
In the Matter of the ORS 656.340 Vocational Services Dispute of

Todd, Michael, Claimant

Contested Case No: H03-134

AMMENDED PROPOSED & FINAL ORDER

February 25, 2004

MICHAEL TODD, Petitioner

SAIF CORPORATION, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

Claimant appeals a Director's Review and Order issued on July 9, 2002 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On November 7, 2003, WCD referred the matter to the Office of Administrative Hearings (OAH) for a show cause hearing to determine whether to grant claimant's late hearing request. On December 19, 2003, Administrative Law Judge Catherine P. Coburn conducted a show cause hearing in this matter. Petitioner Michael Todd (claimant) was represented by attorney R. Adian Martin. Respondent SAIF Corporation and its insured, Garner Electric Company, (insurer) were represented by attorney Mary Goebel Adams. Polly Thompson, SAIF Vocational Coordinator, Laurie Jensen, office manager for claimant's attorney and Colleen Halverson, office manager for Garner Electric Company, testified. The record closed on the date of hearing.

ISSUE

Whether claimant's failure to timely file a request for hearing is excused by good cause.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 3 were received into the record without objection.

FINDINGS OF FACT

- (1) On July 1, 2003, claimant's attorney's office moved to a different suite number. The office submitted a change of address card to the U. S. Post Office. Some mail addressed to claimant's attorney was forwarded either by the post office or by the new tenants and some was not. (Test. of Jensen.)
- (2) On July 9, 2003, RRU issued a Director's Review and Order affirming insurer's denial of vocational assistance. It was copied to employer, insurer, claimant at his home address, and claimant's attorney at the former suite number. (Ex. 1; test of Jensen.)
- (3) On July 10, 2003, insurer received the Director's Review and Order. (Test. of Thompson.)

- (4) Within a few days after its issuance, employer received the Director's Review and Order. (Test. of Halverson.)
- (5) Claimant's attorney's office did not receive the Director's Review and Order through the mail. (Test. of Jensen.)
- (6) In October 2003, claimant's attorney requested his office assistant to contact the department and inquire the status of the case. The department informed her that the Director's Review and Order had issued in July and faxed a copy to claimant's attorney's office. (Test. of Jensen.)
- (7) On October 31, 2003, claimant's attorney filed a request for hearing. (Ex. 2.)
- (8) On November 7, 2003, WCD referred the matter to OAH for a hearing to determine whether to grant or deny claimant's late hearing request. (Ex. 3.)

CONCLUSION OF LAW

Claimant's failure to timely file a request for administrative review is excused by good cause.

OPINION

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 the Rehabilitation Review Unit (RRU) and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996). The burden of proof rests upon the proponent of that fact or position. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982). 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).

In view of the late request for hearing, WCD referred the matter to OAH for a show cause hearing. Claimant contends that the untimeliness is excused by circumstances that constitute good cause. Insurer disagrees and contends that the request for hearing should be dismissed.

A request for hearing must be filed within 60 days of administrative review. ORS 656.319(1)(a). A request filed more than 60 days but less than 180 days after administrative review is valid if claimant establishes good cause for failure to file within 60 days. ORS 656.319(1)(b). Claimant has the burden to establish good cause for failure to file timely. *Hempel v. SAIF*, 100 Or App 68 (1990). The test for determining if good cause exists has been

equated to the standard of “mistake, inadvertence, surprise or excusable neglect” recognized under ORCP 71B(1). *Anderson v. Publishers Paper Co.*, 78 Or App 513, 517, rev den 301 Or 666 (1986); see also *Brown v. EBI Companies*, 289 Or 455 (1980).

Several court cases have defined the rules governing good cause for failure to timely file a request for hearing when it is caused by the negligence of claimant’s attorney or the attorney’s employees. In *Sekermestrovich v. SAIF*, 280 Or 723 (1977), the court held that the failure of an attorney to file a request for hearing did not constitute good cause under ORS 656.319(1)(b), unless the attorney’s reasons for failing to file would be good cause if attributed to the claimant. Here, claimant’s attorney’s office moved to a different suite during the month the denial was issued. Claimant’s attorney’s office filed a change of address card with the U.S. Post Office but did not receive the Director’s Review and Order through the mail. Claimant’s attorney requested and received a copy of the Director’s Review and Order from RRU after the 60-day appeal period had lapsed. Claimant’s attorney filed the request for hearing more than 60 days but less than 180 days after the denial was issued.

OEC 311(1) and OAR 137-003-0520(7) create a rebuttable presumption that documents sent through the U.S. Mail were received. Here, the evidence establishes that claimant’s attorney did not receive the Director’s Review and Order through the mail. Under *Sekermestrovich*, if a failure to timely request a hearing were attributed to a claimant who did not receive the Director’s Review and Order through the mail, the circumstances would constitute excusable neglect. Thus, claimant’s attorney’s failure under the same circumstances constitutes excusable neglect. Based on the record, I find that claimant has carried the burden of proving by a preponderance of evidence that the untimely request for hearing is excused by circumstances constituting good cause. Accordingly, I grant the late hearing request.

ATTORNEY FEES

Claimant has not finally prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

Claimant’s late hearing request is granted.