
In the Matter of the Vocational Assistance Dispute of

Suzanne P. Blakley, Claimant

Contested Case No: H03-132

FINAL ORDER

August 27, 2004

SUZANNE P. BLAKLEY, Petitioner

SAIF CORPORATION, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

This matter comes before the director for issuance of a final order. Insurer, SAIF Corporation, by and through its attorney Michael G. Fetrow, submitted exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Ella D. Johnson's March 4, 2004 Proposed and Final Contested Case Hearing Order. Claimant, Suzanne P. Blakley, by and through her attorney Christopher D. Moore, submitted a response, to which insurer replied. The record has been reviewed, including the exhibits in evidence, the audio recording of the hearing, and the parties' written submissions. The director affirms on different grounds.

As an initial matter, insurer notes that the ALJ's evidentiary ruling is inaccurate. The ALJ stated that the record consists of exhibits 1 through 19. Insurer is correct that the record consists of exhibits 1 through 20.

The underlying issue is whether claimant can return to regular work. The Rehabilitation Review Unit, in its October 22, 2003 Director's Review and Order, found that claimant was able to return to her regular employment, upholding insurer's determination that claimant was ineligible for vocational assistance. The ALJ reversed, finding that the unit abused its discretion. The ALJ ordered insurer to determine claimant's eligibility for vocational assistance.

Insurer contends that the basis for reversal is not clear and that the ALJ exceeded her authority by substituting her judgment for that of the unit. Insurer also disputes many of the ALJ's findings of fact. Claimant responds that the corroborated and un rebutted testimony at hearing establishes something different than the record before the unit.

The parties dispute the appropriate scope of review in vocational assistance matters. The director is bound by ORS 656.283(2) limitations on review of a vocational assistance order from the Rehabilitation Review Unit, and by ORS 183.650 limitations on review of a proposed order from the Office of Administrative Hearings.

The director may adopt the proposed order as the final order or may modify the proposed order. OAR 137-003-0655(6), 436-001-0275(3). If the director modifies the proposed order in any substantial manner, the agency must identify and explain the modifications. ORS 183.650, OAR 137-003-0665(3). The director may only modify the ALJ's findings of historical fact if the director determines that the finding is not supported by a preponderance of the evidence in the record. ORS 183.650(3), OAR 137-003-0665(4).

Insurer takes issue with several of the ALJ's findings of fact. The director modifies the following findings because they are not supported by a preponderance of the evidence in the

record, and otherwise adopts the ALJ's findings of fact.

The ALJ inaccurately summarizes claimant's affidavit regarding how rolls of carpet were moved. The ALJ's finding is, in part, that claimant stated that she had to "lift rolls of carpet without assistance that weighed in excess of 100 pounds." (Finding 8.) Claimant's affidavit states that she had to move rolls of carpet away from the wall; it does not state that she had to lift the rolls of carpet. (Ex. 12.) Accordingly, finding (8) is modified as follows:

(8) On April 21, 2003, claimant signed an affidavit in which [she] stated that her job at injury required her to lift more than five pounds overhead when she lifted various sizes of boxes of panels, weighing from 5 to 25 pounds onto storage shelves approximately six to eight feet high. She also lifted airline seats weighing in excess of 25 to 50 pounds onto a table from the floor, put the panel on the back of the seat and had to reach up over her head to pull the fabric over the seat and secure the fabric. She stated that following her injury, Dr. Wigle limited her overhead lifting to less than five pounds and restricted her lifting to less than 50 pounds. **Claimant stated that in her job she had to push and pull in excess of 50 pounds occasionally when moving rolls of carpet that weighed in excess of 100 pounds away from the walls without assistance.** She also had to lift and carry five gallon glue containers which weighed 40 to 50 pounds. Sometimes she had to install the upholstered panels in the plane. She had to pull herself up into the plane using her arms. She stated that she had reviewed the JA and it was not accurate because there was no mention of the need to move rolls of carpet or the overhead lifting requirement. Dr. Wigle's understanding of the duties of her job was also inaccurate. Both the [job analysis] and Dr. Wigle thought that all she did was cut carpet. She further stated that she continued to have significant pain. (Exs. 12, 17; test. of claimant.)

Finding (10) is, in part, that Dr. Hill became claimant's attending physician on April 21, 2003. Insurer takes issue with this finding, contending there is no evidence establishing when Dr. Hill became claimant's attending physician. The only evidence is Dr. Hill's April 21, 2003 chart note. The relevant portion states: "**Change of attending physician form:** Yes, per patient request." (Emphasis in original.) (Ex. 13-4.) Claimant testified that Dr. Hill became her attending physician in May, 2003. The exact date is not relevant to the issue in dispute. The director therefore modifies the first sentence of finding (10) to state:

(10) Dr. Hill became claimant's attending physician in April or May, 2003. * * *

The remainder of finding (10) is adopted. Finding (11) is as follows: "On April 30, 2003, Dr. Wigle opined that claimant was unable to frequently push and pull using her left arm for six hours out of an eight hour work day. (Ex. 11)." Insurer is correct that Dr. Wigle actually opined

the opposite. In response to a statement written by claimant's attorney, Dr. Wigle marked an "X" next to "no," thereby indicating "* * * it's [not] medically probable that as a consequence of her industrial injury [claimant] is precluded from frequently [six out of eight hours] pushing and pulling using her left arm." (Ex. 11.) Finding (11) is modified accordingly:

(11) On April 30, 2003, Dr. Wigle opined that claimant is not precluded from frequently (six hours out of an eight hour work day) pushing and pulling using her left arm. (Ex. 11.)

The remainder of the ALJ's findings of fact are adopted.

ORS 656.283(2)(b) directs the Rehabilitation Review Unit, on administrative review of a vocational assistance dispute between a worker and an insurer, to "resolve the matter in a written order containing findings of fact and conclusions of law. The order shall be based on a record sufficient to permit review under [ORS 656.283(2)(c)]." ORS 656.283(2)(c) provides, in part,

"At the contested case hearing, the decision of the director's administrative review shall be modified 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."

The courts have provided some guidance in the scope of the contested case hearing under a former version of ORS 656.283.¹ In *Lasley v. Ontario Rendering*, 114 Or App 543 (1992) (it was not an abuse of discretion for the director to find claimant ineligible for assistance under one rule, even if claimant could have been found ineligible under another rule, where the hearing record supported the director's decision), the court held that the responsibility of the referee² to determine historical facts at hearing was unaffected by the limitations on review in ORS 656.283(2). 114 Or App at 547. The referee may make findings of ultimate fact in order to determine whether the underlying order is subject to modification on one of the four bases listed in ORS 656.283(2). On review of the referee's order, the board reviews the record developed by the referee but may make different findings of ultimate fact. On appeal, the Court of Appeals reviews the board's order for errors of law and substantial evidence. *Id.*

In *Colclasure v. Washington County School Dist.*, 317 Or 526 (1993), the issue was whether the referee was allowed to find facts different from those on which the director could have based his action at the administrative review level. Finding that not allowing the referee to

¹ Prior to 1995, ORS 656.283(2) provided, in relevant part, "The decision of the director may be modified 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." In 1995, ORS 656.283(2) was amended to include the language providing that "[T]he director shall resolve the matter in a written order containing findings of fact and conclusions of law. The order shall be based on a record sufficient to permit review * * *."

² At the time *Lasley* and *Colclasure*, discussed *infra*, were decided, contested case hearings in vocational assistance matters were held by referees, and review of the referee's order was by the Workers' Compensation Board. Now, hearings in vocational assistance matters are held by Administrative Law Judges, and the ALJ's order is reviewed by the director. See ORS 656.283(2)(c) and (d), 656.704(2) and (3)(a).

find independent facts would fly in the face of traditional contested case procedures, the court laid out the process under *former* ORS 656.283(2): the director informally investigates the matter and issues an administrative order; the referee conducts a hearing, develops a record, and makes findings of fact; the referee determines whether under those facts the director's order survives review on the bases listed in ORS 656.283(2); the referee's order is reviewed under ORS 656.283(2) on the record developed at hearing. 317 Or at 537.

The court in *Colclasure* noted that “[a] different result would have been obtained had the director conducted a contested case hearing, made a record, and entered findings of fact thereon.” 317 Or at 535, n.4. ORS 656.283(2) was amended in 1995 in response to *Colclasure*. The statute now directs that the order issued by the Rehabilitation Review Unit on administrative review “shall contain[] findings of fact and conclusions of law. The order shall be based on a record sufficient to permit review under [ORS 656.283(2)(c)].”

The 1995 statutory change was interpreted in *Joseph A. Richard*, 1 WCSR 3 (1996). The ALJ noted that the new procedures provided in ORS 656.283(2) coincided with the procedures described in *Colclasure*:

It appears that the [new] language * * * in ORS 656.283(2) was an attempt by the legislature to provide the director with a procedure that would comply with the requirements set out by the court. If, as suggested, I interpret these statutes so that the findings of fact and the record are determined at the initial administrative review before the contested case hearing, then the parties' rights to be heard and to present and rebut evidence at hearing would be made meaningless. By contrast, findings of fact, conclusions of law and a record made by the administrative law judge after a contested case hearing would fully comply with the traditional procedures that provide due process for the parties.”

(Emphasis in original.) 1 WCSR at 5. The ALJ further noted that *Lasley* and *Colclasure* remained unchanged by the amendment of ORS 656.283(2):

“[T]here is no indication that the * * * procedure set out in Lasley was changed by the amendments. * * * Accordingly, I am required to admit all relevant evidence that goes to determining the historic facts in this case and to make findings of fact thereon. The evidence is probative as to the * * * limitations which must be examined for modification of the underlying order. * * * I conclude that the findings of fact, conclusions of law and the record upon which I must make a decision are not limited to those made at the initial administrative review.”

1 WCSR at 5-6.

The director re-affirmed this reasoning in *Timothy W. Stone*, 1 WCSR 378 (1996)

(holding that evidence which is probative of the four bases for modification is admissible). In *Crystal Dougherty*, 2 WCSR 437 (1997), in considering claimant's argument that anything less than a *de novo* review violated her constitutional rights, the ALJ cited *Colclasure* and held that "so long as I review the evidence at hearing *de novo* in determining whether any of the [four bases for modification] occurred, claimant's constitutional rights will not be violated." 2 WCSR at 439.

The director more recently addressed the review limitations in vocational assistance matters in *Teresa Brooke*, 8 CCHR 240 (2003).³ In that case, the ALJ reversed the Rehabilitation Review Unit's order, finding that the unit abused its discretion "by failing to fully investigate the nature of claimant's job at injury to determine whether [claimant] could return to her regular job." 8 CCHR at 240. The director declined to adopt the ALJ's order, reinstating the unit's order. The director found the case distinguishable from *Liberty Northwest v. Jacobson*, 164 Or App 37 (1999), which the ALJ cited in support of her conclusion that the unit abused its discretion by failing to fully investigate.

In *Jacobson*, the claimant raised specific concerns about his training program which were not reflected in the record before the unit or addressed in the unit's order. Although the record did indicate that the unit may have had a general awareness of claimant's concerns, the unit otherwise appeared to have ignored and failed to investigate them. The director and the court held that the unit had no discretion to ignore the claimant's concerns. In upholding the director's conclusion that the unit abused its discretion, the court stated, "the director did not substitute her judgment for that of the [unit]; she exercised judgment in the first instance, because the [unit] had failed to do so." *Jacobson*, 164 Or App at 46. In *Brooke*, by contrast, both the record before the unit and the unit's order reflected and addressed claimant's contentions regarding the number of hours she worked. The unit did not find that her contentions changed the conclusion that she could return to her regular work. The director disagreed with the ALJ that the unit failed to fully investigate:

"Based on this record, the reviewer was clearly aware of claimant's contentions regarding the nature of her job, believed her regarding the hours, and attempted to obtain further clarification from the providers in light of claimant's contentions. Unlike *Jacobson*, the reviewer did not ignore claimant's concerns. After considering and weighing the evidence in the record the unit concluded that, despite the number of hours claimant worked, she nonetheless did not meet the eligibility requirements under the rules. * * * [The] ALJ * * * relied on much of the same record as the reviewer. * * * The unit and the ALJ each weighed the evidence in the record and reached different conclusions. However, the unit's reliance on different evidence than the ALJ does not rise to the level of being 'clearly against reason and evidence.' The record clearly demonstrates that the unit was aware of claimant's

³ Beginning in 2004, the Workers' Compensation Division began a new reporter for contested case hearing orders called the Contested Case Hearing Reporter, or CCHR. Prior contested case orders were published in the Workers' Compensation Supplemental Reporter, or WCSR.

contentions and investigated them. That the ALJ reached a different conclusion is not a basis to modify the unit's order under ORS 656.283(2)(c)."

Brooke, 8 CCHR at 240.

Here, the issue is whether claimant can return to her regular work within her restrictions as to lifting, pushing and pulling, and overhead reaching and lifting. The unit agreed with insurer that she could, making her ineligible for vocational assistance. The ALJ disagreed, finding that the unit abused its discretion by relying on the medical evidence it relied on. The director affirms the ALJ on different grounds, finding that evidence before the unit showed that the overhead lifting requirements of claimant's regular job exceeded claimant's restrictions, and the unit did not adequately explain its finding to the contrary.

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 employment⁴ with the employer at the time of injury or aggravation, and the worker has a substantial handicap to employment.⁵ ORS 656.340(6)(a).⁶ The worker's previous or "regular" employment is the employment the worker held at the time of the injury. ORS 656.340(5), OAR 436-120-0005(10).

Claimant's regular job was Upholstery Associate. The job description prepared by the employer indicates generally that the person in the position must reach, carry, and climb, and be able to occasionally move up to 50 pounds. (Ex. 1.) The job analysis prepared by insurer indicates, in part, that the Upholstery Associate must frequently lift less than five pounds; occasionally and with assistance lift 10-25 pounds; and rarely reach overhead, but will need to

⁴ "Suitable employment" means:

- (i) Employment of the kind for which the worker has the necessary physical capacity, knowledge, skills and abilities;
- (ii) Employment that is located where the worker customarily worked or is within reasonable commuting distance of the worker's residence; and
- (iii) Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker's regular employment. ORS 656.340(6)(b)(B).

⁵ 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. ORS 656.340(6)(b)(A). "Knowledge," "skills," and "abilities" are further defined in OAR 436-120-0005(11) (eff. 7/1/02, see 436-120-0003(1)).

⁶ OAR 436-120-0320(9) further provides:

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

"(a) The worker is authorized to work in the United States.

"(b) The worker is available in Oregon for vocational assistance. The insurer shall consider the worker available in Oregon if the worker lives within commuting distance of Oregon or documents, in writing, willingness to relocate to or within commuting distance of Oregon within 30 days of being found eligible. The worker is responsible for costs associated with being available in Oregon. The requirement that the worker be available in Oregon for vocational assistance does not apply if the Oregon subject worker neither worked nor lived in Oregon at the time of the injury.

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

"(A) Is not able to return to regular employment;

"(B) Is not able to return to any other suitable and available work with the employer at injury or aggravation; and

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

"(d) None of the reasons for ineligibility under OAR 436-120-0350 applies under the current opening of the claim."

kneel and reach above shoulders to cut carpet. (Ex. 7.)

Claimant's affidavit indicates that she was regularly required to lift panels weighing more than five pounds onto shelves that were eight feet high, and had to lift seats from the floor to a table. Further, she was required to reach overhead to pull fabric down over a seat. (Ex. 12.) Claimant disagreed with insurer's job analysis, in that there was no mention of the need to lift overhead.⁷ Claimant told the Rehabilitation Review Unit vocational consultant that the job required overhead lifting of five to 25 pounds every day. She had to lift boxes of panels and 10-15 pound seats onto six foot shelves. (Ex. 17.)

The physical capacities evaluation (PCE) indicates that claimant reported that the maximum lifting was 40-50 pounds from a variety of positions including overhead, four to five times a day. (Ex. 5-1.)

The PCE identified claimant's maximum capabilities as lifting 37 pounds from floor to knuckle level, 32 pounds from knuckle to shoulder level, and 17 pounds from shoulder to overhead, all with both hands. (Ex. 5-2.) As to overhead work, claimant "was able to keep both of her hands above shoulder level for 3 minutes before feeling burning fatigue sensation into her posterior shoulder girdle. By 4 minutes, she needed to bring her hands down by her side to rest." Further, "[h]er major limitation at this time appears to be with regards to overhead activity." The attached Functional Abilities Form indicated that claimant could occasionally reach above shoulder level, and that rest periods were required with overhead activity. The form defined "occasionally" as 1% to 33% of an eight-hour workday. (Ex. 5-5.)

Dr. Wigle reviewed the PCE and agreed with its recommendations about claimant's work capacities. (Ex. 6.) Dr. Wigle released claimant to medium-level work and to the job as described in the job analysis, as long as she is not required to lift more than 50 pounds or exceed the restrictions noted in the PCE. (Ex. 7-3, 8.)

Dr. Hill believed that claimant was clearly not capable of performing any overhead reaching with her left arm. He felt a release to light work was appropriate, and restricted her, in part, to maximum lifting of 30 pounds; occasional lifting over 15 pounds; avoid overhead reaching; and avoid significant lifting above waist level. (Ex. 13.)

On May 29, 2003, claimant was examined by a medical arbiter as part of the reconsideration of her claim closure under ORS 656.268. In response to specific questions posed by the Appellate Review Unit, the arbiter concluded claimant "has partial loss to repetitively use the shoulder in overhead activity"; is capable of medium level work exerting 50 pounds occasionally, 25 pounds frequently and constantly; and is limited in overhead reaching to no more than 20 pounds. (Ex. 15-6, 15-7.)

The Rehabilitation Review Unit reasoned that the PCE and the medical arbiter found that claimant was capable of performing the tasks she indicated were required by her job. (Ex. 18.) Evidence before the unit, however, showed otherwise with respect to overhead reaching and

⁷ Claimant also asserted that the job analysis did not mention the need to move rolls of carpet. Contrary to claimant's assertion, the job analysis that Dr. Wigle reviewed does mention the need to move rolls of carpet, although she is correct that it does not mention any need to lift overhead. (Ex. 7-2.)

lifting. While the job analysis indicated that the Upholstery Associate rarely reached overhead (Ex. 7), claimant told the unit, as indicated by a Memo to Claim File, that her job required overhead lifting of five to 25 pounds every day. (Ex. 17.) Claimant's contention is supported by the PCE, which stated that claimant reported maximum lifting of 40-50 pounds from a variety of positions, including overhead.⁸ (Ex. 5-1.) The PCE, with which Dr. Wigle agreed, found claimant's maximum capability to lift overhead to be 17 pounds. (Ex. 5-2.) The medical arbiter limited claimant to overhead reaching of no more than 20 pounds. (Ex. 15.) Based on these medical findings, even without considering Dr. Hill's opinion, the most claimant could lift overhead was 20 pounds. Yet claimant contended her job required her to lift up to 25 pounds overhead. The unit may have chosen to give more weight to the job analysis than to claimant's contentions, but the unit's order did not explain that.

The phrase "abuse of discretion" is a legal term of art meaning a discretion exercised to an end or purpose not justified by and clearly against reason and evidence; any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted. BLACK'S LAW DICTIONARY 10-11 (6th ed. 1990); *Jerry L. Bell*, 2 WCSR 394, 395 (1997), citing *Casciato v. Oregon Liquor Control Comm'n*, 181 Or 707, 717 (1947) and *Far West Landscaping v. Modern Merchandising*, 287 Or 653,663 (1979). On review for abuse of discretion, "[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made." *Brooke*, 8 CCHR at 241, quoting *Jacobson*, 164 Or App at 45.

The unit's decision is not so egregious as to be labeled unreasonable, unconscionable, or arbitrary. The unit's order reflects that it considered the following evidence: the July 2001 job description; claimant's former attending physician's (Dr. Wigle) opinion; the October 2002 PCE; the February 2003 job analysis; claimant's April 2003 affidavit; claimant's new attending physician's (Dr. Hill) opinion; the May 2003 medical arbiter report; and claimant's statements made to the unit in October 2003. The unit considered the facts pertaining to claimant's job and abilities, applied the law and rules regarding eligibility for vocational assistance, and explained its reasoning as to why it found the PCE, Dr. Wigle's opinion, and the medical arbiter report more persuasive than Dr. Hill's opinion, reasoning that Dr. Wigle's opinion was supported by the PCE, and Dr. Wigle was familiar with claimant's case after his long-term treatment of her.

On the other hand, the unit's decision is clearly against the evidence as to the issue of overhead lifting without adequate explanation. The unit reasoned as follows:

*"[Claimant] did not agree with the [job analysis] stating her job required lifting over five pounds overhead * * *. However, according to the PCE, [claimant] is able to * * * lift 17 pounds over her head * * *. In addition, the medial arbiter stated [claimant] was able to lift up to 20 pounds overhead * * *. I therefore conclude, based on the PCE, the attending physician, and the medical arbiter reports that Ms. Blakley is physically capable of returning to regular work. * * * [E]ven if the job is as she*

⁸ Claimant's contention was further corroborated by the testimony at hearing.

describes it in her affidavit and in her statement to [the unit], she still has the physical capacities to perform the job based on the findings of the PCE.”

(Emphasis added.) (Ex. 18-4.) The notes of claimant’s statement to the unit begin by stating: “The job-at-injury required overhead *between five and 25 pounds.*” (Emphasis added.) (Ex. 17.) If the job was as claimant described it, she did not have the physical capacities to perform it based on the findings of the PCE. While the unit has the discretion to find certain evidence more persuasive than other evidence, the unit did not explain why it believed that claimant’s job required overhead lifting of less than 17 pounds, when claimant stated it required overhead lifting up to 25 pounds. Under these circumstances, the unit’s order is subject to modification under ORS 656.283(2)(c)(D).

The director therefore modifies the unit’s order; claimant is not able to return to her regular work; insurer must evaluate claimant’s eligibility for vocational assistance under the remaining criteria set forth in ORS 656.340 and OAR 436-120-0320. In light of the above, the director does not reach the issue of whether the unit abused its discretion by relying on the job analysis, the PCE, and the opinion of Dr. Wigle or the parties’ corresponding arguments.

ATTORNEY FEES

Claimant has prevailed and her attorney is entitled to a fee under ORS 656.385(1). The ALJ awarded \$6,000 considering, among other things, the high quality of representation and the high risk that claimant’s attorney’s efforts would go uncompensated.

Effective January 1, 2004, new rules apply to attorney fees awarded by the director in vocational assistance disputes. ORS 656.385(1), as amended by Oregon Laws 2003, chapter 756, section 2 (Enrolled Senate Bill 620),⁹ provides, in relevant part:

In all cases involving a dispute over compensation benefits pursuant to ORS * * * 656.340, where a claimant finally prevails after a proceeding has commenced before the [d]irector * * *, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant’s attorney. * * * The attorney fee must be based on all work the claimant’s attorney has done relative to the proceeding at all levels before the department. The attorney fee assessed by the director, or on appeal from an order of the director, under this section must be proportionate to the benefit to the injured worker. The director shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances.”

⁹ The amendments to ORS 656.385(1) apply to all claims for which an order relating to the issue on which attorney fees are sought has not become final on or before January 1, 2004. Or Laws 2003, ch 756, § 3.

The director has amended the rules applicable to attorney fee awards in contested cases in response to this statutory change. OAR 436-001-0265 now provides a matrix outside of which the fee award may not fall absent a showing of extraordinary circumstances or agreement of the parties. The matrix factors in time devoted and results achieved. The maximum number of hours on the matrix is 12; the maximum result achieved is \$10,000. Other factors may also be considered, including the complexity of the issues involved; the quality of the legal representation; the value of the interest involved; the nature of the proceedings; the risk in a particular case that an attorney's efforts may go uncompensated; the assertion of frivolous issues or defenses; a statement of services; and any other relevant consideration deemed appropriate. OAR 436-001-0265(2)(a)-(h).

Claimant's attorney requested \$6,000, representing that his firm spent 20 hours on this case, his normal hourly rate is \$250, and the benefit to claimant may exceed \$25,000. Claimant's attorney argues that extraordinary circumstances exist because the hours expended and the value to claimant exceed the values contemplated by the director's matrix; the matter went to hearing; and the fact that the hearing was postponed on very short notice.

Insurer objects to the amount of the fee, contending that 20 hours appears excessive and 20 hours multiplied by \$250 equals less than \$6,000. Insurer further disputes that extraordinary circumstances exist in this case.

Attorney fees under ORS 656.385(1) are not simply a matter of multiplying the number of hours worked by the hourly fee. The statute directs that primary consideration shall be given to the time devoted and the results achieved. Quantifying the results achieved is not an easy task, but OAR 436-120-0008(2) provides guidance for calculating the value of vocational benefits to be provided to a worker. *See* OAR 436-001-0265(1)(d). OAR 436-120-0008(2)(b) provides, in relevant part:

“(b) In determining the value of the results achieved, the director may consider, but is not limited to the following:

* * * * *

*(C) For the purposes of applying the matrix, the value of an eligibility determination is assumed to be the maximum allowed in the fee schedule provided in OAR 436-120-0720 for completing an eligibility evaluation; the value of vocational assistance or a training plan, unless determined to be otherwise, is assumed to fall within the highest category provided in the above matrix * * * .”*

(Emphasis added.) As a result of this order, claimant is now entitled to an eligibility evaluation with a substantial handicap analysis. *See* OAR 436-120-0340(1). Claimant is not eligible for vocational assistance unless, as a result of that evaluation and analysis, she is found eligible. While the potential benefit to claimant, should she be found eligible, is great, the calculation of the benefit achieved at this stage is limited under the rules. Under OAR 436-120-0720(1) and the director's Bulletin 124 (June 4, 2004), the maximum allowed for completing an eligibility evaluation is \$377. The maximum allowed for completing a substantial handicap analysis is \$754. Therefore, the estimated results achieved falls within the lowest range (\$1 to \$2000) on the

director's matrix. The maximum fee allowed under the matrix considering the value of the results achieved is \$1,250 for 8.1 to 12 hours, the maximum number of hours contemplated by the matrix.

Claimant's attorney requests a fee that falls outside the matrix, contending that extraordinary circumstances exist because the values in the director's matrix have been exceeded; the matter went to hearing; and the hearing was postponed on very short notice. The director does not find the fact that a matter goes to hearing extraordinary. Neither are scheduling delays and unexpected weather events which, although inconvenient, are a normal part of doing business. However, the director does find that circumstances warrant going beyond the matrix here; a fee of \$1,250 for 20 hours of work would not fairly compensate claimant's attorney. On the other hand, the statute directs that the fee must be proportionate to the benefit to the worker, and the director's rules provide a method for calculating the benefit here. A fee of \$6,000 would be disproportionate to the benefit to claimant as calculated under the rules, and out of proportion with the values provided in the matrix as a whole. *See Pedro Santa Maria*, 9 CCHR 69 (2004); *Willie J. Graham*, 9 CCHR 215 (2004).

The director acknowledges that claimant's attorney provided excellent legal representation and presented his client's position in a thorough, well-reasoned, and skillful manner. The issue of the appropriate scope of review was of above-average complexity. No frivolous issues or defenses were presented. While the documentary record was quite short and the hearing took less than an hour, two witnesses testified and the attorneys' respective arguments were not simplistic. The exceptions, response, and reply were rather lengthy and detailed, including the argument on the attorney fee issue.¹⁰

However, the director is bound by ORS 656.385(1) and her rules. Considering the time devoted to the case, the results achieved, and in keeping in proportion to the values provided in the director's matrix, the director awards claimant's attorney a fee in the amount of \$3,300.

IT IS HEREBY ORDERED the March 4, 2004 Proposed and Final Contested Case Hearing Order is affirmed. SAIF Corporation is ordered to determine claimant's eligibility for vocational assistance.

DATED this 27th day of August, 2004.

¹⁰ Time devoted to arguing the issue of attorney fees is not considered in calculating the fee.