

In the Matter of the ORS 656.340 Vocational Services Dispute of

Sitzman, Jeramy W., Claimant

Contested Case No: H04-035

PROPOSED & FINAL ORDER

June 10, 2004

JERAMY W. SITZMAN, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals the Director's Review and Order issued on February 9, 2004 by the Rehabilitation Review Unit (RRU), Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On April 2, 2004, WCD referred the matter to the Office of Administrative Hearings (OAH). On May 12, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioner Jeramy W. Sitzman (claimant) was represented by attorney R. Adian Martin. Respondent Liberty Northwest Insurance Corporation (insurer) was represented by attorney Raymond T. Smitke. Claimant testified on his own behalf and Senior Vocational Consultant Robert Black testified on insurer's behalf. The record closed on the date of hearing.

ISSUE

Whether RRU correctly determined that claimant is ineligible for vocational services.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 21 were received into the record without objection.

FINDINGS OF FACT

(1) On August 25, 1997, claimant suffered a back injury while working as a cook. (Ex. 1.) Insurer accepted an L5-S1 disc herniation. (Exs. 2-4 and 7-4.)

(2) Following three aggravation claims, claimant's condition became medically stationary on August 7, 2003. Attending physician Thomas J. Rosenbaum imposed the following work restrictions: 25-pound lifting limit, no repetitive bending or twisting and postural changes. (Exs. 3 and 10.)

(3) On October 14, 2003, claimant requested insurer to evaluate his eligibility for vocational assistance. (Ex. 9.)

(4) In a letter dated October 30, 2003, insurer requested verification of claimant's wages and unemployment benefits for the purpose of evaluating his vocational eligibility. The letter requested a response within 10 days and informed claimant that failure to provide the requested information would result in vocational ineligibility. (Ex. 12.) Insurer sent a second letter on the same date enclosing an Educational/Work History form and requesting current employment information. (Ex. 13.) The letters were copied to claimant's attorney's office. (Testimony of claimant; Exs. 12 and 13.)

(5) Upon receiving the October 30th letters, claimant went to Gresham Employment Department office and requested unemployment records. He learned that the Employment Department had no records for him because he had never applied for or received any unemployment benefits. Claimant telephoned the rehabilitation consultant but left no message. (Testimony of claimant.)

(6) Insurer sent two warning letters dated November 26, 2003 enclosing a second work history form and advising that failure to provide the requested information would result in vocational ineligibility. The warning letters were delivered by certified mail to claimant and claimant's attorney's office. (Ex. 14.)

(7) In December 2003, claimant faxed to insurer a work history but no wage information. (Testimony of claimant and Black.)

(8) On December 17, 2003, insurer notified claimant that he was ineligible for vocational assistance because he failed to provide requested information. (Ex. 17.)

(9) Claimant possesses 2000 and 2001 tax records, including W-2 forms, but has not provided them to insurer. (Testimony of claimant.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational services.

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4) and ORS 656.704(3)(a). In a contested case hearing, vocational assistance disputes arising under ORS 656.340 are reviewed pursuant to the limited scope of review specified by ORS 656.283. 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 RRU and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The burden of proving a fact or

position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of a fact or position); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard, 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 (1998).

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. Under the heading “Ineligibility and End of Eligibility for Vocational Assistance”, OAR 436-120-0350(9) provides in pertinent part:

A worker is ineligible or the worker’s eligibility ends when any of the following conditions apply:

(7) The worker has failed, after written warning, to participate in the vocational assistance process, or to provide relevant information.

RRU determined that claimant is ineligible for vocational assistance because he failed to provide relevant information as required by OAR 436-120-0350(9). Claimant first contends that insurer failed to comply with the rule because it contains the word “information” while insurer’s letters requested claimant to provide “verification.”

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 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 436-120-0350(7) to allow an insurer to request an injured worker to provide verification of wages and unemployment benefits for the purpose of evaluating vocational eligibility. Inasmuch as this interpretation is plausible and not inconsistent with the wording of the rule or its context, I defer.

Claimant next contends that the letters were confusing and misleading. However, the record contains no evidence that he consulted either his attorney or insurer for clarification or assistance in responding. Claimant further contends that insurer and not claimant should have obtained his wage records. However, the plain meaning of OAR 436-120-0350(7) places the onus on the injured worker to provide relevant information. Claimant failed to do so, and

therefore, I find that him ineligible for vocational assistance. Finally, claimant failed to carry the burden of proving that the administrative order is incorrect, and therefore, I affirm.

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 Directors Review and Order dated February 9, 2004 is affirmed.