

In the Matter of
AARON DONALDSON, Claimant
Contested Case No: H04-198
PROPOSED AND FINAL ORDER
December 5, 2005

LIBERTY NORTHWEST INSURANCE CORP., Petitioner
AARON W. DONALDSON, Respondent
Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Insurer and claimant appeal the Administrative Order issued on November 30, 2004 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On May 25, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On August 31, 2005, in Beaverton, Oregon, Administrative Law Judge Catherine P. Coburn convened and continued a hearing because the *pro se* claimant did not possess the exhibits. On September 29, 2005, I convened and continued the hearing to allow claimant to submit supplementary exhibits. Attorney Robert L. Seelig represented Liberty Northwest Insurance Corporation (insurer). Aaron W. Donaldson (claimant) appeared without benefit of counsel and testified on his own behalf. The record closed on November 7, 2005 when the parties reconvened for closing argument .

ISSUES

1. Whether RRU incorrectly determined that claimant remains eligible for vocational assistance.
2. If so, whether RRU incorrectly calculated claimant's suitable wage based on his wage at aggravation.
3. If so, whether RRU incorrectly determined that claimant is eligible for a direct employment plan.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 41, as well as Claimant's Supplementary Exhibits 3A through 51¹ were admitted into the record without objection.

FINDINGS OF FACT

(1) On January 21, 1998, claimant suffered a compensable injury while working full time as a construction framer, earning \$614 weekly. (Exs. 1 and 35-3.) Insurer accepted a left

¹ Claimant submitted Supplementary Exhibits 42 through 69 which were renumbered 3A through 51 in chronological order.

knee puncture wound, traumatic chondromalacia left patella, and microfracture left lateral patella. (Exs. 6, 10, 11, 13 and 20.)

(2) On April 1, 2001, claimant began working for a subsequent employer in a permanent, year-round position as an architectural installer, using auto-CAD and earning an average weekly wage of \$204.06. (Exs. 3A, 15-1, 21 and 36-6.) On October 23, 2001, he suffered an aggravation. (Exs. 3, 15 and 21)

(3) On July 9, 2002, Jonathon Greenleaf, M.D. performed left knee surgery. (Exs. 9 and 11C-2.) On December 18, 2003, claimant's condition became medically stationary, and on February 18, 2004, the claim was closed with a 12 percent permanent partial disability (PPD) award. (Exs. 11C-3 and 12.) Claimant's standing limitation placed him in the sedentary range. (Ex. 26-2.)

(4) On May 12, 2004, claimant requested administrative review of insurer's suitable wage calculation based on his wage at aggravation. (Ex. 20.) Based on the wage at aggravation, his suitable wage was \$163.25 or 23.16 hours at \$7.05 minimum wage without subsequent cost-of-living adjustment. (Exs. 23-2 and 24-3.)

(5) On May 14, 2004, insurer notified claimant that he was eligible for vocational assistance. (Ex. 22.) On June 10, 2004, Rehabilitation Consultant Ann Krier conducted a vocational eligibility evaluation and recommended that claimant be found eligible for direct employment services. (Ex. 24-5.) Based on claimant's interview, Krier learned that claimant was computer literate, self-taught in AutoCAD and web design and that he would like to work as a commercial pilot. (Exs. 24 and 25.)

(6) Claimant is dyslexic and has a problem with confronting authority figures. (Ex. 26-2; testimony of claimant.) Claimant was uncomfortable with Krier and asked to meet with her in his attorney's office. Krier was willing to do so but claimant failed to schedule a meeting when Krier was available. (Ex. 35-1; testimony of claimant.) Claimant indicated to Krier and to RRU that he had transferable skills and did not need direct employment assistance to obtain a minimum wage job. (Exs. 26-1 and 26-2.)

(7) On June 10, 2004, RRU telephoned claimant's attorney concerning the suitable wage dispute. (Ex. 26-2.)

(8) On June 16, 2004, claimant cancelled a scheduled appointment with Krier and rescheduled the appointment for June 17, 2004. On that date, claimant cancelled the appointment because he lacked transportation. Krier offered to meet claimant at his home and claimant refused. (Ex. 29.) Claimant and Krier discussed the possibility of meeting in claimant's attorney's office but no such meeting took place. (Ex. 35-3; testimony of claimant.)

(9) On June 17, 2004, Krier sent claimant a vocational evaluation with a signature page and a self-addressed stamped envelope. Claimant did not return the vocational evaluation.

(10) On June 28, 2004, Krier notified claimant that he was entitled to direct employment

services. (Ex. 27.) Krier sent the notice by certified and regular mail again requesting the signature page and requesting a meeting on July 6th and enclosing bus tickets. (Ex. 29) On June 29, 2004, claimant received the letter. Claimant did not return the signature page; he did not attend the meeting set for July 6th and did not call to cancel. (Exs. 29 and 33.)

(11) On July 6, 2004, Raymond North, M.D. approved a job analysis for telemarketer, parking lot attendant, and assembler. (Exs. 16, 17 and 19.) On July 8, 2004, Dr. North approved a job analysis for security officer. (Ex. 18.)

(12) On July 7, 2004, claimant's attorney requested administrative review of the direct employment plan decision. (Ex. 28.)

(13) On July 7, 2004, Krier sent claimant a warning letter and informed claimant of an appointment set for July 15, 2004. (Ex. 29.) Claimant received this letter by certified mail. (Ex. 30-1.) Claimant did not attend the meeting scheduled for July 15 and did not call to cancel. (Exs. 33-2 and 35-3.) On July 16, 2004, insurer notified claimant of the end of his eligibility for vocational assistance. (Ex. 33.)

(14) On July 16, 2004, claimant's attorney wrote to RRU, noting the warning letter and requesting abatement of the failure to cooperate question pending the outcome of the suitable wage dispute. Claimant's attorney indicated that he did not have good contact with claimant due to claimant's living situation. (Ex. 32.)

(15) On July 28, 2004, claimant's attorney appealed the eligibility termination. (Ex. 34.)

CONCLUSIONS OF LAW

RRU incorrectly determined that claimant remains eligible for vocational assistance.

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, insurer bears the burden of proving by a preponderance of the evidence that RRU incorrectly determined that claimant is eligible. *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 (1998). Having reviewed the record, I find that insurer has carried its burden of proof.

RRU determined that claimant remains eligible for vocational services. RRU reasoned that insurer erred in terminating claimant's eligibility for noncooperation because a request for administrative review of the suitable wage question was pending at that time. Next, RRU calculated claimant's suitable wage based upon the wage at aggravation. Finally, RRU determined that claimant qualifies for a direct employment plan.

Claimant first contends that insurer improperly terminated his vocational eligibility and that he remains eligible. Claimant next contends that his suitable wage should be based upon his wage at injury rather than his wage at aggravation. Claimant further contends that he is eligible for vocational training rather than a direct employment plan. In contrast, insurer contends that it properly terminated claimant's eligibility.

Eligibility

Claimant argues that insurer issued warning letters prematurely because RRU was in process of reviewing a suitable wage question and that he remains eligible for vocational assistance. In support of his position, claimant argues that insurer should have postponed issuing a warning letter until after resolution of the suitable wage dispute. On the other hand, insurer contends that it is obligated to continue providing vocational services during the pendency of an administrative dispute, and by the same token, claimant is obligated to continue participate.

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 (eff. 4/1/04) provides in pertinent part:

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

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

Having adopted OAR 436-120-0350(9), the department must apply it in the appropriate case. *AETNA Casualty & Surety Company v. Blanton*, 139 Or App 283 (1996) (Administrative agency does not have authority to ignore its own rules). Here, RRU declined to apply the rule because administrative review of another issue was pending at the time insurer issued warning letters to claimant. As explained below, I find that RRU erred by declining to apply OAR 436-120-0350(9) to the facts of the case.

In interpreting the meaning of an administrative rule, the same method of analysis is employed as is used in determining the meaning of a statute *viz.*, to ascertain the meaning of the words used, giving effect to the intent of the enacting body, which in this case is the department.

Abu-Adas v. Employment Dept., 325 Or 480, 485 (1997); *Larry Hemenway*, 5 WCSR 33 (2000); *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993) (court's task in determining legislative intent first is to examine the statute including context in which the statute is found and, if intent is clear, to proceed no further with its analysis). The function of the forum is "not to insert that has been omitted or to omit what has been inserted". ORS 174.010; *In re Gatti*, 330 Or 517, 533 (2000). The text of OAR 436-120-0350(9) contains no exception providing that an injured worker is excused from participation in the vocational process during the pendency of an administrative dispute.

Here, claimant failed to appear for four appointments with his vocational consultant in June and July 2004. The vocational consultant offered to meet in claimant's home, sent him bus tickets and agreed to meet in claimant's attorney's office, but claimant failed to participate in any of these arrangements. Moreover, in June 2004, claimant failed to return a vocational evaluation form that the vocational consultant provided with a stamped, self-addressed envelope. Similarly, in June 2004, claimant failed to return a Direct Employment Services signature page. On July 7, 2004, the vocational consultant sent claimant a warning letter and informed him of an appointment set for July 15, 2004. Claimant received this letter by certified mail, but failed to appear for the appointment and did not call to cancel it. Under the circumstances, the record establishes that claimant failed to participate with the vocational process, and that insurer properly terminated services on July 16, 2004. Accordingly, I reverse the administrative order. Finally, inasmuch as claimant is ineligible for vocational assistance, I do not address the issues concerning suitable wage and level of assistance.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is not entitled to an attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated November 30, 2004 is reversed.