

In the Vocational Assistance of
Debra R. Howard-Douglas, Claimant

Contested Case No: 07-058H

PROPOSED & FINAL ORDER

August 24, 2007

AMERICAN CAUSALITY CO. OF READING, PA, Petitioner
DEBRA R. HOWARD-DOUGLAS, Respondent
Before Darren Otto, Administrative Law Judge

A hearing was convened and concluded in the above-entitled matter on August 7, 2007, in Portland, Oregon, before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was present and was represented by her attorney Phillip M. Lebenbaum. The employer, Treasure Chest Advertising, and its processing agent, CNA Claimplus, were represented by their attorney Steven Verotsky. Exhibits 1 through 26, 2A, and 2B were received into evidence.

ISSUES

The employer appeals the April 25, 2007 Director's Review and Order, which determined that claimant was entitled to additional job placement assistance. The issues are whether the Director abused his discretion or violated a statute or rule in determining eligibility for vocational assistance.

FINDINGS OF FACT

On September 7, 2001, claimant injured her left shoulder while working for the employer as a press assistant in its printing business (Ex 1). On December 1, 2004, claimant was found to be eligible for vocational rehabilitation services and/or other forms of return-to-work assistance (Ex 3). Vocational rehabilitation counselor, Steven R. Cardinal, was assigned to claimant to provide vocational assistance. *Id.* Claimant pursued a pharmacy technician training plan and program without any assistance from Mr. Cardinal (claimant [cl] testimony; Ex 15-10). The Portland Community College program lasted 3 months (cl testimony). Afterward, claimant began an internship at Rite-Aid pharmacy. *Id.* She met with Mr. Cardinal four or five times and spoke with him on the phone four or five times as well. *Id.* Mr. Cardinal asked claimant to bring all her contact information and asked her how things were going, but otherwise did not assist her in job placement. Instead, claimant made all of the employer contacts. *Id.* Mr. Cardinal did not provide any employer contacts, employer lists, interview techniques, or suggestions to improve her resume'. *Id.* On her own initiative, claimant began the pharmacy technician program, found the internship at Rite-Aid, and took the National Examination for pharmacy technicians. *Id.* Unfortunately, claimant failed the National Examination. *Id.* She submitted another application, but the form was outdated and, by the time she submitted the correct application, it was too late. *Id.* Claimant could not get a pharmacy technician position without passing the National Examination. *Id.*

On November 15, 2005, claimant's eligibility for vocational assistance was terminated

because she had allegedly received a maximum of four months of direct employment services following successful completion of her training program (Ex 12-1). Claimant requested Director review of that decision (Exs 14 and 21).

On April 25, 2007, a Director's Review and Order determined that claimant was entitled to 4 months of additional job placement assistance (Ex 24). That decision was based in part on the conclusion that vocational counselor Cardinal provided no documentation that could verify that claimant was provided with any direct employment assistance (Ex 24-3). The employer appealed that decision (Ex 25).

On June 1, 2007, claimant began working for Richard's Warehouse through a temporary service agency for 30 to 40 hours a week (cl testimony). She was laid off from that job on July 5, 2007, then brought back a week later. *Id.* She worked in an on-call status with no benefits. *Id.*

CONCLUSIONS OF LAW AND OPINIONS

The employer contends that the Director abused his discretion in finding that it was impossible to verify whether Mr. Cardinal contacted employers on claimant's behalf and thus it could not be determined that claimant was provided with any direct employment assistance. Also, the employer contends that the Director violated OAR 436-120-0430 by replacing the language concerning job "assistance" with job placement. Claimant asserts that the Director did not abuse his discretion, the evidence overwhelmingly established that claimant's vocational counselor did not provide vocational assistance for 120 days, the Director did not violate a statute or rule, and the Director's Order should be approved.

OAR 436-001-0225(3) provides that, in vocational assistance disputes under ORS 656.340, new evidence may be admitted and considered. The rule further provides that, under ORS 656.283(2), the Administrative Law Judge may modify the Director's Order only if it: (a) violates a statute or rule; (b) exceeds the Director's statutory authority; (c) was made upon unlawful procedure; or (d) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. On review for abuse of discretion, "[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made." Liberty Northwest v. Jacobson, 164 Or Ap 37, 45 (1999).

OAR 436-120-0430(1) outlines the provisions for "Direct Employment" service for workers, stating, "The insurer shall provide an eligible worker with four months of direct employment services dating from the date the insurer approves a direct employment plan or the completion date of an authorized training program." OAR 436-120-0430(1)(a) through (e) further provide that direct employment services include, among other things, vocational evaluation, employment counseling, job search skills instructions, job analysis, return-to-work-follow-up, and "job development, which assists the worker to contact appropriate prospective employers, and with related return-to-work activities."

Claimant testified that *she* initiated the pharmacy technician program at Portland Community College, *she* submitted her resume' to countless employers on her own, and *she* found the internship at Rite-Aid without any assistance from Mr. Cardinal. She further testified that Mr. Cardinal provided for no employer contacts, no lists, no interview techniques, and no suggestions to improve her resume'. In short, claimant did everything that was necessary to successfully complete her vocational program except pass the National Examination, which was required if she were to obtain a pharmacy technician position. The employer's counselor conceded as much during closing argument when he stated that claimant was doing everything she could have done and there was nothing left for Mr. Cardinal to do. As the Director stated on February 28, 2007, "**** [Claimant] says she did all the job development in her behalf. Reports she was never referred for an interview by Mr. Cardinal. Reports he met with her to discuss her job search, but he never referred her to any jobs or indicated he contacted any employers. She doesn't believe he contacted any employers in her behalf.****" (Ex 15-10).

Despite Mr. Cardinal's general assertions in his vocational rehabilitation reports that he conducted vocational services on claimant's behalf, he was unable to verify those assertions with any documentation because he had purged claimant's file by the time Director Review occurred. Those actions, as the Director noted, were contrary to OAR 436-120-0800(4), which provides that the vocational assistance provider "shall maintain the worker's vocational assistance files for four years after the end of vocational assistance with that vocational assistance provider,****."

The Director concluded that, without documentation, it was impossible to verify whether Mr. Cardinal contacted employers on claimant's behalf (Ex 24-3). Since the vocational counselor provided no documentation to verify his activities, the Director concluded that claimant was not provided with any direct employment assistance. That decision was not an abuse of discretion. Claimant was highly motivated to succeed in her vocational program and did all of the work herself to become a pharmacy technician. Nevertheless, it was incumbent upon Mr. Cardinal to provide some form of vocational assistance. Claimant's testimony, along with the lack of documentation of any vocational services provided by Mr. Cardinal, confirmed the Director's conclusion that no vocational assistance was provided.

The Director did not violate OAR 436-120-0430 because job development, which assists the worker to contact appropriate prospective employers and engage in related return-to-work activities, was required from Mr. Cardinal in his efforts to provide vocational assistance. The Director's focus on a lack of documentation of job development and other return-to-work activities was appropriate. The Director followed the language of the rule in determining that claimant was entitled to an additional 120 days of vocational services because it had not been provided to her by Mr. Cardinal.

Finally, the employer's contention that claimant's eligibility ended when she began working for Richard's Warehouse on June 1, 2007 is not an issue which is ripe for litigation. Initial jurisdiction over that issue lies with the Director, not the Workers' Compensation Board's Hearings Division.

Pursuant to ORS 656.385(3), claimant's attorney is entitled to an assessed fee payable by the employer because claimant's compensation was not disallowed or reduced. After

considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, I find that a reasonable fee for claimant's attorney's services at hearing regarding the vocational services issue is \$2500.00 (Two thousand five hundred dollars) payable by the employer.¹ In reaching this conclusion, I have particularly considered the time devoted to the issues, the complexity of the issues, the value of the interest involved, and the risk that counsel may go uncompensated.

ORDER

IT IS HEREBY ORDERED that the April 25, 2007 Director's Review and Order is approved in its entirety.

IT IS FURTHER ORDERED that Treasure Chest Advertising and CNA Claimplus are assessed a reasonable attorney fee pursuant to ORS 656.385(3) in the amount of \$2,500.00 (Two thousand five hundred dollars) to be paid directly to claimant's attorney.

¹ The attorney fee grid described in OAR 436-001-0265(1) does not apply to the facts of this case because the fee was assessed under ORS 656.385(3), not ORS 656.385(1).