. (Ex. 9.) The notice reads, "Your training ends on the above date because of current medical problems that have inhibited your ability to participate and are documented by your treating physician. Your lack of suitable employment cannot be resolved by currently providing vocational assistance. This action does not end services to you. Please stay in touch with your counselor." (Ex. 9.)

(4) On November 25, 2002, claimant underwent lumbar fusion surgery. (Ex.10-2.) On December 5, 2002, attending physician Brad A. Ward, MD released claimant for part-time academic participation and claimant continued attending Central Oregon Community College as a part-time student during his convalescence from surgery. Insurer provided Optional Services including Academic Training Monitoring and Direct Worker Purchases (DWP) such as tuition and mileage reimbursement (Exs. 10-2, 10A and 11-1.) Claimant completed one course during winter term, 2002. (Exs. 10-2 and 10-2.)

(5) On March 6, 2003, Dr. Ward released claimant to participate in one course and claimant completed English Composition during spring term 2003. (Exs. 10B, 11-2, 11A, 11B and 12-1.) Insurer provided Optional Services DWP including a bookstore account, training supplies, a disability parking permit and an ergonomic chair. (Ex. 11-2.)

(6) On May 30, 2003, Dr. Ward recommended continued vocational rehabilitation and released claimant to participate in three courses during summer term 2003. Claimant completed two courses and dropped one due to the difficulty of prolonged sitting following lumbar fusion. (Exs.12-2, 12A, 13-1 and 13A.) Insurer continued to provide Optional Services DWP including tuition and mileage reimbursement. (Exs. 12-2.)

(7) During fall term, 2003, claimant continued a part time class schedule and insurer continued to provide Optional Services DWP. (Exs. 14A and 15-2.) From September 26, 2002

through January 5, 2004, insurer provided Optional Services DWP including a college application fee, clothing, tuition, books, training supplies, mileage, a disabled parking pass and an ergonomic chair. (Exs. 11-2, 15-1 and 28.)

(8) On December 31, 2003, insurer and claimant entered into a Return to Work Training Plan directed toward medical transcription. The start date was January 5, 2004 and end date was August 15, 2004. (Exs. 15-5 and 16-2.) Attending physician James O. Nelson, MD released claimant to a full time academic schedule, effective January 5, 2004. (Ex. 15.) During winter term 2002-2003, claimant completed 15 credits. (Ex. 16.)

(9) Before winter term began, claimant submitted a DWP request to the insurer for purchase of a computer in order to complete course assignments at home. (Exs. 14 and 16-2.) Claimant also submitted a DWP request for child care services. (Ex. 16-2.) On January 5, 2004, insurer denied these requests because the remaining three months at the community college would exhaust the allowed direct worker purchases. Insurer noted that pursuant to OAR 436-120-0720(1) and Bulletin 124, the maximum direct worker purchase cost was \$14,688. To date, insurer had paid \$9,559.43 for direct purchases such as tuition, books and mileage reimbursement, leaving a balance of \$5,128.57 for the remaining three terms. Claimant's tuition and books were estimated at \$3,240 leaving \$1,888.57 which would not cover claimant's mileage expenses for the full training program. For budgetary reasons, insurer denied the request for purchase of a computer and child care services. (Ex. 17.) On February 24, 2004, insurer corrected the dollar figures by subtracting \$1,417.92 from the total paid to date. (Ex. 22.)

(10) Claimant enrolled in full time classes winter term, 2004 and insurer provided DWP including tuition, and a bookstore account. (Ex. 20-2.) On January 23, 2004, Dr Nelson noted that claimant was unable to continue attending classes due to an aggravation. (Ex. 20-2.) On February 25, 2004, insurer issued a Notice of End of Training. (Ex. 21A.)

(11) On February 27, 2004, claimant's condition returned to medically stationary status and the claim was closed on July 9, 2004. (Ex. 25.) On August 9, 2004, insurer notified claimant that he was eligible for vocational services. (Ex. 26A.) On October 7, 2004, insurer approved claimant's training plan to begin on September 9, 2004 and to end on June 10, 2005. (Ex. 27A.) Pursuant to the July 1, 2004 annual cost-of-living increase, insurer agreed to provide a home computer and child care services to claimant. (Stipulation of the parties.)

CONCLUSION OF LAW

RRU incorrectly determined that Optional Services insurer provided from September 26, 2002 through January 5, 2004 are exempt from the maximum spending limits prescribed in OAR 436-120-0720.

OPINION

Vocational assistance disputes arising under ORS 656.340 are reviewed pursuant to the limited scope of review specified by ORS 656.283(2)(c). I may modify the administrative order only if it: (A) violates a statute or rule; (B) exceeds the statutory authority of the agency; (C) was made upon unlawful procedure; or (D) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(5). In determining whether one of those criteria exist, I may admit evidence which was not before the RRU and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996). The burden of proving a fact or position is borne by the proponent. ORS 183.450(2). As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence.) Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

RRU determined that in September 2002, claimant became ineligible for vocational assistance for medical reasons and that insurer provided Optional Services from September 26, 2002 through January 5, 2004. Additionally, without explanation, RRU determined that Optional Services are excluded from the maximum spending limits prescribed by vocational rules. Finally, RRU concluded that since the Optional Services insurer had previously provided did not count toward the maximum spending limit, funds were available to provide a computer and child care services to claimant. Insurer contends that the administrative order is faulty and must be modified under all four criteria specified in ORS 656.283(2)(c). In particular, insurer challenges RRU's determination that Optional Services are excluded from maximum spending limits prescribed by OAR 436-120-0720. On the other hand, claimant takes the position that the administrative order is correct and should be affirmed.

Insurer contends that RRU incorrectly found that claimant became ineligible in September 2002 and that the services insurer provided from September 26, 2002 through January 5, 2004 qualified as Optional Services. In support of its position, insurer argues that claimant remained eligible and that insurer provided Training Services rather than Optional Services during the period in question. Insurer further argues that the direct worker purchases it provided are included in the maximum spending limits prescribed in OAR 436-120-0720(1).

To begin, I find the question whether claimant was eligible or ineligible during the disputed period is immaterial. Pursuant to OAR 436-120-0455(1), an insurer may provide

Optional Services to either eligible or ineligible injured workers. Next, I disagree with insurer's contention that the services it provided to claimant during the disputed period were Training Services. Contrary to insurer's position at hearing, in September 2002, insurer sent claimant a Notice of Training End, indicating that it would continue to provide some form of vocational assistance. Subsequently, insurer did provide vocational assistance and consistently issued documents labeling the vocational services as "Optional Services." For these reasons, I agree with RRU's finding that insurer provided vocational assistance to claimant from September 26, 2002 through January 5, 2004 that are properly classified as "Optional Services."

Insurer next contends that the administrative order incorrectly determined that direct worker purchases that an insurer provides through Optional Services are excluded from the maximum spending limits specified in OAR 436-120-0720(1). I agree.

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. OAR 436-120-0455(1) provides:

Optional Services are services provided to an ineligible worker or services provided to an eligible worker in excess of those described in these rules. Such services are at the discretion of an insurer.

Additionally, OAR 436-120-0720(1) provides:

Fee Schedule and Conditions for Payment of Vocational Assistance Costs

(1) The director has established the following fee schedule for professional costs and direct worker purchases. The schedule sets maximum spending limits per claim opening for each category; however, the insurer may spend more than the maximum limit if the insurer determines the individual case so warrants. Spending limits are to be adjusted annually, effective July 1. The annual adjustment is based on the conversion factor described in OAR 436-120-0005(2) and published with the cost-of-living matrix. The amounts in section (3)² do not include the adjustment effective July 1, 2004.

In construing the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480 (1997); *Larry Hemenway*, 5 WCSR 33 (2000). See also *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) (court's task in determining the legislative intent is to first examine the statute, including text and context, and if the 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

² OAR 436-120-0720(3) provides:

(3) Amounts include professional costs, travel/wait, and other travel expenses: [Table not included. See ED. NOTE.]

[ED. NOTE: Tables referenced are available from the agency.]

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 Siting Council*, 320 Or 132 (1994). Here, RRU interpreted OAR 436-120-0720(1) to mean that Optional Services are excluded and not subject to the maximum spending limits adopted by the department.

I find that RRU's interpretation conflicts with ORS 656.268(1) in violation of ORS 656.283(1)(c)(A). ORS 656.268(1) provides in pertinent part:

One purpose of this chapter is to restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker.

ORS 656.268(1) establishes a policy of providing vocational services as soon as possible, accommodating an injured worker's physical limitations as prescribed by the attending physician. In contrast, RRU's interpretation means that if an insurer provides Optional Services, enabling a non-medically stationary worker to attend school part-time, those expenditures will not be credited toward the maximum amount budgeted for providing vocational services to that worker. Consequently, under RRU's interpretation, insurers would offer no vocational services to injured workers until the medically stationary date, causing undue delay. Furthermore, RRU's interpretation of the rule does not benefit injured workers; it creates a disincentive for insurers to provide Optional Services under any circumstances. Inasmuch as RRU's interpretation of OAR 436-120-0720(1) conflicts with ORS 656.268(1), I do not defer. Accordingly, I reverse.

I further find that RRU abused its discretion in violation of ORS 183.283(2)(c)(D). RRU abused its discretion by offering no explanation for its determination that Optional Services are excluded from the maximum spending limits. RRU's interpreted the rules so as to obtain benefits for claimant outside the budgetary constraints defined by the department, but failed to address the far-reaching ramifications for other injured workers who may be deprived of Optional Services.

Finally, I find that the administrative order was made upon unlawful procedure in violation of ORS 183.283(2)(c)(C). RRU issued the order on August 4, 2004 after the annual cost-of-living increase took effect on July 1. On July 1, additional funds became available within the OAR 436-120-0720 matrix to fund the disputed computer and child care services. Consequently, the issue presented to RRU became moot before it reviewed the matter. For these reasons, I reverse.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated August 3, 2004 is reversed.