

In the ORS 656.340 Vocational Services Dispute of
JANEAN M. FOSSUM, Claimant

Contested Case No: H04-071

PROPOSED AND FINAL ORDER

December 14, 2004

JANEAN M. FOSSUM, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

Before Ella D. Johnson, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Director's Review and Order issued on March 24, 2004 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or the department). On September 9, 2004, the department referred the matter to the Office of Administrative Hearings. On October 18, 2004, Administrative Law Judge Ella D. Johnson conducted a contested case hearing. Attorney Thomas Cary represented petitioner Janean M. Fossum (claimant). Attorney Darren Lee represented respondent Liberty Northwest Insurance Corporation (insurer). No witnesses testified and the record closed on October 18, 2004 following the hearing.

ISSUE

Whether RRU's decision that claimant was not entitled to payment of temporary total disability (TTD) and reimbursement for the costs of training she obtained without insurer's approval violates ORS 656.313.

EVIDENTIARY RULING

WCD Exhibits 1 through 19 and claimant's supplemental Exhibits 18-5¹, 18A and 18B were admitted into the record without objection.

FINDINGS OF FACT

I adopt the Findings of Fact set forth in RRU's March 24, 2004 Director's Review and Order, with the following supplementation:

- (1) Claimant suffered a compensable injury to her right hand, arm and shoulder on November 13, 1998 while working as a permanent year-round registered nurse for McKenzie-Willamette Hospital. (Ex. 1.)

¹ Exhibit 18, which is the Director's Review and Order, inadvertently omitted the record contents and RRU's certification of the record. Exhibit 18-5 supplies a copy of the omitted document.

(2) On December 13, 2001, insurer denied claimant's request for vocational assistance contending that she did not have a substantial handicap to employment. On April 29, 2002, RRU issued an order which set aside insurer's denial and ordered insurer to refer claimant to a mutually agreed upon vocational assistance provider within five days from the date of the order. (Ex. 3.) Insurer appealed RRU's decision.

(3) On July 31, 2002, insurer closed claimant's claim by Notice of Closure (NOC) awarding TTD for the period of November 23, 1998 through November 27, 2001 and 12 percent (38.4 degrees) permanent partial disability (PPD). (Ex. 4.) An Order on Reconsideration modified the TTD award and decreased the PPD award. (Ex. 5.)

(4) On November 7, 2002, insurer notified claimant that an audit of her claim file revealed that her TTD had been overpaid because her average weekly wage (AWW) had been miscalculated. (Ex. 6.)

(5) On December 12, 2002, the vocational assistance provider developed an Authorized Training Plan (ATP) with the goal of preparing claimant to become a nurse recruiter or nurse supervisor. Under the proposed ATP, claimant would complete nine credit hours on her own during the fall term 2002. Insurer would begin paying for her ATP on-line academic programs at the Oregon Health Sciences University (OHSU) and Lane Community College (LCC), beginning January 6, 2003 and ending March 26, 2004. (Ex. 10.)

(6) On January 1, 2003, insurer notified claimant that her ATP was not approved because it had miscalculated her AWW. Insurer rescinded claimant's eligibility for vocational assistance and issued a Notification of Eligibility for Vocational Evaluation instead. (Ex. 6.) At that point, claimant had already completed the fall term 2002 and was about to start the winter term 2003 of her ATP. (Ex. 17)

(7) Claimant appealed insurer's rescission and continued the plan on her own without insurer's approval and financial assistance. A February 24, 2003 Director Review and Order set aside insurer's Notification of Eligibility for Vocational Evaluation and ordered insurer to reinstate claimant's entitlement to vocational assistance. A November 7, 2003 Proposed and Final Contested Case Order affirmed RRU's decision. (Exs. 6, 8.)

(8) To date, claimant has paid \$13,469.89 toward her ATP. She has taken all but 21 credits needed for a Bachelor of Science Degree, which will qualify her to be a nurse recruiter or nurse supervisor. The cost of the remaining portion of her ATP is \$12,752.73. On January 8, 2004 claimant signed a new ATP to begin on January 5, 2004 and end on June 11, 2004 with the same goals as the December 12, 2002 plan. (Ex. 10.)

(9) On January 14, 2004, the vocational assistance provider notified claimant that insurer had approved the remainder of her training, but had not authorized reimbursement of the \$13,469.89 already paid by claimant. (Ex. 11.)

(10) On January 20, 2004, claimant requested review of insurer's refusal to reimburse her for the ATP costs already paid. On reconsideration, she requested that the costs be reimbursed

with interest. (Exs. 13, 18A.)

CONCLUSION OF LAW

RRU's decision that claimant was not entitled to payment of temporary total disability (TTD) and reimbursement for the costs of training she obtained without insurer approval does not violate ORS 656.313.

OPINION

Jurisdiction lies with the director. ORS 656.340(4). Pursuant to ORS 656.283(2)(c), I may modify the administrative order 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). The burden of proof falls upon the proponent of a fact or position. ORS 183.450(2). In that regard, claimant bears the burden of proving by a preponderance of the evidence that RRU's decision should be modified because it allegedly violates ORS 656.313. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is by a preponderance of the 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).

Based on its interpretation of ORS 656.313, RRU concluded that claimant was not entitled to payment of TTD and reimbursement of the costs of training she received from January 2003 through August 2003. Focusing on the language set forth in the highlighted subsection (1)(a)(D), RRU determined that insurer was not required to provide vocational benefits retroactively prior to its order becoming final. ORS 656.313 states in pertinent part:

(1)(a) Filing by an employer or the insurer of a request for hearing on a reconsideration order before the Hearings Division, a request for Workers' Compensation Board review or court appeal or request for review of an order of the Director of the Department of Consumer and Business Services regarding vocational assistance stays payment of the compensation appealed, except for:

(A) Temporary disability benefits that accrue from the date of the order appealed from until closure under ORS 656.268, or until the order appealed from is itself reversed, whichever event first occurs;

* * * * *

(D) Vocational benefits for services for vocational evaluation and help in directly obtaining employment as provided by ORS 656.340 (7) and for services related to the development of plans for return to work, as provided by ORS 656.340 (9). **No plan for return to work may be implemented until the vocational order on appeal has become final.**

(b) If ultimately found payable under a final order, benefits withheld under this subsection shall accrue interest at the rate provided in ORS 82.010 from the date of the order appealed from through the date of payment.

The parties dispute the proper construction of the statute. Claimant contends that RRU misinterpreted ORS 656.313 because it failed to read the statute in light of the purposes of the Workers' Compensation Act set forth in ORS 656.012(2).² Claimant also argued that RRU failed to read the vocational assistance provisions of the statute in the context of the entire statute. In support of her argument, claimant contended that the purpose of ORS 656.313 is to delineate the benefits that must be paid during the pendency of an appeal of the decision, not to provide a basis for denial of benefits once the final decision is made. She invites me to analyze the text and context as set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993).

In contrast, insurer argues that no benefits were stayed because her eligibility for vocational assistance had been terminated prior to her appeal. In support of its argument, insurer contends that it never approved claimant's vocational plan but claimant nonetheless decided to proceed on her own. Moreover, insurer further argues that, even if her plan had been approved, she is not entitled to reimbursement of the training she obtained without insurer's approval and TTD because one of the purposes of ORS 656.313 with regard to vocational benefits is to stay the matter until both insurer and worker can be on the same page in implementing any vocational plan.

In interpreting a statute, the court's, and thus my task, is to determine the legislative intent. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). In order to discern the legislative intent, the first level of analysis is to examine the text and context of the statute. The text of the statute is the best evidence of the legislature's intent. If the legislature's intent is unclear, then I consider legislative history, and if still unclear, then I apply the general maxims of statutory construction. *Id.*

Applying the foregoing method of analysis to ORS 656.313, I find I need proceed no further than examining the plain meaning of the statute. I agree with insurer that one of the purposes of the statute as set forth in subsection (1)(a)(D) is to stay the implementation of any

² ORS 656.012 (2) provides in pertinent part:

(2) In consequence of these findings, the objectives of the Workers' Compensation Law are declared to be as follows:

* * * * *

(c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable;

* * * * *

plan pending appeal to ensure that both parties are in agreement concerning the plan. But I do not agree that claimant's entitlement to vocational assistance was terminated. The record establishes that a February 24, 2003 Director Review and Order set aside insurer's Notification of Eligibility for Vocational Evaluation and ordered insurer to reinstate claimant's entitlement to vocational assistance. RRU's decision was affirmed on appeal. On the other hand, I do agree with claimant that the purpose of the statute is to stay payment of compensation, not to provide a basis for denying payment once the worker prevails in the appeal.

Taking the parties' arguments into consideration, I nonetheless find that WCD's interpretation of the language of ORS 656.313 is entitled to deference inasmuch as WCD has special expertise, is the agency charged with enforcing the Workers' Compensation Law and has been very involved in developing the legislation of the creating and amending the law. *See Springfield Educ. Ass'n v. Springfield School District*, 290 Or 217 (1980) (agency's interpretation of a statute may be given an appropriate degree of presumptive validity if the agency is involved in the legislative process or if it has expertise based on qualifications of personnel or its experience in the application of the statute to varying facts). Moreover, WCD's interpretation to disallow retroactive reimbursement of the costs of vocational assistance paid by the claimant without insurer approval is not inconsistent with the language of the statute. It is also consistent with the purpose of the statute to stay any action until both insurer and worker can be on the same page in implementing the vocational plan, WCD's duty to enforce the Workers' Compensation Law and its policy that the vocational assistance process should be a collaboration between the insurer and the worker. Accordingly, finding no basis for modifying the administrative order, I affirm.

ATTORNEY FEES

Claimant has not prevailed in the contested case, and therefore, is not entitled to an assessed attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Directors Review and Order dated March 24, 2004 is **AFFIRMED**.