

In the ORS 656.340 Vocational Assistance Dispute of

JEFF E. BENNING, Claimant

Contested Case No: H04-088

FINAL ORDER

December 2, 2004

LIBERTY NORTHWEST INSURANCE CORP., Petitioner

JEFF E. BENNING, Respondent

Before Cory Striesinger, Director, Department of Consumer and Business Services

This matter comes before the director for issuance of a final order. Insurer, Liberty Northwest, by and through its attorney Phillip L. Nyburg, submitted exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's September 22, 2004 Proposed and Final Contested Case Hearing Order. Claimant, represented at hearing by attorney James L. Edmunson, did not respond. The entire record of this matter, including the exhibits in evidence, the audio recording of the hearing, and the parties' written submissions, has been reviewed. The director modifies the award of attorney fees, but otherwise adopts and affirms.

Insurer ended claimant's eligibility for vocational assistance, citing OAR 436-120-0350(1) and (3). The Rehabilitation Review Unit set aside insurer's determination, finding that insurer did not obtain new information as required to end eligibility under OAR 436-120-0350(1), and that claimant's lack of suitable employment is due to the injury, so claimant's eligibility cannot be ended under OAR 436-120-0350(3).

Insurer requested a contested case hearing, arguing that it had new information on which to end claimant's eligibility, and the unit misapplied OAR 436-120-0350(1). Insurer argued that the evidence at the time claimant's eligibility was ended showed that the impairment due to the injury was gone. Claimant argued that the information on which insurer ended claimant's eligibility did not rise to the level of "new information." Claimant further argued that claimant's permanent partial disability award is final and is the law of the case.

The ALJ agreed with claimant and upheld the unit's order, deferring to the unit's interpretation of OAR 436-120-0350(1). The ALJ found that the information on which insurer ended claimant's eligibility was not new information, but only a reevaluation of already existing medical evidence.

In its exceptions, insurer argues the information on which it ended claimant's eligibility was a new medical finding based on new information; the worker's condition had changed and the accepted condition had, by that time, resolved; and the ALJ erred in her analysis.

In vocational assistance matters, the unit's order may be modified at hearing only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). While insurer does not specifically allege any of these grounds, insurer argues the unit misapplied an administrative rule. However, insurer's arguments do not

persuade the director that the unit's order is subject to modification under ORS 656.283(2)(c). Therefore, the director adopts and affirms the ALJ's order insofar as it affirms the unit's order setting aside insurer's notice of end of eligibility.

The director modifies the award of attorney fees. If a claimant finally prevails in a dispute over vocational assistance, the director shall require the insurer to pay a reasonable fee to the claimant's attorney. ORS 656.385(1). Effective January 1, 2004, the total fee may not exceed \$2,000 absent a showing of extraordinary circumstances. The unit awarded claimant's attorney \$1,068.75, and the ALJ awarded claimant's attorney \$1,237.50. It appears both awards were based on a simple calculation of time devoted multiplied by hourly rate. However, under ORS 656.385(1), primary consideration is to be given to the time devoted and the results achieved. The director has adopted rules for establishing the amount of the fee. The rules contain a matrix outside of which the fee may not fall absent a showing of extraordinary circumstances or agreement of the parties. OAR 436-001-0265(1)(b).

Claimant's attorney devoted a total of 10.25 hours (4.75 hours at administrative review, 5.5 hours at hearing), within the highest "time" range of the matrix. Although there is no evidence or argument as to the estimated results achieved, OAR 436-120-0008(2) provides guidance. *See* OAR 436-001-0265(1)(d). Here, claimant is entitled to an authorized training plan. (Ex. 9.) The value of a training plan falls in the highest "results" range of the matrix. OAR 436-120-0008(2)(b)(C). No extraordinary circumstances have been alleged. Therefore, claimant's attorney is awarded the maximum of \$2,000 for all services rendered in this matter.

IT IS HEREBY ORDERED:

1. The September 22, 2004 Proposed and Final Contested Case Hearing Order is adopted and affirmed, except the award of attorney fees. Claimant remains eligible for vocational assistance.

2. Insurer shall pay claimant's attorney a total fee in the amount of \$2,000, for time spent before the unit and at hearing.