
In the ORS 656.340 Vocational Assistance Dispute of

Jim R. Allen, Claimant

Contested Case No: 07-090H

FINAL ORDER

April 3, 2008

JIM R. ALLEN, Petitioner

SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Claimant, through attorney John M. Oswald, timely filed exceptions¹ to Workers' Compensation Board Administrative Law Judge (ALJ) Robert Pardington's November 1, 2007 Proposed and Final Order. Insurer, through its attorney Holly A. Ansari, responded. This matter comes before the director for a final order. I limit my review to the issues raised by claimant. The issue is whether wages from all of claimant's employment should be used to determine his suitable wage for purposes of vocational assistance. For the reasons stated below, I affirm.

With his exceptions claimant submitted for supplemental inclusion in the record exhibit 18A, payment ledgers from insurer. The ledgers are dated February 14, 2007, several months prior to the October 17, 2007 hearing. I decline to admit the exhibit during director review when it was available to claimant to submit as evidence at the time of the hearing.

I adopt the Summary of Facts as stated in the proposed order as my findings of fact. On the date of injury, claimant held one full-time job and two part-time jobs. He was injured while working at one of his part-time jobs.

The underlying issue is whether claimant has a substantial handicap to employment, making him eligible for vocational assistance. By Notice of Ineligibility for Vocational Assistance dated February 9, 2007, insurer notified claimant he was ineligible for vocational assistance because he did not have a substantial handicap to employment. Claimant requested review by the Rehabilitation Review Unit (RRU).

By Director's Review and Order dated June 25, 2007, RRU affirmed insurer's ineligibility determination. RRU concluded that claimant does not have a substantial handicap to employment and is therefore ineligible for vocational assistance. RRU reasoned that ORS 656.210(2)(a)(B)² addresses temporary total disability payments while a worker is temporarily

¹ Claimant called his filing a Motion to Abate, Reopen the Record, and Reconsider the November 1, 2007 Proposed and Final Order and filed it with the ALJ. Under OAR 436-001-0246, claimant's motion was forwarded to the director and treated as exceptions.

² ORS 656.210(2)(a) provides:

“For the purpose of this section, the weekly wage of workers shall be ascertained:

unable to work, but does not apply to determining a worker's average weekly wage for the purpose of determining eligibility for vocational assistance. RRU determined that a suitable wage is 80% of claimant's average weekly wage in his permanent, year-round, part-time job at injury. His average weekly wage at his job at injury was \$157.50; eighty percent of that wage is \$126 a week. Because there are positions that pay a suitable wage and are within claimant's physical capacities, knowledge, skills, and abilities, reasoned RRU, claimant does not have a substantial handicap to employment and is therefore not eligible for vocational assistance.

Claimant requested a hearing to challenge RRU's order. ALJ Pardington affirmed. The ALJ reasoned that under OAR 436-120-0007(4), the weekly wage upon which temporary disability was based must be used to determine the worker's adjusted weekly wage. According to the ALJ, claimant's temporary disability rate was calculated using only his wages from the job at injury. The ALJ reasoned that the director does not have authority to alter a temporary disability rate under the parameters of a vocational assistance dispute. Accordingly, the ALJ found no error in insurer's calculation of claimant's weekly wage for vocational eligibility purposes absent a change in claimant's temporary disability rate.

Claimant contends there was error in calculating claimant's weekly wage for vocational eligibility purposes. Claimant argues that the issue has nothing to do with the calculation of his temporary disability rate, but rather whether all of his wages from all three jobs held at the time of injury should be considered when calculating his suitable wage for purposes of determining his eligibility for vocational assistance. According to claimant, insurer was required to consider all of his employment at the time of injury to determine his eligibility for vocational assistance. Claimant argues that doing so comports with the purposes of the Workers' Compensation Law to provide adequate and reasonable income benefits to injured workers and to restore the injured worker economically to self-sufficient status to the greatest extent practicable. Claimant requests that this matter be remanded to insurer for recalculation of his suitable wage.

Insurer argues there was no error in calculating claimant's weekly wage for vocational eligibility purposes and only claimant's average weekly wage from his job at injury should be used. Under OAR 436-120-0007(1)(e), according to insurer, the adjusted weekly wage used to determine a suitable wage is the average weekly wage for the job at injury. In addition, insurer argues, under OAR 436-120-0007(g), "temporary disability" means wage loss replacement for the job at injury.

RRU's order may only be modified if it violates a statute or rule; exceeds the director's statutory authority; was made upon unlawful procedure; or is characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c).

“(A) For workers employed in one job at the time of injury, by multiplying the daily wage the worker was receiving by the number of days per week that the worker was regularly employed; or

“(B) For workers employed in more than one job at the time of injury, by adding all earnings the worker was receiving from all subject employment.”

A worker is eligible for vocational assistance 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 the worker has a substantial handicap to employment. ORS 656.340(6)(a). A substantial handicap to employment means the worker, because of the injury, lacks the necessary physical capacities, knowledge, skills, and abilities to be employed in suitable employment. ORS 656.340(6)(b)(A); OAR 436-120-0005(11).³ Employment is suitable if, among other things, it pays a suitable wage. OAR 436-120-0005(12)(c). A suitable wage is a wage at least 80 percent of the adjusted weekly wage.⁴ OAR 436-120-0005(13)(a). The adjusted weekly wage is established under OAR 436-120-0007.⁵

The calculation of the worker's weekly wage depends on the nature of the worker's job at injury. If the worker's job at injury was temporary or seasonal, the worker's average weekly wage is calculated under OAR 436-120-0007, section (3). If the worker's job at injury was "other than as described in section (3)," the worker's average weekly wage is calculated using the weekly wage upon which temporary disability was based, and then converting the weekly wage to the adjusted weekly wage. OAR 436-120-0007(4).

For purposes of calculating the worker's weekly wage, "temporary disability" means wage loss replacement for the job at injury. OAR 436-120-0007(1)(g). The worker's job at injury is the job on which the worker originally sustained the compensable injury. OAR 436-120-0007(1)(e). Claimant's job at injury was his part-time work for Outlaws Entertainment. Under the rules, claimant's temporary disability is wage loss replacement for his job at Outlaws Entertainment.⁶ The weekly wage upon which claimant's temporary disability was based was \$157.50. This is the rate used by insurer and RRU in calculating claimant's suitable wage. I find no error in the calculation of claimant's suitable wage.

While I agree with the outcome of the proposed order, I disagree with the ALJ's reasoning that claimant's temporary disability rate was calculated perhaps incorrectly using only his wages at Outlaws Entertainment. Under the rules that apply to calculating the worker's suitable wage for purposes of vocational assistance eligibility⁷ and the rules that apply to calculating the worker's temporary and supplemental disability,⁸ the wage from the job at injury (or primary job) is used to calculate the worker's temporary disability, and wages from other employment (or secondary jobs) are used to calculate the worker's supplemental disability. Only the worker's temporary disability benefits, and not the worker's supplemental disability benefits, are used to determine the worker's suitable wage for vocational assistance purposes. RRU acknowledged in its order that claimant had been receiving supplemental disability benefits.

³ The rules effective January 1, 2006, as adopted by Admin. Order No. 05-080, apply to this matter. *See* OAR 436-120-0003(2).

⁴ "Suitable employment" is employment that pays a weekly wage within 20 percent of the wage currently being paid for the worker's regular employment. ORS 656.340(6)(b)(B)(iii). The worker's regular employment is the employment the worker held at the time of the injury. ORS 656.340(5); OAR 436-120-0005(10).

⁵ ORS 656.340(6)(b)(B)(iii) provides, "The director shall adopt rules providing methods of calculating the weekly wage currently being paid for the worker's regular employment for use in determining eligibility and for providing assistance to eligible workers. * * *"

⁶ Wage loss replacement for claimant's other jobs is supplemental disability. *See* OAR 436-060-0035(1)(d) and (e).

⁷ OAR 436-120-0007.

⁸ OAR 436-060-0035.

RRU did not err, however, in not considering those benefits in its calculation of claimant's suitable wage.

As claimant has not prevailed, his attorney is not entitled to a fee under ORS 656.385(1).

Claimant has not challenged any other aspect of the Director's Review and Order. Accordingly, it is affirmed and claimant's request for remand is denied.

IT IS HEREBY ORDERED the November 1, 2007 Proposed and Final Order is affirmed.