

In the Vocational Assistance of

**Gillis M. Robinson, Claimant**

Contested Case No: 07-079H

**PROPOSED & FINAL ORDER**

October 9, 2007

GILLIS M. ROBINSON, Petitioner

SEDGWICK CLAIMS MANAGEMENT SERVICES, Respondent

Before Robert A. Davis, Administrative Law Judge

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Hearing convened and closed in this matter on September 10, 2007, in Portland, Oregon, before the undersigned administrative law judge. Claimant was present with his attorney, David B. Wagner. The employer, Amtech Lighting Services, and the processing agent, Sedgwick Claims Management Services, Inc., were represented by their attorney, Randy G. Rice.

**EXHIBITS**

The following exhibits were admitted into evidence: Exhibits 1 through 18 as received from the Department of Consumer and Business Services. Also admitted was Exhibit 4A as offered by the employer/processing agent. The parties offered testimony. Exhibit 4A and the testimony were admitted without objection. See Fister v. South Hills Health Care, 149 Or App 214 (1997).

**ISSUES**

The issue presented to the Director concerned whether claimant is ineligible for vocational assistance due to his alleged failure to provide the processing agent with necessary information.

**FINDINGS OF FACT**

Claimant is a male in his middle years. He sustained a compensable injury to his left ankle on October 7, 2004, when he fell from a ladder.

The processing agent referred claimant to Concentra for a vocational eligibility assessment. The vocational counselor called claimant's attorney on January 4, 2007. She also spoke to claimant on the phone that day, though she noted that he sounded distracted.

The counselor wrote to claimant on January 4, 2007 and provided him with work and educational-history forms for completion prior to her meeting with claimant. She indicated that she would call claimant later and set up a time for a meeting.

It was the counselor's expectation that claimant would have completed the education and work-history forms by the time they met, which meeting date was set for January 24, 2007, at a restaurant.

Claimant and the counselor met on January 24, 2007. The counselor did not feel that claimant had provided a sufficient work history, as she noted that he indicated his employment from 1995 to 1996, from July 5, 2000 to December 31, 2001, and March 18, 2004 to October 7, 2004. The counselor wrote to claimant on January 25, 2007, and requested that he provide a more detailed work history for the last 10 years with dates of employment, names of employers, job titles, wages earned, job duties. She also wanted information about tools used in the jobs and why the jobs ended. She requested a chronological work history back 10 years to be provided by January 31, 2007.

The processing agent issued a February 1, 2007 Notice of Closure that provided for various periods of temporary total and temporary partial disability and a 14% scheduled permanent partial disability award (18.90 degrees) as to the left ankle.

The counselor prepared a report on February 19, 2007. Claimant had not yet provided a full work history per the counselor's request.

On March 13, 2007, the counselor sent claimant a warning for his failure to cooperate and advised that he might lose his eligibility for vocational assistance. She indicated that in order to assess his work skills, she needed his work history for at least the last five years. The counselor indicated she did not yet have the work history and she asked that claimant provide the information in writing by March 26, 2007. She noted that if she did not receive the requested work-history information by that date, she would be obliged to find claimant ineligible for vocational assistance.

The counselor discussed the matter with claimant's attorney on March 20 and March 21, 2007. Claimant's attorney indicated that he would talk to his client and ask him to obtain the work history from an employment office. The counselor indicated her concern that given claimant's difficulty in following through with the required task, that he would not be a good candidate for vocational training.

Claimant apparently had some difficulty obtaining his employment history from state employment offices. Claimant apparently had worked for temporary-personnel agencies in recent years.

On March 29, 2007, Concentra issued a Notice of Ineligibility for Vocational Assistance, Effective March 29, 2007.

On April 3, 2007, claimant's attorney wrote to the processing agent and indicated that claimant had contacted someone with the processing agent "on numerous occasions regarding his inability to obtain the work history. . . ." Claimant's attorney understood that Sedgwick could have requested a release from claimant and attempted to obtain the information on claimant's behalf. Claimant's attorney asked that Sedgwick provide him with a release and he indicated that he would have the released signed.

Claimant, through his attorney, requested review of the employer's decision concerning ineligibility for vocational assistance.

On June 1, 2007, a Director's Review and Order affirmed the Notice of Ineligibility.

### **OPINION AND ORDER**

I have limited ability to reverse or otherwise modify the Director's Review and Order. Vocational-assistance orders from the Director are reviewed pursuant to the scope of review specified by ORS 656.283(2)(c). I may modify the order only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ORS 656.340(1)(a) provides that an insurer or self-insured employer is to provide vocational assistance to an injured worker who is eligible for assistance. ORS 656.340(6)(a) provides that a worker is eligible for assistance if he 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 the worker has a substantial handicap to employer.

ORS 656.340(6)(b) provides in relevant part that a worker has a substantial handicap to employment if the worker, because of the injury, lacks the necessary physical capacities, knowledge, skills and ability to be employed in suitable employment. ORS 656.340(6)(b)(B)(i) provides that suitable employment refers to employment of the kind for which the worker has the necessary physical capacity, knowledge, skills, and abilities.

Given the statutory requirements, it is necessary and appropriate for the employer to determine claimant's knowledge, skills, and abilities. An important way of obtaining this information is to seek from claimant information about his prior jobs, his job duties, and the tools he used in his jobs. This is part of the information the vocational counselor sought in the present case.

The processing agent issued a Notice of Ineligibility for Vocational Assistance on the grounds that claimant failed, after written warning, to participate in the vocational assistance process and to provide relevant information needed for the eligibility assessment (Exhibit 10-1). OAR 436-120-0350(9) provides in relevant part that a worker is ineligible for vocational assistance if he has failed after written warning to participate in the vocational assistance process or to provide relevant information.

I must come to the conclusion that claimant failed to provide the vocational counselor with a clear statement of jobs and duties and tools. He was initially asked to provide the information for the prior 10 years (Exhibit 7-1). The counselor then reduced the requirement to a five-year period (Exhibit 8-1). It does not appear that claimant complied with the request that was reduced in scope (Exhibit 10).

Given the need the employer had to determine claimant's knowledge, skills, and abilities, the request for a 10-year work history was a reasonable one. Claimant had nearly three months, from early January 2007 (Exhibit 3) to late March 2007 (Exhibit 8), to comply and did not do so.

I am unable to conclude that the Director's order violates a statute or rule. It seems to be consistent with ORS 656.340(6)(a) and (b) and also with OAR 436-120-0350(9). I find no basis for concluding that the order violates the statutory authority of the agency. Pursuant to ORS 665.283(2)(b), the Director has authority to review disputes over the provision of vocational assistance. I cannot conclude that there was any unlawful procedure in this matter. The insurer was obliged to warn the worker prior to finding the worker ineligible for vocational assistance. OAR 436-120-0350(8). Concentra (acting on behalf of the processing agent) provided written warning (Exhibit 8).

Further, I cannot conclude that the Director's order represented an abuse of discretion or unwarranted exercise of discretion. There is significant evidence in the record to the effect that the worker was not adequately cooperative with the attempt of the employer to evaluate claimant's eligibility for vocational services. It is unfortunately reasonable to infer from this record in its totality that claimant did not focus adequately on the task of compiling his basic employment information.

### **ORDER**

IT IS HEREBY ORDERED:

The June 1, 2007 Director's Review and Order—VO 07-138—is affirmed.