

In the ORS 656.340 Vocational Assistance Dispute of

Patrick C. Dooley, Claimant

Contested Case No: 08-109H, 08-110H

PROPOSED & FINAL ORDER

September 26, 2008

PATRICK C. DOOLEY, Petitioner

SAIF CORPORATION, Respondent

Before Emerson G. Fisher, Administrative Law Judge

Claimant appeals the Director's Review and Order issued on September 7, 2007 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

Pursuant to notice, a hearing was convened on September 8, 2008, in Portland, Oregon, before the undersigned Administrative Law Judge (ALJ). Claimant was present and represented by attorney Gary Borden. The employer, Concrete Services, Inc., and its insurer, the SAIF Corporation, were represented by attorney Janelle Irving. The proceedings were recorded by the ALJ.

The documentary evidence received consists of Exhibits 1 through 34, 21A, 23A, 25A, and 26A.

The record closed on September 8, 2008.

ISSUE

Whether claimant is eligible for vocational assistance.

FINDINGS OF FACT

Claimant compensably injured his right knee on July 28, 2004. (Exs. 1; 2). On July 19, 2006, SAIF determined that claimant was eligible for vocational services. (Ex. 3). Claimant commenced training on September 25, 2006. (Ex. 4-1).

Vocational training ended on April 16, 2007, for medical reasons. (Ex. 13).

On or about August 2, 2007, arrangements were made for the resumption of training (keyboarding skills class) on August 13, 2007. (Ex. 18). Claimant was expected to attend class three days per week, two hours per day. (*Id.*) Claimant's participation was to be "flexible" in that he could attend class any day, Monday through Friday between the hours of 7:30 am and 5:00 pm. (*Id.*)

Claimant did not commence the keyboarding class on August 13, 2007, and SAIF sent claimant a “warning” letter advising that he “must” start keyboarding class on August 27, 2007, and participate three days per week for two hours per day. (Ex. 21).

Claimant attended keyboarding on August 27, 2007. (Ex. 26). Claimant did not attend keyboarding on either August 28 or August 29. (*Id.*) On August 30, claimant advised Lisa (keyboarding class) that he was sick and would make up hours on Friday (August 31). (Exs. 25; 26). Claimant attended keyboarding for 1½ hours on the afternoon of August 31. (Ex. 26).

On September 4, 2007, SAIF advised claimant that his eligibility for vocational assistance had ended because he failed to fully participate in the vocational process; *i.e.*, not participating in keyboarding class as scheduled. (Ex. 24).

Claimant requested review.

Believing that OAR 436-120-0521(1) required claimant to notify his vocational counselor that he did not attend keyboarding on August 28 and August 29, and finding that claimant had not provided his vocational counselor with such notice, and further finding no circumstances to excuse claimant from providing such notice, an April 11, 2008, Amended Director’s Review and Order affirmed SAIF’s end-of-eligibility determination. (Ex. 33).

Claimant requested a hearing.

CONCLUSIONS OF LAW

Pursuant to ORS 656.283(2)(c), a director’s administrative review regarding vocational assistance may be modified only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by an abuse of discretion or clearly unwarranted exercise of discretion.¹ However, in determining whether any of the factors set forth in ORS 656.283(2)(c) were violated, the ALJ may admit evidence and make independent findings of fact. *See Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The ALJ has the responsibility to ensure that the record is fully

¹ “The phrase ‘abuse of discretion’ is a legal term of art meaning a 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. BLACK’S LAW DICTIONARY 10-11(6th ed. 1990); *Jerry L. Bell*, 2 WCSR 394, 395 (1997), *citing Casciato v. Oregon Liquor Control Comm’n*, 181 Or 707, 717 (1947) and *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 663 (1979). On review for abuse of discretion, ‘[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made.’ *See Teresa Brooke*, 8 CCHR 240, 241 (2003) *quoting Liberty Northwest v. Jacobson*, 164 Or App 37, 45 (1999).” *Suzanne P. Blakley*, 9 CCHR 287, 294 (2004).

developed and sufficient for judicial review. ORS 183.415(10). In doing so, the ALJ may admit and consider new evidence. OAR 436-001-0225(3).

Here, RRU identified the dispute as whether claimant had reasonable cause for not notifying his vocational counselor that he did not attend training on August 28, 2007 and August 29, 2007. Believing that OAR 436-120-0520(1) required such notice, and finding that claimant had no reasonable grounds for not providing the required notice, RRU affirmed SAIF's end-of-eligibility determination.

OAR 436-120-0520(1) provides (in pertinent part):

“If the worker stops attending training for any reason, the worker must notify the vocational counselor by the close of the next working day.”

Thus, the notice required by the rule is due by the close of the next working day after the worker “stops attending training.” Implicit in the rule, is a requirement on the worker to attend training on a specific day.

Under the terms of SAIF's August 13, 2007 warning letter, claimant was instructed to start keyboarding class on August 27, 2007, and participate three days per week for two hours per day. Other than August 27, 2007, which was expressly required, claimant was free to participate in keyboarding class any day, Monday through Friday between the hours of 7:30 am and 5:00 pm. Therefore, claimant was not required to attend keyboarding class on either August 28, 2007, or August 29, 2007. Because claimant was not required to attend keyboarding class on those days, his absence in class on those days did not satisfy the regulatory prerequisite (“stop attending training”) to trigger notice to the vocational counselor. In other words, the notice provision of OAR 436-120-0520(1) is not applicable to the facts of this case. Consequently, the April 11, 2008, Amended Director's Review and Order, must be vacated.

I acknowledge SAIF's argument that there are other reasons to end claimant's eligibility for vocational assistance. While that may be true, none of the other reasons relied upon by SAIF were the basis for the April 11, 2008 Order. Accordingly, I reject SAIF's argument.

Claimant's counsel is entitled to an assessed attorney fee. ORS 656.385(1); OAR 436-001-0265. Taking into account the factors listed in the aforementioned statute and rule, I find a reasonable fee for claimant's services is \$2,000.

ORDER

The April 11, 2008, Amended Director's Review and Order, is vacated, and SAIF's September 4, 2007 end-of-eligibility determination is set aside. Claimant's counsel is awarded a \$2,000 assessed attorney fee, payable by SAIF.