
In the ORS 656.340 Vocational Assistance Dispute of

Jose Reyes-Joya, Claimant

Contested Case No: 07-052H

PROPOSED & FINAL ORDER

September 4, 2007

JOSE REYES-JOYA, Petitioner

SAIF CORPORATION, Respondent

Before G DUFF BLOOM, Administrative Law Judge

Pursuant to notice, a hearing was held and the record closed on August 7, 2007 in Medford, Oregon before Administrative Law Judge Bloom. Claimant was present and represented by Attorney Bruce D Smith. The employer, Pacific Stone and Supply Co, Inc (dba Rogue Pacific Lumber), and its insurer, SAIF Corporation (SAIF), were represented by Attorney Michael G Fetrow. Also present was employer representative Colleen Stuart. Certified Interpreter Charles Sheldon provided Spanish-language interpreter services. The record consists of Exhibits 1 through 62 and claimant's supplemental Exhibit 17A.¹

ISSUE

(1) The sole issue is claimant's eligibility for vocational services.

(a) In WCB Case No 06-00174H, claimant contests the October 20, 2006 Director's Review and Order determining he was not eligible for vocational assistance (VO 06-302). (Ex. 40).

(b) In WCB Case No 07-00052H, claimant contests the April 24, 2007 Director's Review and Order on Reconsideration affirming its determination that he was not eligible for vocational assistance (RVO 07-104). (Ex. 60).

FINDINGS OF FACT

I adopt and incorporate by this reference RRU's Findings of Fact contained in its April 24, 2007 Director's Review and Order on Reconsideration (Ex 60-2 through 60-6), with the following supplementation:

Claimant (CL) and employer's administrative assistant, Colleen Stuart (CS), discussed return-to-work and work-restriction issues on July 19, 2006. (CL, CS testimony). Despite a language difference, Ms Stuart and claimant agreed that, pursuant to Dr Lowengart's two-day release covering July 20 and 21, 2006, claimant would report to work as scheduled Monday, July 24, 2006, at 7:00 AM. (CS testimony; Exs 18, 20).

¹ Exhibits 1 through 62 constitute the record submitted by the Director—on which it relied; I also admitted Ex 17A and testimony, pursuant to OAR 436-001-0225(1), (3).

Throughout his tenure with employer, claimant had been very dependable in phoning-in when he would have to miss work; if he were unable to make the telephone call, a family member would do so on his behalf. (CL, CS testimony).

In an April 24, 2007 Director's Review and Order on Reconsideration, RRU concluded claimant was ineligible for vocational assistance benefits because (1) he had returned to physically suitable modified work (2) under employer's activation of preferred worker benefits, and, (3) when he was terminated for cause that employment became "suitable" as defined in OAR 436-120-0005(12)(e)(C). (Ex 60).

Claimant requests this hearing to contest the Director's October, 2006 and April, 2007 orders.

CONCLUSIONS OF LAW AND OPINION

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 Department's administrative 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 abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(3). WCD Admin Order 06-050 (1/2/06). In determining whether one of those criteria exist, I may admit evidence that was not before RRU and make independent findings of fact. OAR 436-001-0225(1), (3); *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993).

The burden of proving a fact or position rests with its proponent. ORS 183.450(2). As the party contesting RRU's order, 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 convinced that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1998).

For the reasons stated in this order, I conclude that claimant has failed to meet his burden.

Claimant argues the Director's orders should be reversed as characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(3). I disagree.

"Abuse of discretion" is a legal term of art meaning "discretion exercised to an end or purpose not justified by and clearly against reason or evidence; any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and laws pertaining to the matter submitted." *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 663 (1979); *Casciato v. Oregon Liquor Control Comm'n*, 181 Or 707, 717 (1947) (citing Black's law Dictionary).

On review for Director's abuse of discretion in a vocational-eligibility review, "[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decisionmaker, under circumstances pertinent to the decision to be made." *Liberty Northwest v. Jacobson*, 164 Or App 37, 45 (1999). Claimant asserts the courts consider the term "abuse of discretion" "has no hard and fast meaning;" and that is in fact what the *Jacobson* court declared. *Id.*, citing *Far West Landscaping, Inc. v. Modern Merchandising, Inc.*, 287 Or 653, 664 (1979). Nevertheless, I cannot construe that language so superficially as to authorize me to replace the Director's decision with what I may believe is a better outcome—as the court noted: a familiar but non-exclusive test for determining whether discretion has been abused is whether the decision reached was "clearly against reason and evidence." *Id.* at 44-45; *State v Farmer*, 210 Or App 625, 640 (2007) (restating principle).

For the reasons discussed below, claimant has not proved the Director's decisions in this matter were reached in clear contravention of reason or evidence.

A worker is eligible for vocational assistance (1) if the worker will not be able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury, and (2) the worker has a substantial handicap to employment. ORS 656.340(6)(a), OAR 436-120-0320(10)(c).

A "substantial handicap to employment" exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. ORS 656.340(6)(b)(A). The parties do not dispute that claimant has a "substantial handicap to employment."

"Suitable employment" means employment for which the worker has the necessary physical capacity, knowledge, skills and abilities; employment that is located where the worker customarily worked or is within reasonable commuting distance of the worker's residence; and employment that produces a suitable wage, defined as a wage within 20 percent of that currently being paid for the worker's regular employment. ORS 656.340(6)(b)(B), OAR 436-120-0005(12) and (13). "Permanent employment" is a job "with no projected end date or a job which had no projected end date at time of hire." OAR 436-120-0005(6). Claimant argues the "inventory clerk" modified job did not constitute "suitable employment" in the first instance. I disagree.

Claimant submits on review the argument addressed at both RRU proceedings below: that the modified inventory-clerk position was not "suitable," as Dr Lowengart did not release him to the specific job duties for the specific hours-per-day on a daily basis; and that, in fact, the most persuasive evidence proves that she restricted claimant from all work whatsoever. The latter is the case—*retroactively*, as of six months after the fact—but before, during and immediately after claimant's return to modified work and termination for failure to report for work or call-in, Dr Lowengart approved the job analysis and released claimant for the specific job duties. (Exs 8, 9, 17, 20, 28, 35). Absent any persuasive explanation underlying Dr Lowengart's fundamentally-changed opinion in December, 2006 and January, 2007, I hold the Director very reasonably relied on Dr Lowengart's earlier, more chronologically-relevant

opinion in concluding claimant was offered—and returned to—suitable employment as of summer, 2006, when he was determined ineligible.

OAR 436-120-0350(17) provides that a worker is ineligible for vocational benefits, or the worker's eligibility ends, when

“The worker has been suitably employed in modified or new employment that results from employer at injury activation of preferred worker benefits as provided in OAR 436-120-0005(12)(e).”

OAR 436-120-0005(12)(e)(C) defines “suitable employment” or a “suitable job” to mean modified or new employment that results from an employer-at-injury activated use of the Preferred Worker Program “if the worker is terminated for cause.”

Relying on those rules, and the evidence in the record, the Director reasoned that claimant became ineligible for vocational assistance benefits when he was terminated for cause on July 24, 2006, the day he failed to appear for work or phone-in to report his unavailability. (*See* CL, CS testimony; *see* Exs 18, 21-2, 23, 24, 25, 62). That is a reasonable interpretation of the plain language of OAR 436-120-0350(17) and OAR 436-120-0005(12)(e)(C), in light of the evidence in the record. I decline to find the Director abused its discretion in so interpreting the rule. ORS 656.283(2)(c); OAR 436-001-0225(3).

Finally, I address claimant’s specific argument that discrimination and/or retaliation for pursuing his rights and remedies under the Act motivated his discharge, not a violation of the employer's work rule—that is, that claimant was not terminated “for cause” as that term is used in OAR 436-120-005(e)(C) (referenced by OAR 436-120-0350(17)).

First, as noted, I hold the Director reasonably relied on the record, and did not abuse its discretion in finding that employer terminated claimant because he neither appeared for work nor phoned-in on the morning of July 24 2006, as required under the employer's policy, not because he filed a workers' compensation claim or could not perform his regular job because of his compensable injury. (CL, CS testimony; *see* Exs 21-2, 23, 24, 25, 62).

Moreover, even if employer's actions were discriminatory or unlawful, those are not issues within the purview of the Act. *See Kenneth A. Meyer*, 50 Van Natta 2302, 2304 (1998) (the Board refrained from addressing whether an employer's action in terminating a claimant's employment was unreasonable, unjustified, discriminatory or unlawful, because those issues are not within the purview of the workers' compensation law); *Glenn E. Hall*, 48 Van Natta 1452 (1996) (a claimant's remedy for unlawful or unjustified termination is civil action under ORS Chapter 659). In fact, the Director properly based its determination on that principle. (Ex 60-7).²

² I disagree with claimant’s contention that the Director abused its discretion by failing to address the discrimination issue altogether in determining whether he was terminated “for cause.” *after* finding claimant was terminated due to his July 24, 2006 “no-show, no-call,” the Director concluded:

“even if [claimant’s lawyer] is right [regarding a discriminatory motive], the director lacks the authority to determine whether [claimant’s] termination was lawful. [Claimant] should contact the Bureau of Labor and Industries if he believes he was a victim of unlawful discrimination.” (Ex 60-7).

Claimant does not argue that the WCD's Director's Reviews and Orders violate a statute or rule, or exceed their statutory authority, or were made upon an unlawful procedure, and on review, I hold they do not.

ORDER

IT IS THEREFORE ORDERED that, in WCB Case No 06-00174H, the Director's Review and Order dated October 20, 2006 is affirmed.

IT IS FURTHER ORDERED that, in WCB Case No 07-00052H, the Director's Review and Order on Reconsideration dated April 24, 2006 is affirmed.