

---

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

**PENNY J. STAPLES, Claimant**

Contested Case No: H05-119

**PROPOSED AND FINAL ORDER**

October 24, 2005

PENNY J. STAPLES, Petitioner

SAIF CORP., Respondent

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

---

**HISTORY OF THE CASE**

Claimant appeals the Administrative Order issued on June 22, 2005 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 10, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On October 13, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Jean M. Fisher represented petitioner Penny J. Staples (claimant). Attorney Carol J. Smith represented respondent SAIF Corporation (insurer). Claimant testified on her own behalf and the record closed on the date of hearing.

**ISSUE**

Whether RRU correctly determined that claimant is ineligible for vocational assistance pursuant to OAR 436-120-0350(4).

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 22, as well as insurer's Exhibits R1 through R41, were admitted into the record without objection.

**FINDINGS OF FACT**

(1) On October 31, 2001, claimant suffered a compensable injury while working in a permanent part-time position as a school cook and earning \$9.88 per hour. (Exs. R1 and R37.) Insurer accepted a lumbar strain and right sacroiliac joint strain. (Ex. R8-4.)

(2) A Physical Capacities Evaluation dated September 13, 2002 placed claimant in the sedentary to light work category. (Ex. R6-1.)

(3) On May 15, 2003, insurer re-opened the claim for an aggravation of the right sacroiliac joint strain. (Ex. 5.)

(4) In an Eligibility Evaluation Report dated June 30, 2003, Rehabilitation Consultant Bill Sakagawa recommended that claimant be found ineligible for vocational assistance because she was capable of working as a pre-school teacher, teacher's aide, teller, cashier or food preparation and food service worker. (Ex. R6-3.)

(5) On August 12, 2003, the accepted conditions became medically stationary and on August 25, 2003, the claim was closed. (Exs. R7-3 and R8.)

(6) On October 27, 2003, insurer notified claimant that she was eligible for vocational assistance. (Ex. R9.) Insurer sent the notice pursuant to a Director's Order that was pending on appeal. (Exs. R9-1 and R10.) On November 21, 2003, Rehabilitation Consultant Adele Bostwick conducted an eligibility evaluation and recommended that claimant be found eligible for a six-month or two-term office skills training program. (Ex. R11-4.) On December 11, 2003, insurer notified claimant that she was entitled to vocational training. (Ex. R12.)

(7) On January 12, 2004, Jennifer K. Lawlor, M.D. approved a job analysis for full time receptionist and office positions. (Exs. R14 and R15.) On February 13, 2004, Bostwick reported that she and claimant had developed a community college curriculum and that claimant would begin classes spring term, 2004. (Exs. R15, R16 and R17.)

(8) In February 2004, claimant's mother-in-law passed away and claimant became responsible to care for her disabled brother-in-law. (Exs. R15-2, R19; testimony of claimant.) Claimant's brother-in-law, now aged 63, is mentally retarded, schizophrenic, obese, suffers Tourette's syndrome and requires 24-hour care. (Exs. R20 and R35; testimony of claimant.) His mental state is declining and his life expectancy is limited. (*Id.*) Claimant is a state-licensed adult foster caregiver and is paid \$1,002 monthly or \$230 weekly to care for her brother-in-law in her home. (Exs. R24, R27 and R36; testimony of claimant.) He is currently on a waiting list for a group home. (Testimony of claimant.)

(9) On March 2, 2004, insurer rescinded the Notice of Authorized Training. (Ex. R18.) On March 24, 2004, insurer notified claimant of the end of eligibility because she had become unavailable for vocational assistance. (Exs. R21 and R22.) On June 2, 2004, claimant requested insurer to extend her vocational eligibility, pending placement of her brother-in-law in a group home. (Ex. R25; testimony of claimant.) Insurer approved an extension until September 1, 2004. (Ex. R26.)

(10) On August 17, 2004, claimant requested insurer to extend her vocational eligibility for another three months. (Ex. R28.) Insurer approved an extension until December 1, 2004. (Ex. R29.)

(11) On December 2, 2004, insurer notified claimant that she was no longer eligible for vocational assistance because she had been suitably employed for 60 days. (Ex. R30.)

(12) Claimant's average weekly wage is \$154.40 and her suitable weekly wage is \$123.52 or \$6.90 hourly working 18 hours per week. (Ex. 39-2.)

### CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance pursuant to OAR 436-120-0350(4).

## 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 App 437 (1980) (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).

RRU determined that claimant was suitably employed as an adult foster caregiver for more than sixty days after aggravation, and therefore, she is ineligible for vocational assistance. Claimant contends that she is not suitably employed because the adult foster caregiver position is not permanent. In support of her position, claimant argues that the patient's life expectancy is limited. In contrast, insurer contends that the adult foster care position is as permanent as any at-will employment and that RRU correctly found claimant ineligible. Having reviewed the record, I find that claimant has failed to carry her burden of proof.

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(6) provides in pertinent part:

(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<sup>1</sup> with the employer at the time of injury or aggravation, and the worker has a substantial handicap to employment.

---

<sup>1</sup> ORS 656.340(b)(B) provides:  
"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) of this section.

OAR 436-120-0350(4) provides in pertinent part:

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

(4) The worker has been employed at least for 60 days in suitable employment after the injury or aggravation \*\*\*.

Additionally, OAR 436-120-0005(12) defines the term "suitable employment" and provides in pertinent part:

"Suitable employment" or "suitable job" means employment or a job:

(a) For which the worker has the necessary physical capacities, knowledge, skills and abilities;

(b) Located where the worker customarily worked, or within reasonable commuting distance of the worker's residence.

(c) Which pays or would average on a year-round basis a suitable wage as defined in section (13)<sup>2</sup> of this rule;

(d) Which is permanent. Temporary work is suitable if the worker's job at injury was temporary;

Here, insurer has extended vocational eligibility for nine months to accommodate claimant's circumstances. Furthermore, claimant has worked as an adult foster caregiver for over a year and the record contains no evidence that she has sought medical treatment during that period. Consequently, I find that she has the necessary physical capacity, knowledge, skills and abilities to perform this job. Next, the job is geographically appropriate since claimant provides foster care in her home. Next, claimant's current position as an adult foster caregiver is as permanent as ordinary at-will employment. Finally, claimant earns a weekly wage of \$230 which exceeds her suitable wage of \$123.52. Therefore, claimant is ineligible for vocational assistance, and accordingly, I affirm.

#### ***ATTORNEY FEES***

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

---

<sup>2</sup> OAR 436-120-0005(13) provides:  
(13)"Suitable wage" means:

(a) For the purpose of determining eligibility for vocational assistance, a wage at least 80 percent of the adjusted weekly wage as defined in OAR 436-120-0007.