

In the ORS 656.340 Vocational Assistance Dispute of

**Jason M. Thomas, Claimant**

Contested Case No: 07-054H

**PROPOSED & FINAL ORDER**

August 28, 2007

JASON M. THOMAS, Petitioner

LIBERTY NW INSURANCE CORPORATION, Respondent

Before Keith Kekauoha, Administrative Law Judge

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Hearing convened in Portland on August 1, 2007 before Administrative Law Judge Keith Kekauoha. Claimant was present with his attorney, J. Michael Casey. Employer, Tillamook Treasure, and insurer, Liberty Northwest Insurance Corporation, were represented by their attorney, David Wilson. The insurer representative was Bob Black. The hearing was recorded by the Administrative Law Judge. Exhibits 1-15 were admitted into evidence. Testimonies were taken. After recorded closing arguments, the record closed on August 1, 2007.

**ISSUE**

Vocational Assistance. Claimant appealed a Director's Review and Order, issued by the Worker's Compensation Division's Rehabilitation Review Unit (RRU), which upheld insurer's notice of ineligibility for vocational assistance.

**FINDINGS OF FACT**

Claimant, a movie production assistant, has an accepted injury claim for a partial compression fracture of the T9 vertebral body, which he sustained in a motor vehicle accident on August 7, 2005.

While claimant was physically incapacitated, his mother cared for him at her home. He lived with her for about six months. Thereafter, he continued to receive his mail at her home address (2520 NE Siskiyou, Portland, Oregon 97212) because he was not in a consistent living situation. He periodically called her to check on his mail, and she sometimes called him when mail arrived for him.

On January 18, 2007, insurer closed the claim with awards of temporary disability and 13 percent whole person impairment for the thoracic spine.

On January 31, 2007, insurer's vocational rehabilitation consultant, Bob Black, wrote a letter to claimant, stating in part:

“We are currently reviewing your file to determine whether you may be eligible for vocational assistance services. To that end, we require you to provide verification of your wages and any unemployment benefits received for the 52 week period prior to your injury, specifically August 7, 2004 through August 7, 2005. \*  
\* \* \* Please provide this information within 10 days of your

receipt of this letter.” (Ex. 6).

Black personally prepared the letter, placed it in the addressed envelope, and put the envelope in the outgoing mail slot, where the designated mailperson picks up the mail and takes it to the outgoing mail bin. The letter was sent by regular mail and was not returned by the postal service.

Black did not receive the requested information. On February 15, 2007, he sent a warning letter by certified mail. The letter stated in part:

“In order to determine your eligibility for vocational assistance services, we require you to provide verification of your wages and any unemployment benefits received for the 52 week period prior to your injury, specifically August 7, 2004 through August 7, 2005.  
\* \* \* \* Please provide this information within 10 days of your receipt of this letter.

“We previously requested this information from you on January 31, 2007. It has not been received as requested. \* \* \* \*

“This is a written warning, *failure to return this information no later than March 1, 2007 will result in your ineligibility for vocational assistance.*” (Ex. 8, italics supplied).

A certified mail notice for the February 15, 2007 letter was actually received at claimant’s mother’s home.

On the morning of February 15, 2007, claimant took a flight to Mexico, where he remained until his flight back to Portland on March 1, 2007. (Ex. 12). During his stay in Mexico, he did not talk to his mother.

On March 1, 2007, claimant’s flight arrived in Portland in the evening, and he got home at about midnight.

Meanwhile, Black had not received the information requested in his February 15, 2007 letter. Consequently, on March 2, 2007, he sent by certified mail a Notice of Ineligibility for Vocational Assistance. The notice explained that claimant had been found ineligible for vocational assistance because he had not provided the information requested in the January 31 and February 15 letters. (Ex. 9).

A certified mail notice for the March 2, 2007 letter was actually received at claimant’s mother’s home.

On March 3, 2007, claimant’s mother took a flight from Portland to visit her grandchild in Portugal. Claimant had a key to his mother’s house during her absence. He looked for mail in her house; however, her home was in shambles due to her abrupt departure, and he did not find

any mail.

Claimant's mother returned home near mid-March 2007. On March 13, 2007, she called claimant and told him that she had a stack of mail for him. He went to her home, looked through the stack, and found certified mail notices. He took the notices to the post office and received the February 15, 2007 warning letter and the March 2, 2007 notice of ineligibility for vocational assistance.

Claimant promptly retained counsel and requested the Director's review of the notice of ineligibility. The Director's designate, RRU, conducted a telephone conference with claimant, claimant's counsel and Black. Claimant's counsel represented that his client did not remember getting the January 31, 2007 letter and did not actually receive the February 15, 2007 letter until March 13, 2007 because his mother was not home and he could not get his mail during her absence.

On April 23, 2007, RRU issued a Director's Review and Order that upheld the notice of ineligibility. RRU found that claimant had failed, after written warning, to provide wage history information that was needed to assist in determining his eligibility for vocational assistance. RRU therefore concluded that claimant was ineligible for vocational assistance under OAR 436-120-0350(9).

### CONCLUSIONS OF LAW AND OPINION

Claimant contends that the Director, through its designate, RRU, erred in upholding insurer's March 2, 2007 notice of ineligibility for vocational assistance because he did not actually receive any request for wage information until March 13, 2007. Insurer responds that claimant has not carried his burden of proving error in the Director's determination. After reviewing the record, I agree with insurer.

As the party appealing the Director's order, claimant has the burden of proving error in the Director's determination. See *Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000). The Director's decision may be modified 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. ORS 656.283(2)(c).

Claimant argues that the Director's designate, RRU, abused its discretion in upholding the ineligibility notice. Generally, under the "abuse of discretion" standard, the inquiry is "whether discretion was exercised 'to an end or purpose not justified by, and clearly against, reason and evidence.'" *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or App 37 (1999) (quoting *Far West Landscaping, Inc. v. Modern Merchandising, Inc.*, 287 Or 653, 664 (1979)). Therefore, the inquiry in this case is whether RRU's decision was within the range of discretion justified by, and consistent with, reason and evidence.

RRU based its ineligibility determination on OAR 436-120-0350(9), which provides that a worker is ineligible for vocational assistance when "[t]he worker has failed, after written

warning, to participate in the vocational assistance process, or to provide relevant information.” RRU found that: (1) insurer needed wage history information from claimant in order to determine his eligibility for vocational assistance; (2) insurer sent a letter to claimant on January 31, 2007 requesting the information; (2) insurer sent a warning letter on February 15, 2007 requesting the same information; and (3) claimant did not respond to the January 31 and February 15 letters, resulting in the issuance of the March 2, 2007 notice of ineligibility.

Claimant asserts that he never received the January 31, 2007 letter and did not actually receive the February 15, 2007 warning letter until March 13, 2007. He argues that he should have been allowed 10 days from the date of his *actual receipt* of the February 15 letter (March 13, 2007) to submit the requested information.

I disagree. The Director’s rule, OAR 436-120-0350(9), provides that a worker is ineligible for vocational assistance if he/she fails, “after written warning,” to provide relevant information. The rule does not say “after *claimant’s receipt* of written warning.” Thus, claimant’s reading of the rule is not supported by the language of the rule and would require inserting terms that are not contained in the rule.

Furthermore, claimant’s reading of the rule would defeat the statutory requirement to complete the eligibility determination within 30 days. ORS 656.340(4) provides that an insurer has no more than 30 days after the initial contact to complete the determination of a worker’s eligibility for vocational assistance. See OAR 436-120-0320(6). In this case, insurer had a period of no more than 30 days from its initial letter of January 31, 2007, or until March 2, 2007, in which to complete its eligibility determination. Thus, claimant’s contention that he should have been allowed additional time beyond March 2, 2007 to submit the requested information is inconsistent with the legislative directive that eligibility determinations be completed within 30 days.

Claimant’s reading of the rule would also effectively absolve him of the responsibility to monitor his mail with reasonable diligence. Although insurer could not produce the green card confirming receipt of the certified warning letter, it is undisputed that claimant actually received the certified letter. Thus, the record establishes that the notice of certified mail was actually received at claimant’s mother’s home, where claimant receives mail, but apparently was not brought to his attention until March 13, 2007. Claimant explains that he was in Mexico from February 15 until March 1, 2007 and that his mother was away from March 3 until mid-March 2007; however, claimant has not provided a reasonable explanation for why he did not call his mother to check on his mail while he was in Mexico.

He also has not provided a persuasive explanation for why he could not get his mail during his mother’s absence. He testified that he had a key to her house and tried to look for his mail, but could not find any because his mother had left the house in shambles. However, there is no evidence that he tried to contact his mother in Portugal to find out where his mail was being kept in her home.

Therefore, based on this record, I am not persuaded that claimant monitored his mail with reasonable diligence.

Claimant argues that there is insufficient evidence to establish that the January 31, 2007 letter was actually mailed. I disagree. Black testified that he personally placed the letter in the envelope and, in accordance with the normal mailing procedure, placed the envelope in the mail slot for the mailperson to take to the outgoing mail bin. This record establishes actual mailing of the letter.

Claimant testified that he did not recall receiving the January 31, 2007 letter and that the letter was not among the documents he had received from insurer. I am not persuaded that his testimony is sufficient to affirmatively establish that the letter was not received at his mother's home. His mother was not called to testify, and it has not been persuasively established that she gave him all of the mail that had been received at her home.

In any event, the receipt or non-receipt of the January 31, 2007 letter is not critical because it is undisputed that claimant actually received the February 15, 2007 warning letter. Moreover, as previously discussed, actual receipt of the "written warning" is not a requirement under the rule, and would in fact defeat the statutory requirement that eligibility determinations be completed within 30 days.

For these reasons, I conclude that claimant has not carried his burden of proving an abuse of discretion. RRU's decision is well within the range of discretion allowed under OAR 436-120-0350(9) and comports with reason and the evidence. Accordingly, the Director's order shall be affirmed.

### **ORDER**

Claimant's request for relief is denied, and the Director's Review and Order dated April 23, 2007 is affirmed.