

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

**Albert V. Cooper, Claimant**

Contested Case No: H03-013

**FINAL ORDER**

August 10, 2004

EXPRESS COMPANIES LLC, OREGON CONTRACTORS WORKERS' COMPENSATION  
TRUST, AND EMPIRE PACIFIC RISK MANAGEMENT, INC., Petitioner

ALBERT V. COOPER, Respondent

Before Jerry Managhan, Deputy Administrator, Workers' Compensation Division

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Petitioner employer filed exceptions to Office of Administrative Hearings Administrative Law Judge Ella D. Johnson's February 26, 2004 Proposed and Final Contested Case Hearing Order. Respondent claimant filed a response and supplemental statement of services. This matter comes before the director for issuance of a Final Order. The issue is whether claimant can return to regular work.<sup>1</sup> The entire record has been reviewed, including the exhibits in evidence, the audio recordings of the hearings, and the parties' written submissions.<sup>2</sup> The director adopts and affirms the ALJ's proposed order with the following supplementation.

The proposed order slightly misstates the history of the case. A hearing was held before ALJ Paul Vincent on May 20, 2003. Claimant, Albert V. Cooper, testified on his own behalf and Susan Martin of Workforce Dynamics testified on employer's behalf.<sup>3</sup> The hearing was continued for depositions and rescheduled before ALJ Coburn on October 21, 2003. ALJ Coburn had previously been recused in this matter, so the hearing we re-set before ALJ Johnson on January 9, 2004.

The issue is whether the Rehabilitation Review Unit's January 24, 2003 Director's Review and Order finding that claimant is not able to return to regular employment is subject to modification under ORS 656.283(2)(c).

The director adopts the ALJ's findings of fact.

On December 4, 2002, employer found claimant ineligible for vocational assistance because he was released to regular work. Claimant requested review. The Rehabilitation Review Unit set aside employer's decision and found that claimant was not able to return to regular employment. The unit ordered employer to evaluate whether claimant has a substantial handicap

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<sup>1</sup> The Rehabilitation Review Unit, the parties, and the ALJ have incorrectly framed the issue as whether claimant is eligible for or entitled to vocational assistance. As discussed below, the issue before the director is limited to whether claimant is able to return to regular work.

<sup>2</sup> The third of three telephone hearings in this matter was held before ALJ Johnson on January 9, 2004 for the purpose of closing arguments. The audio recording of that hearing is missing. Rather than re-create that portion of the hearing, the parties agreed to submit their closing arguments to the director in writing. A briefing schedule was set. Employer's argument was due July 20, 2004, and was timely submitted. Claimant's written argument was due July 30, 2004, and has not been received to-date. The director therefore proceeds on the record before her.

<sup>3</sup> The proposed order does not indicate that any oral testimony was heard. *See* OAR 137-003-0645(3)(b) (providing that a proposed order shall include, among other things, the identity of witnesses).

to employment. Employer requested a hearing. ALJ Johnson affirmed the unit's order and awarded attorney fees.

Employer argues that claimant does not have a substantial handicap to employment because he is employed as a long-haul truck driver; he is therefore not eligible for vocational assistance under OAR 436-120-0330(9)(c). Employer further argues that the unit abused its discretion and committed an error of law by failing to address all of the eligibility rules. Notably, employer states that it is not arguing that claimant is able to return to his regular employment.

Claimant responds that claimant is not able to return to his regular employment, and his current job is not "suitable" as that term is defined in OAR 436-120-0005.

A review of the process for determining a worker's eligibility for vocational assistance would be helpful. The insurer determines whether a worker is eligible for vocational assistance under ORS 656.340(6) and OAR 436-120-0320(9).<sup>4</sup> ORS 656.340(4); OAR 436-120-0320, 436-120-0340. If the worker disagrees with the insurer's determination, the worker can request review of that determination by the Rehabilitation Review Unit. ORS 656.283(2)(b) and 656.340(1), (4). The unit does not make the original eligibility determination; rather, the unit reviews the insurer's determination.

Here, employer's eligibility evaluation stated:

"The findings, therefore, are that in accordance with OAR 436-120-0320(9)(c)(A), Mr. Cooper is ineligible for vocational assistance, as he is able to return to regular employment with regard to his accepted industrial claim for fractured metacarpal left hand and fractured metacarpal fifth finger of the left hand. \* \* \* Mr. Cooper, therefore, is found ineligible for vocational assistance as he has a regular release to return to truck driving as per the accepted industrial injury with Express Companies LLC and their carrier Empire Pacific Risk Management."

(Ex. 152-2.) Employer's evaluation only addressed one of several eligibility criteria under OAR 436-120-0320(9); namely, whether claimant was able to return to regular employment under OAR 436-120-0320(9)(c)(A). Because it found that claimant was able to return to regular employment and did not meet that criterion, employer did not address the remaining eligibility criteria.

Claimant disagreed with employer's determination and requested review. (Ex. 153.) While the unit framed the issue as "[w]hether Mr. Cooper is eligible for vocational assistance" (Ex. 156-1), the only issue before the unit was whether claimant was able to return to regular employment. The unit found that claimant was not able to return to regular employment, and ordered employer to address the remaining eligibility criteria: "I therefore conclude that Mr. Cooper is not able to return to regular employment. The insurer's denial of vocational assistance

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<sup>4</sup> The rules effective on July 1, 2002 apply to this matter. See OAR 436-120-0003 (eff. 7/1/02) regarding applicability. All references to OAR 436-120 in this order refer to the rules in effect on July 1, 2002.

is set aside. Empire Pacific is ORDERED to evaluate whether Mr. Cooper has a substantial handicap within 20 days of the date of this order.” (Emphasis in original.) (Ex. 156-3.) The unit did not find claimant eligible for vocational assistance.

Employer requested a contested case hearing. The ALJ, too, incorrectly framed the issue as “[w]hether RRU’s decision that claimant was entitled to vocational assistance because he was unable to return to regular work violates the provisions of ORS 656.283(2).” As stated above, the unit did not decide that claimant was entitled to vocational assistance. However, the ALJ’s analysis was appropriately limited to the issue of whether claimant was able to return to regular employment. Agreeing with the unit that he was not, the ALJ affirmed.

Employer argues that the unit and the ALJ failed to address the rules regarding substantial handicap, which must also be addressed in determining whether a worker is eligible for vocational assistance. Employer is correct that the unit and the ALJ did not address the issue of substantial handicap. That failure, however, was not an abuse of discretion or an error of law. Under the terms of the underlying order and the director’s rules, employer must first perform a substantial handicap evaluation and issue the appropriate notice before that issue is ripe for review. *See* OAR 436-120-0340(1), 436-120-0004. Employer did not, and was not required to, do so before because it found that claimant did not meet one of several eligibility criteria. Now that employer has been overturned on that issue, employer must go back and address the remaining criteria.

The eligibility criteria are found in ORS 656.340 and OAR 436-120-0320(9). ORS 656.340(6)(a) provides,

“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.”

(Emphasis added.) 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 \*  
\* \*.

“(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<sup>5</sup> 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.”

The unit and the ALJ found that claimant is not able to return to regular work. Employer does not challenge that finding, and the director affirms it. Employer therefore is required to address the remaining eligibility criteria pursuant to ORS 656.340, OAR 436-120-0320, and 436-120-0340.

The ALJ awarded claimant’s attorney \$4,000. Employer made no specific objection to the fee award or amount, other than to request that the entire proposed order be reversed. Claimant’s attorney states that she spent one additional hour in the exceptions process, but does not request a specific additional amount. The director affirms the ALJ’s fee award.

**IT IS HEREBY ORDERED** that the February 26, 2004 Proposed and Final Contested Case Hearing Order is affirmed. Employer shall determine whether Mr. Cooper is eligible for vocational assistance, including whether he has a substantial handicap to employment.

DATED this 10<sup>th</sup> day of August, 2004.

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<sup>5</sup> ORS 656.340(6)(b)(A) and OAR 436-120-0005(11) define “substantial handicap to employment” to exist when “the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.” “Knowledge,” “skills,” and “abilities” are defined in OAR 436-120-0005(11). “Suitable employment” is defined in ORS 656.340(6)(b)(B) and OAR 436-120-0005(12).