

In the ORS 656.340 Vocational Assistance Dispute of

DARIN R. KENNEY, Claimant

Contested Case No: H04-122

FINAL ORDER

MARCH 2, 2005

SYSCO FOOD, Petitioner

DARIN R. KENNEY, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

Petitioner employer, through its attorney Patrick D. Gilroy, filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's November 3, 2004 Proposed and Final Contested Case Hearing Order. Respondent claimant, through his attorney James O. Marsh, submitted a response. The entire record has been reviewed, including the exhibits in evidence, the audio recording of the hearing, and the parties' written submissions. The director adopts the ALJ's proposed order as the final order except the attorney fee award, which is modified below. ORS 183.650(2), OAR 137-003-0655(6).

The issue is whether claimant can return to regular work. Employer found that claimant can return to regular work, and is therefore ineligible for vocational assistance. The Rehabilitation Review Unit set aside employer's finding, reasoning that the attending physician did not approve an accurate description of the job claimant performed at the time of injury. The unit further found that claimant is not able to return to any other suitable and available worker with employer, and ordered a substantial handicap evaluation.¹ The ALJ affirmed, finding that employer failed to carry its burden of proving that the unit's order should be modified. The director agrees that employer has failed to carry its burden.

On review of a decision by the Rehabilitation Review Unit in a vocational assistance matter, the unit's order may only be modified if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). Employer did not allege at hearing or in its written exceptions which, if any, of these bases it is relying on in its argument that the unit's order is wrong. On that basis alone, the director is not persuaded to modify the unit's order.

In its exceptions, employer first disagrees with the ALJ's finding that if claimant were able to perform his regular work employer would have offered him a job when he became medically stationary in August 2003. Even assuming, however, employer is correct that it could not have offered claimant a job at that time because the attending physician had not yet provided any permanent restrictions, that fact would not change the outcome that claimant is not able to

¹ The director notes one error in the June 29, 2004 Director's Review and Order. In the findings of fact on page 3, the order quotes a statement made by claimant. In the first paragraph it includes the statement, "It is simply awkward lifting pallets with your palms facing *downward*." (Emphasis added.) Claimant's actual statement was that "It is simply awkward lifting pallets with your palms facing *upward*." (Emphasis added.) Ex. 28. The order's Conclusion is consistent with claimant's actual statement.

return to his regular work as a result of the limitations caused by the injury.

Employer next argues that had claimant returned to work he would have driven the Raymond model forklift, which he can drive within his permanent restrictions. Employer asserts that claimant's job was to drive whatever type of equipment employer provided. However, as employer states equipment changes over time. Just because a Raymond forklift would be available to claimant now does not mean that a Raymond forklift will always be available to claimant.

Claimant is not able to return to his regular employment and is not able to return to any other suitable and available work with the employer at injury. However, claimant is only eligible for vocational assistance under OAR 436-120-0320(9) if he also has a substantial handicap to employment and requires assistance to overcome that handicap.² Accordingly, employer must complete a substantial handicap evaluation in order to determine whether claimant is eligible for vocational assistance.³

Claimant has prevailed and his attorney is entitled to a fee. ORS 656.385(1). Pursuant to OAR 436-120-0008, the unit awarded \$400 based on the time devoted and the results achieved. Citing OAR 436-001-0265, the ALJ awarded \$2,250. Claimant requested \$2,250 for 7.5 hours of time at a rate of \$300 per hour. Under ORS 656.385(1), however, attorney fees are not simply a matter of multiplying the number of hours by the hourly rate. Effective January 1, 2004, primary consideration is to be given to the time devoted and the results achieved.⁴ The director has adopted rules which include a matrix for determining the amount of the fee. *See* OAR 436-001-0265(1)(b) and 436-120-0008(2). ORS 656.385(1) further provides that the total fee may not exceed \$2,000 absent a showing of extraordinary circumstances. No extraordinary circumstances have been alleged or found here.

Claimant's attorney devoted 4.4 hours at the administrative review level (Ex. 32-3, 33-5.), 7.5 hours at the contested case hearing level, and one hour in the exceptions process, for a total of 12.9 hours, falling within the highest "time" range of the matrix. By prevailing, claimant is now entitled to a substantial handicap evaluation. The value of a substantial handicap evaluation falls in the lowest "results" range of the matrix. OAR 436-001-0265(1)(d), 436-120-0008(2), and 436-120-0720. No extraordinary circumstances have been alleged. Therefore, pursuant to ORS 656.385(1) and OAR 436-001-0265(1), claimant's attorney is awarded \$1,200 for all services rendered in this matter.

IT IS HEREBY ORDERED the November 3, 2004 Proposed and Final Contested Case Hearing Order is adopted except the award of attorney fees. Employer shall pay to claimant's attorney a total fee in the amount of \$1,200 for services rendered at all levels.

² Further, there can be no reasons for ineligibility under OAR 436-120-0350.

³ The ALJ ordered employer to conduct an eligibility evaluation. However, under the rules the next step in determining eligibility is a substantial handicap evaluation. OAR 436-120-0340.

⁴ Or Laws 2003, ch 756, § 2 & 3.