

In the ORS 656.340 Vocational Assistance Dispute of

**Gregory J. Miller, Claimant**

Contested Case No: 05-172H

**PROPOSED & FINAL ORDER**

March 28, 2006

SAIF Corporation, Petitioner

Gregory J. Miller, Respondent

Before Geoffrey G. Wren, Administrative Law Judge, Workers' Compensation Board

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Pursuant to notice, a hearing was convened on March 20, 2006 in Portland, Oregon, before Administrative Law Judge Geoffrey G. Wren. Claimant was present and represented by James E. Oliver, Jr. The employer, John A. Lantz Construction, Inc., and its insurer, SAIF Corporation, appeared by their attorney Thomas R. Nash. The record closed on March 20, 2006.

Exhibits 1 through 24 were admitted at hearing.

**ISSUES**

Vocational Expenses SAIF appeals the October 6, 2005 Director's Review and Order on Reconsideration awarding claimant \$4,338.46 in childcare expenses while claimant attended a training program.

Attorney Fees Should claimant recover childcare expenses, he seeks award of an attorney fee under ORS 656.385.

**MOTION TO DISMISS**

This matter arose from SAIF's November 17, 2005 request for a contested case hearing directed to the Director of the Department of Consumer and Business Services. Claimant moved at hearing for dismissal of the case on the ground that SAIF requested review before January 2, 2006. Claimant contends that the Hearings Division does not have subject matter jurisdiction.

ORS 656.704 (2005) provides in part:

A party dissatisfied with an action or order regarding a matter other than a matter concerning a claim under this chapter may request a hearing on the matter in writing to the director. The director shall refer the request for hearing to the Workers' Compensation Board for a hearing before an Administrative Law Judge. Review of an order issued by the Administrative Law Judge shall be by the director and the director shall issue a final order that is subject to judicial review as provided by ORS 183.480 to 183.497.

The legislature made this statute applicable hearings "held on or after January 2, 2006," not just to hearings for which a request for hearing was filed on or after that date. HB 2091, §19. The statute, in any event, does not confer subject matter jurisdiction in the Hearings Division.

Rather, the statutory scheme contemplates that jurisdiction at all times remains with the Director. Claimant's motion is denied.

### FINDINGS OF FACT

Claimant has a child, Adam Miller, born September 25, 2001. Claimant's wife took care of Adam from his birth until January 22, 2002. She then returned to work. The couple's respective work schedules thereafter meant that they needed childcare for Adam from 8:30 a.m. to 4:30 p.m. Monday through Thursday, a total of 32 hours a week. Claimant anticipated that this need would have continued after January 28, 2002 had claimant not suffered a work injury.

Adam required four hours of childcare on January 22, 2002, eight hours on January 23, 2002, and eight hours on January 28, 2002.<sup>1</sup> That childcare cost \$2.50 an hour for a total cost of \$50.00.

Claimant compensably injured his left arm and shoulder on January 28, 2002. At the time of injury, he was earning \$21,438.60 a year for a net of \$17,448.53 a year/\$335.55 a week after taxes.

Claimant went off work due to his work injury. His wife continued working. Claimant provided childcare services from January 28, 2002 until he returned to light duty in April 2002. The couple contracted for childcare services until claimant's light duty ended in May 2002. Claimant again provided childcare up to shoulder surgery on July 22, 2002. While claimant recovered from surgery, the couple contracted for childcare through August 31, 2002. Claimant thereafter remained off work and provided childcare until he started a year-long return-to-work training program on June 7, 2004.

Because of his participation in the training program, claimant could not provide childcare. He and his wife thus contracted for childcare services from June 7, 2004 through the end of claimant's training program on June 7, 2005. The couple purchased 2,056.14 hours of in childcare at a total cost of \$4,885.90.

Claimant received temporary total disability ("TTD") benefits in the amount of \$316.45 a week while participating in the training program.

Claimant sought childcare assistance for his training program from SAIF. SAIF declined to pay for any assistance, asserting that claimant's post-injury earnings exceeded his pre-injury earnings. Claimant sought review by the Director. By Director's Order and Review dated November 16, 2004, the Director ordered SAIF to pay childcare for the months of July 2004 through October 2004 and that SAIF pay claimant's counsel an attorney fee of \$600.00.

SAIF requested reconsideration of the November 16, 2004 order, contending that the Director erred in assuming that claimant provided childcare at the time of injury and that

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<sup>1</sup> The record does not show why Adam did not require eight hours of childcare on January 24, 2002, a Thursday. I nonetheless accept the testimony of claimant's wife that Adam needed childcare Monday through Thursday.

claimant's post-injury income exceeded his pre-injury income. The Director abated and withdrew the order on January 14, 2005.

On October 6, 2005, the Director issued a Director's Review and Order on Reconsideration. The Director concluded that claimant should be reimbursed for childcare while he attended the retraining program. The Director determined that childcare was necessary for claimant to participate in retraining and that claimant's pre-injury net income exceeded his post-injury net income, as adjusted by the cost-of-living matrix. The Director then applied OAR 436-120-0710(14) and ordered SAIF to pay \$4,338.46 in childcare expenses. The Director based this amount on the total hours of Adam's childcare while claimant was in retraining multiplied by \$2.11, the Department of Human Services ("DHS") childcare subsidy rate applicable to a child Adam's age.

## CONCLUSIONS OF LAW AND OPINION

### *Childcare Reimbursement*

SAIF challenges the Director's order requiring reimbursement for all hours of childcare claimant purchased during his vocational retaining program. As this dispute involves vocational assistance, I can modify the Director's order only if it (1) violates a statute or rule, (2) exceeds the statutory authority of the agency, (3) was made upon unlawful procedure, or (4) was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c).

At hearing, the parties narrowed the issues, agreeing about several matters:

- Only claimant's earnings are relevant to determination of SAIF's obligation to pay childcare.
- Claimant earned \$335.55 a week in after-tax earnings before his work injury, adjusted for cost of living to \$359.04 per week (or \$18,670.08 per year) for the period he was in training.
- Claimant received \$316.45 a week (or \$16,455.40 per year) in TTD benefits during his training program.
- Adam needed childcare while claimant underwent retraining.
- Claimant's total out-of-pocket cost for Adam's childcare came to \$4,885.90.
- Adam was in childcare 2,056.14 hours.

Claimant also acknowledged that OAR 436-120-0710(14) provides that \$2.11 an hour is the applicable rate for determining reimbursement of childcare costs.<sup>2</sup>

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<sup>2</sup> Claimant does not concede that the law otherwise requires reimbursement at that rate.

SAIF took the position at hearing that claimant is entitled to some reimbursement of his childcare costs during his retraining program. The parties' disagreement comes down to how much reimbursement claimant should receive. That being the case, the outcome of this case hinges on OAR 436-120-0710(14). That rule provides:

Child or disabled adult care services. These services are payable when required to enable the worker to participate in vocational assistance at rates prescribed by the State of Oregon's Department of Human Services. For workers receiving temporary total disability compensation or equivalent income, these costs shall be paid only when in excess of what the worker paid for such services at the time of injury, adjusted using the cost-of-living matrix.

The Director interpreted this rule to mean that claimant was entitled to reimbursement based on multiplying all the hours of childcare while claimant underwent retraining by the DHS rate of \$2.11. This resulted in an award of \$4,338.46.

I find that the Director's interpretation is not consistent with the rule's wording and context. *See Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994) ("Where . . . the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously.'"); *see also Perlenfein and Perlenfein*, 316 Or 16, 20 (1993) (in interpreting administrative rules, the rules of statutory construction apply); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993) (statutory construction methodology). Insofar as claimant would have continued purchasing childcare had he not been injured, award of \$4,338.46 would put claimant in a better position than he otherwise would have been had he not suffered a work injury. While this result might square with the first sentence of OAR 436-120-0710(14), it disregards the second sentence. That sentence requires comparing childcare at injury with childcare during vocational services.

SAIF contends that valuing claimant's entitlement to childcare reimbursement should turn on comparing the hours of Adam's childcare at the time of injury with the hours during claimant's retraining program. I find that this method more appropriately effectuates the apparent intent behind OAR 436-120-0710(14). *See* ORS 656.340 (requiring payment of vocational assistance and providing for Director's promulgation of rules to that end).

The evidence shows that, at the time of injury, claimant paid for 32 hours of childcare a week. Over the 52-week period of claimant's retraining program, 32 hours a week amounted to 1664 hours of childcare. Adam in fact was in childcare for 2056.14 hours.<sup>3</sup> The difference comes to 392.14 hours. The first sentence of OAR 436-120-0710(14) requires applying the DHS childcare subsidy rate of \$2.11 an hour for childcare during vocational services. 392.14 hours at \$2.11 an hour results in entitlement to reimbursement in the amount of \$827.42. The Director's order must be modified accordingly.

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<sup>3</sup> The record does not show why Adam required more than 32 hours a week of childcare during claimant's training program.

*Attorney Fees*

The Director awarded a \$600 attorney fee below. ORS 656.385(1) provides for award of a reasonable attorney fee proportionate to the benefit to the injured worker. The statute further provides that the Director “shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case.” In no event shall an assessed fee exceed \$2,000 absent a showing of extraordinary circumstances.

As a result of this order, claimant will not be entitled to as much compensation as previously ordered. Claimant’s position nonetheless has improved from commencement of litigation, as SAIF took the position prior to hearing that claimant was not entitled to any reimbursement of childcare costs. Claimant’s counsel participated in an approximately hour-long evidentiary hearing and prepared for that hearing. Claimant’s counsel also participated below in securing an original order and an order on reconsideration. I do not find any extraordinary circumstances. Applying the matrix in OAR 436-001-0265(1)(b), I find that \$750 is a reasonable assessed fee.

**ORDER**

IT IS HEREBY ORDERED that the Director’s October 6, 2005 Review and Order on Reconsideration is modified. Claimant is awarded \$827.42 in childcare reimbursement.

IT IS FURTHER ORDERED that claimant’s counsel is awarded an attorney fee of \$750, payable in addition to, and not out of, claimant’s compensation.