
In the ORS 656.340 Vocational Assistance of

James A. Miller, Claimant

Contested Case No: 05-130H

ORDER ON REMAND

June 2, 2006

ST. PAUL FIRE AND MARINE, Petitioner

JAMES A. MILLER, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Petitioner insurer, through its attorney William H. Replogle, timely filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Lawrence S. Smith's December 1, 2005 Proposed and Final Order. Respondent claimant, through his attorney John C. DeWenter, responded. This matter comes before the director for a final order. The issue is eligibility for vocational assistance. I reverse and remand.

I adopt the ALJ's findings of fact with two exceptions:

Finding (4) is modified to delete the words "based on his performance when returning to his job at injury."

The ALJ accepted and incorporated the findings of the Rehabilitation Review Unit (RRU) in its August 22, 2005 Director's Review and Order. RRU made the following finding: "Mr. Miller * * * eventually returned to his regular job duties. However, Mr. Miller could not perform required heavy lifting; therefore, Lumberman's terminated his employment in November, 2003." The record developed at hearing does not support the finding that Lumberman's terminated claimant's employment because he could not perform required heavy lifting. I therefore modify the finding to state: "Mr. Miller returned to light-duty work with Lumbermen's in April 2003 and eventually returned to his regular job duties. However, Lumbermen's terminated his employment in November 2003."

The underlying issue is whether claimant is eligible for vocational assistance. Insurer determined claimant was ineligible, finding that he does not have a substantial handicap to employment. The Rehabilitation Review Unit (RRU) set aside insurer's determination, finding that claimant does have a substantial handicap to employment. RRU concluded that reasonable opportunities for suitable employment are not available to claimant in his local area. The ALJ affirmed, reasoning that insurer did not meet its burden of showing that RRU's order should be modified.¹

Insurer argues that RRU and the ALJ abused their discretion and violated a statute or rule by failing to address the issue of whether claimant is ineligible for vocational assistance because he was suitably employed for 60 days following the date of injury, under OAR 436-120-

¹ An order of RRU regarding vocational assistance may only be modified if it violates a statute or rule; exceeds the statutory authority of the agency; was made upon unlawful procedure; or is characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c).

0350(4).² Insurer is correct that neither RRU nor the ALJ addressed this issue even though it is presented by the facts in the record.

OAR 436-120-0350(4) provides:

“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 and any necessary worksite modification is in place.”

“Suitable employment” is defined as employment:

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

“* * * * *

“(c) Which pays or would average on a year-round basis a suitable wage * * *; and

“(d) Which is permanent. Temporary work is suitable if the worker’s job at injury was temporary; and the worker had transferable skills to earn, on a year-round basis a suitable wage as defined in [OAR 436-120-0005(13)].”

OAR 436-120-0005(12).³

Insurer argues claimant was suitably employed between April 21, 2003, the date he returned to modified work, and November 7, 2003, the date he was laid off. The modified job, by itself, was not suitable because it was not permanent as required by OAR 436-120-0005(12)(d). However, the record shows that claimant was released to regular work on June 11, 2003, and returned to his pre-injury job at his previous wage. He was to work with caution when lifting and to use pain as a barometer. However, no specific restrictions were put in place at that time. Claimant continued working until he was laid off on November 7, 2003, five months later. The evidentiary record establishes that claimant was employed in his pre-injury job for more than 60 days after the date of injury. The issue is whether the employment claimant held was suitable as that term is defined under the rule. Specifically, whether claimant had the necessary physical capacities for the work. Because RRU did not address this issue, I find that remand is appropriate.

² All rule references herein are to those adopted by WCD Admin. Order 04-056, effective April 4, 2004. *See* OAR 436-120-0003(2).

³ To be suitable, the employment must also be located where the worker customarily worked, or within reasonable commuting distance of the worker’s residence. OAR 436-120-0005(12)(b). That factor is not at issue here.

Claimant has not yet prevailed, so his attorney is entitled to no fee. ORS 656.385(1).

IT IS HEREBY ORDERED the December 1, 2005 Proposed and Final Order is reversed. This matter is remanded to the Rehabilitation Review Unit for a determination of whether claimant was suitably employed for more than 60 days and therefore ineligible for assistance under OAR 436-120-0350(4).

DATED this 2nd day of June, 2006.