
In the ORS 656.340 Vocational Assistance Dispute of

Jose Reyes-Joya, Claimant

Contested Case No: 07-052H, 06-174H

FINAL ORDER

December 19, 2007

JOSE REYES-JOYA, Petitioner

SAIF CORPORATION AND PACIFIC STONE AND SUPPLY, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Claimant, Jose Reyes-Joya, through attorney Bruce D. Smith, timely filed exceptions to Workers' Compensation Board Administrative Law Judge G. Duff Bloom's September 4, 2007 Proposed and Final Order. Attorney Michael G. Fetrow responded on behalf of SAIF Corporation and Pacific Stone and Supply Co. Inc. (dba Rogue Pacific Lumber). I review under ORS 656.704(2)(a), and adopt and affirm.

Claimant raises two arguments in his exceptions. The first issue is whether Judge Bloom erred in affirming the director's orders¹ that determined that the claimant was not eligible for vocational assistance because he was terminated for cause.

Claimant's second argument is that his return to work job with his employer at injury was not suitable.

Termination for Cause

Addressing the first argument, the claimant contends that Judge Bloom erred in holding that the Rehabilitation Review Unit (RRU) had not abused its discretion in finding the modified employment was "suitable employment" under OAR 436-120-0005(12)(e)(C).

OAR 436-120-0005(12) defines suitable employment. OAR 436-120-0005 (12)(e)(C) states that "modified or new employment that results from an employer at injury activated use of the Preferred Worker Program, will be considered 'suitable' if the worker is terminated for cause."

Claimant was under modified employment through his employer at injury's use of the Preferred Worker Program. Judge Bloom and the RRU found that claimant was terminated for cause when he failed to appear for work or call to report his unavailability.

At hearing, claimant contended that the termination was improper and argued that the actual reason for the termination was unlawful discrimination. In addition, claimant testified that he, in fact, notified the employer he would be absent.

Insurer argued that the termination for cause was proper and at hearing provided

¹ October 20, 2006 Director's Review and Order (VO 06-302) concluding that claimant was not eligible for vocational assistance and April 24, 2007 Director's Review and Order on Reconsideration (RVO 07-104) affirming that claimant was not eligible for vocational assistance.

testimony from Colleen Stuart, administrative assistant for employer, that claimant did not give notice of his absence.

Judge Bloom reviewed this case under ORS 656.283(2)(c). The director's decision may only be modified if it: (1) violates a statute or a rule; (2) exceeds the statutory authority of the agency; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(3).

Using the analysis of *Liberty Northwest v. Jacobson*, 164 Or App 37, at 44-45 (1999) for reviewing the director's decision in a vocational eligibility case, Judge Bloom determined that the test of abuse of discretion is whether the decision reached was "clearly against reason and evidence." He held that it was not.

In light of the conflicting evidence that was presented on this issue, Judge Bloom's decision is proper.

Suitable Employment

Before RRU and at hearing, claimant provided an opinion from his attending physician, Dr. Lowengart, that the inventory job was not suitable. Judge Bloom noted that the same attending physician released claimant to return to work at the inventory job and it was not until six months later that the attending physician changed her opinion. Judge Bloom chose to rely on the earlier "more chronologically-relevant opinion," and found that the RRU did not abuse its discretion.

Because at the time of the employment Dr. Lowengart continued to release the claimant for work, I agree with Judge Bloom's opinion that the RRU did not abuse its discretion in finding that the inventory job was suitable.

IT IS HEREBY ORDERED that the September 4, 2007 Proposed and Final Order is adopted and affirmed.