

In the Vocational Assistance Dispute of

STANLEY HUNT, Claimant

Contested Case No: H04-195

PROPOSED AND FINAL ORDER

MAY 23, 2005

STANLEY HUNT, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on December 9, 2004 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On January 13, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On April 29, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Petitioner Stanley Hunt (claimant) appeared without benefit of counsel. Attorney Phillip Nyberg represented respondent Liberty Northwest Insurance Corporation (insurer). Claimant testified on his own behalf and called Taylor Hunt as a witness. Senior Rehabilitation Consultant Jan Plummer testified on insurer's behalf. The record closed on the date of hearing.

ISSUE

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

EVIDENTIARY RULINGS

WCD Exhibits 1 through 20 and insurer's Supplementary Exhibits 9A, 21 and 22 were admitted into the record without objection.

FINDINGS OF FACT

- (1) Claimant has 13 years of education and resides in Astoria. (Ex. 4; testimony of claimant.)
- (2) On September 18, 2003, claimant suffered a compensable right elbow injury while working in a seafood plant. Claimant performed seasonal work and earned a \$268.22 per week. (Exs. 1, 2 and 18-2.) Insurer accepted "Open Displaced Fracture of the Right Distal Humerus." (Ex. 3.) Claimant's condition became medically stationary on June 2, 2004. (Exs. 5 and 7.)
- (3) On July 27, 2004, a physical capacities evaluation indicated that claimant was capable of performing light to medium work with no restrictions regarding sitting, standing or walking. (Exs. 9 and 9A.) Claimant's suitable wage is \$7.05 per hour working 10 hours per week. (Exs. 13-1 and 18-2.) Minimum wage jobs in the medium to light category exist in the Astoria area. (Exs. 21 and 22.)

(4) On August 31, 2004, insurer notified claimant that he was ineligible for vocational assistance. Insurer listed the following return to work options: Security Guard, Housekeeper, Service Station Attendant, Retail Salesperson, and Fast Foods Worker/Food Preparation. (Ex. 13.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible 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, 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 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).

ORS 656.340 requires an insurer to provide vocational assistance to injured workers who are eligible. OAR Chapter 436 Division 120 governs the provision of vocational services.

ORS 656.340(6) provides:

(a) 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.

(b) As used in this subsection:

(A) A “substantial handicap to employment” exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

(B) “Suitable employment” means:

(i) Employment of the kind for which the worker has the necessary physical capacity, knowledge, skills and abilities;

(ii) Employment that is located where the worker customarily worked or is within reasonable commuting distance of the worker’s residence; and

(iii) Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment as defined in subsection (5)¹ of this section. The director shall adopt rules providing methods of calculating the weekly wage currently being paid for the worker’s regular employment for use in determining eligibility and for providing assistance to eligible workers. If the worker’s regular employment was seasonal or temporary, the worker’s wage shall be averaged based on a combination of the worker’s earned income and any unemployment insurance payments. Only earned income evidenced by verifiable documentation such as federal or state tax returns shall be used in the calculation. Earned income does not include fringe benefits or reimbursement of the worker’s employment expenses.

Additionally, OAR 436-120-0005(8) provides:

“Substantial handicap to employment” means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

RRU concluded that claimant does not suffer a substantial handicap to employment and is ineligible for vocational assistance. RRU determined that claimant is able to perform work as a security guard which accommodates his physical restrictions and pays his suitable wage of \$7.05 per hour working 10 hours per week. Since claimant is able to obtain suitable employment as a security guard, RRU did not address the other positions insurer listed as return to work options. Claimant contends that he is eligible for vocational assistance. In contrast, insurer

¹ ORS 656.340(5) provides:

(5) The objectives of vocational assistance are to return the worker to employment which is as close as possible to the worker’s regular employment at a wage as close as possible to the weekly wage currently being paid for employment which was the worker’s regular employment even though the wage available following employment may be less than the wage prescribed by subsection (6) of this section. As used in this subsection and subsection (6) of this section, “regular employment” means the employment the worker held at the time of the injury or the claim for aggravation under ORS 656.273, whichever gave rise to the potential eligibility for vocational assistance; or, for a worker not employed at the time of the aggravation, the employment the worker held on the last day of work prior to the aggravation.

contends that the administrative order is correct and should be affirmed. Having reviewed the record, I agree with insurer's position.

On the date of injury, claimant performed seasonal work at a relatively low wage. Consequently, minimum wage is a suitable wage for him, based on his past wages. Additionally, he has 13 years of education and was released to medium-light work. Moreover, minimum wage jobs in the medium to light category exist in the Astoria area. For these reasons, claimant lacks a substantial handicap to employment and is ineligible for vocational assistance. Accordingly, I affirm the administrative order.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated December 9, 2004 is affirmed.