
In the Compensation of
William R. Short, Claimant
Contested Case No: 07-061H
PROPOSED & FINAL ORDER

February 28, 2008

WILLIAM R. SHORT, Petitioner
SAIF CORPORATION, Respondent

Before Jill M. Riechers, Administrative Law Judge

The hearing convened before Administrative Law Judge Jill M. Riechers on December 17, 2007, in Portland, Oregon. Claimant was present and represented by Ronald A. Fontana. The employer, Vigoren Roofing, and its insurer, SAIF Corporation (“SAIF”), were represented by Janelle Irving. At hearing, Exhibits 1 through 48, A, 2A, 4A, 5A, 6A, 10A, 10B, 11A and 17A were offered and admitted. The parties submitted written closing arguments. The record closed January 29, 2008, when claimant’s reply argument was received.

ISSUE

Claimant challenges a May 4, 2007 Director’s Review and Order that affirmed SAIF’s March 5, 2007 notice of ineligibility for vocational assistance. (Ex 45).

FINDINGS OF FACT

Claimant, a roofer, sustained a compensable injury to his left leg on September 2, 2004, when he fell off a roof. The claim was accepted for non-displaced intercondylar fracture of the proximal left tibia, left ankle sprain, left medial meniscus tear and left knee traumatic osteoarthritis. The claim was closed by Notice of Closure on August 28, 2006, with an award of 10 percent scheduled permanent partial disability (“PPD”). By Order on Reconsideration dated January 19, 2007, the PPD award was increased to 16 percent. (Exs 1, 3, 4, 13).

On November 3, 2006, Linda Fishman, Ph.D., a licensed psychologist, wrote a report after performing tests to evaluate claimant’s intelligence, reading ability and learning ability. (Ex 6). Claimant had never learned to read and write. Claimant told Dr. Fishman that in high school, after his father discovered that he had been placed in a slow-learners class, he took him out of school and began teaching him the roofing trade. Claimant made many mistakes when he was learning, and needed much demonstration and practice, but eventually learned the necessary skills. Claimant learned to apply roofing materials, but never learned to measure roofs or to do estimates, according to the testimony of his wife, Julia Short, who also worked with claimant’s family in the roofing business for a time.

Dr. Fishman also reported claimant’s history of previous alcohol and drug abuse. On the Wechsler Abbreviated Scale of Intelligence (WASI) test, claimant’s non-verbal skills were in the low average range, with a non-verbal IQ estimate of 88. His lesser verbal IQ estimate of 72 was in the borderline range. The spread between the verbal and non-verbal abilities was a strong indication of verbal difficulties, and was a pattern often seen among individuals with learning

disabilities. (Ex 6-3). Dr. Fishman advised that claimant had significantly greater difficulty in learning and retaining information that was more abstract and less connected to his current knowledge and experience. (Ex 6-4). Claimant read at the first-grade level. In summary, Dr. Fishman concluded that claimant's abilities were stronger for non-verbal, visual learning. His auditory and verbal learning skills were somewhat weaker. (Ex 6-5). Dr. Fishman recommended the use of flow charts and illustrations rather than verbal directions.

In December 2006 and January 2007, claimant worked with Kent Reigel, a vocational counselor, and was ultimately placed in an Authorized Training Program ("ATP") to obtain skills to work as a parts order and stock clerk with a company called Truck Parts, located in Chehalis, Washington. Bob Prothero owned the company, and his son, Aaron, worked there also. (Exs 8, 10B, 11, 14; Testimony). The ATP included on-the-job learning, and reading tutoring sessions.

On January 26, 2007, claimant and his wife met with Mr. Reigel, who read the Return-to-Work training plan ("plan") to them at that time. After Mr. Reigel read the plan to claimant, claimant signed it. (Ex 11-1, -2). Among other requirements, the plan also provided:

2. Worker agrees to contact counselor immediately if misses more than one day of training for any reason.
3. Worker agrees to call counselor immediately if anything threatens the completion of the plan. (Ex 11-1).

On January 9, 2007, claimant underwent psychological testing performed by Robert Schneider, Ph.D. (Ex 12). The WASI testing performed by Dr. Schneider revealed an estimated verbal IQ of 68, and non-verbal IQ of 78. This indicated that claimant was functioning at "the lowest end of the range of borderline ability." (Ex 12-2). Dr. Schneider considered the scores he obtained to be more reliable than the January 2006 scores, because they were measured over multiple tests rather than over a few subtests. In the verbal testing, claimant obtained one of his lowest scores on comprehension. Claimant's performance indicated extremely limited problem solving abilities and very limited reasoning abilities. The comprehension testing not only indicated limited understanding of his environment, but also indicated very limited ability to think about and solve even simple problems. Claimant could understand very simple instructions, but was slow to understand and slow to learn. (Ex 12-3, -4). Mr. Fontana provided copies of Dr. Schneider's report to SAIF and to Mr. Reigel on February 16, 2007. (Exs 19, 20).

Claimant began the training program on January 29, 2007. (Ex 16). Within a few days of beginning the program, claimant had a tire blow out on his Toyota pickup that damaged his brake lines. Claimant borrowed his brother's S-10 pickup which he used the rest of the time he worked at Truck Parts. (Testimony of claimant). After the tire blowout, claimant was late to training. He called one of the Protheros and advised him of the situation, and also went in later with his wife and talked to Bob Prothero about it. (Testimony of claimant and Mrs. Short). Claimant did not recall mentioning this incident to Mr. Reigel. Mrs. Short called Mr. Reigel after the tire incident, who said not to worry about it as long as Bob Prothero was aware of the situation. (Testimony of Mrs. Short).

On January 31, 2007, Mr. Reigel reported that claimant had begun his training at Truck

Parts on January 29, 2007, and appeared to be doing well, according to Bob Prothero. (Ex 16). Mr. Reigel planned to meet with claimant and the trainer in February. Aaron Prothero completed a form assessing claimant's performance in the training program from January 29 to February 9, 2007, and rated claimant "Excellent" in all categories. (Ex 22). On February 28, 2007, Mr. Reigel reported that claimant had completed his first month of training and that telephone contact with the trainer indicated claimant was doing quite well, and that claimant was working diligently with his reading tutor. (Ex 21).

Meanwhile, on the morning of Wednesday, February 28, 2007, claimant's brother's truck broke down. Afterward, claimant walked to a truck stop, and called Truck Parts and spoke with Aaron Prothero to let him know that his brother's vehicle had broken down, and that claimant would not be able to make it in to work. Claimant told him it would probably be a couple of days before he could get in to work because he had to fix the vehicle. Claimant asked Aaron Prothero to call his wife to let her know. Aaron Prothero told claimant to get the problem fixed, and get back to work as quickly as he could. Mr. Prothero did not advise claimant or Mrs. Short to call Mr. Reigel or SAIF. Neither of the Protheros contacted Mr. Reigel to advise him of these events. Mrs. Short subsequently contacted a friend, who came and picked claimant up. Claimant and his friend took the truck to his shop and determined the problem was the fuel pump. Claimant and his wife ordered a fuel pump from Truck Parts the following day, which arrived on Monday, March 5, 2007. Claimant called his reading tutor on March 2 to tell her he could not attend the tutoring sessions.

During this interval, claimant was at his mother's house most of the time, which is a few blocks from his own home. (Testimony of claimant). He stays there on occasion when he and his wife are not getting along. Claimant and his wife were having marital difficulties during this time. (Testimony of Mrs. Short). Mrs. Short assumed claimant was at his mother's home.

On March 5, 2007, Mrs. Short called Mr. Reigel and left a message that claimant had disappeared and could not be found. Mr. Reigel called Bob Prothero, who told him that claimant had left work a little early on February 27, than called the next morning to let them know he would not be in because his truck had broken down. Claimant had missed work February 28, March 1, March 2 and March 5, and as of March 5, the Protheros had not heard from claimant. Mr. Reigel notified SAIF that claimant had missed the training days on March 5, 2007. (Testimony of claimant, Mrs. Short and Mr. Reigel; Ex 27).

On March 5, 2007, SAIF issued notices of end of training, and of end of eli-gibility for vocational assistance, both effective February 27, 2007. (Exs 23, 24).

Claimant appealed. (Ex 29). Nancy Cummings of the Workers' Compensation Division's Rehabilitation Review Unit ("RRU") conducted an investigation, which included communications with claimant's counsel, Mr. Reigel, SAIF representatives, and reviewed documents provided, including follow-up correspondence from the reading tutor, Mr. Reigel, claimant's counsel and SAIF's counsel. (Exs 30 – 44). Mr. Fontana disagreed with the decision to terminate the plan, contending that claimant had not unreasonably failed to comply with the requirements of OAR 436-120-0350(10), and had, in fact, complied with that rule. He asserted that claimant should have received a written warning prior to termination of training and

eligibility. In addition, Mr. Fontana asserted that SAIF had not fully complied with applicable vocational rules, including that Mr. Reigel had not reviewed the plan with him prior to having claimant sign it, that the actual job requirements of the training job were beyond claimant's physical restrictions and that Mr. Reigel had not kept in frequent enough contact with claimant despite knowledge of claimant's limited capabilities and Mr. Fontana's frequent requests.

Mr. Fontana also contended that claimant believed contacting Mr. Prothero on the first day he missed training was all that was required of him, and that given claimant's limited problem solving ability and illiteracy, it was not reasonable to expect him to follow his responsibilities according to the plan. (Ex 45-7). He also contended that Mrs. Short's contact with Mr. Reigel on March 5, 2007 constituted adequate notice under the provisions of OAR 436-120-0350(10). SAIF asserted that claimant had been informed of the plan's requirements, that he did not abide by the requirements of the plan in not contacting Mr. Reigel within a day of the vehicle breakdown, and that termination of vocational assistance was appropriate, because claimant was no longer enrolled and actively engaged in training.

On May 4, 2007, the Director's Review and Order that is the subject of the present dispute issued. Ms. Cummings, as the Director's representative, was persuaded that claimant did not have reasonable cause when he failed to notify the vocational counselor or SAIF of his absence from training as set forth in the plan. (Ex 45-7). The factors Ms. Cummings based her decision on were that Mr. Reigel read the plan to claimant, and that claimant's attendance and preparation for his tutoring sessions evidenced sufficient ability to accept the responsibilities of a student/trainee. She also found that claimant's 'disappearing' was further indication he did not have reasonable cause for failing to attend training and failing to notify Mr. Reigel or SAIF of his absences. (Ex 45-7). Based on this information, Ms. Cummings found that claimant failed, without reasonable cause, to attend two consecutive training days, and failed, without reasonable cause, to notify the vocational counselor or insurer. (Ex 45-8). Ms. Cummings also determined that none of claimant's or SAIF's other contentions had a bearing on the issue.

At hearing, claimant explained that he believed that it was sufficient to call his employer, the trainer, to tell him that he could not make it to training. Claimant believed that this was the same as with any job, that the worker would call the employer to say he could not come in. Claimant and Mrs. Short did not recall that claimant was expected to contact Mr. Reigel or SAIF directly in the event of claimant's inability to show up for training. Mr. Prothero did not tell claimant or Mrs. Short that they had to contact anyone besides him. The information they had been given when claimant had the first incident involving the tire blowout, led them to believe that as long as the Protheros did not have a problem, there was no cause for concern. Mr. Prothero told claimant on February 28 after the fuel pump breakdown just to get in to work as quickly as he could.

Mr. Reigel testified at hearing that the plan required claimant to call within one day of missing training, although the vocational rule allowed two days. He thought claimant understood the plan after he read it to him. Near the end of his testimony, Mr. Reigel stated that he had told claimant that one thing that could really get claimant in trouble was to miss work and not tell anyone, and so that if claimant was not going to be at work, he needed to make sure to let him know, or his trainer know. Claimant was not sent a written warning letter prior to the

notices of end of training and end of eligibility that issued on March 5, 2007. (Testimony of Mr. Reigel).

CONCLUSIONS OF LAW AND OPINION

ORS 656.283(2)(c) provides, that at a contested case hearing regarding a director's order concerning vocational services, the decision of the director's review shall be modified only if it:

- (A) Violates a statute or rule;
- (B) Exceeds the statutory authority of the agency;
- (C) Was made upon unlawful procedure; or
- (D) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.¹

OAR 436-120-0350 provides, in pertinent part:²

A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

(10) The worker has failed, after written warning, to comply with the return-to-work plan. No written warning is required if the worker fails to attend 2 consecutive training days and fails, without reasonable cause, to notify the vocational counselor or the insurer.

OAR 436-120-0350(10) Requirement of Notification by Worker

In analyzing statutes, the principles of construction outlined in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) provides guidance in interpretation of statutory meaning. One such principle is "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted [.]" *PGE*, 317 Or at 611. It seems reasonable to apply a similar principle to the interpretation of state agency rules.

Applying the principle set forth in *PGE*, I note that OAR 436-120-0350(10) contains no time requirement for notification of the vocational counselor after the worker fails to attend two consecutive days of training. The vocational training plan contained a more stringent requirement than the language of the rule, as interpreted by Mr. Reigel at hearing as requiring notice within two days, requiring claimant to contact the vocational counselor immediately if he missed more than one day of training for any reason.

Whether a plan may contain a stricter notification requirement than contained in the rule is not specifically addressed in the rule, but if so, one wonders why the WCD would enact a rule such as OAR 436-120-0350(10) at all, if it were not intended to set the standard to be applied uniformly to all insurers, vocational providers and claimants. In this regard, OAR 436-120-0002

¹ See also OAR 436-001-0225(3)(a) through (d), WCD Admin. Order 06-050, which sets forth the same requirements as contained in the statute.

² All references to OAR 436 Division 120 rules in this order will be to rules contained in WCD Admin. Order 05-080, which were in effect and applied at the time of the Director's decision.

provides, “The purpose of these rules is to prescribe uniform standards for determining eligibility, delivery and payment for vocational services to injured workers, procedures for resolving disputes, and to establish standards for the certification of vocational counselors and providers.” Considering the foregoing, I conclude that the rule must be followed as written, and that SAIF could not place further restrictions on claimant, not permitted by the rule. See also *Fairlawn Care Center v. Douglas*, 108 Or App 698, 700-01 (1991); *Eastman v. Georgia Pacific Corporation*, 79 Or App 610 (1986).

In this case, there was compliance with the notification requirements of OAR 436-120-0350(10), as written, without “reading into” the rule a provision that is not there, i.e., a provision that the notification be provided within a specified time during or after the two consecutive days missed. For this reason, I conclude that the notification to Mr. Reigel on March 5, 2007 constituted notice that is sufficient to satisfy OAR 436-120-0350(10). Under the circumstances, the rule required that written warning be provided to claimant prior to ending claimant’s eligibility for vocational assistance. Written warning was not provided, hence, eligibility should not have ended.

OAR 436-120-0350(10) Requirement of Reasonable Cause

Assuming for the sake of discussion that I had not determined that SAIF did not comply with the rule for the reasons set forth above concerning the notification requirement, the wording of the rule itself, and the written warning requirement, I believe that it has not been established that claimant’s failure to notify Mr. Reigel within a day (or two) of his failing to appear for training on February 28 was “without reasonable cause.” Reasonable cause may include, but is not limited to, medically documented limitations in a worker’s activities or to illness or medical condition of the worker. See OAR 436-120-0005(8).³

In the present case, the claimant is of borderline mental capabilities. His areas of weakness include comprehension of verbal instructions, and of learning and retaining information that is less connected to claimant’s experience. According to both Dr. Fishman’s and Dr. Schneider’s assessments, which were based on objective testing, claimant’s problems in these areas were legitimate. Claimant was going to require much greater assistance to be able to comprehend instructions adequately and to succeed in his program. This was amply reinforced to Mr. Reigel, to SAIF and to RRU by these reports as well as Mr. Fontana’s voluminous correspondence.

In this context, claimant’s failure to recall that he was supposed to call Mr. Reigel, rather than his employer, as commonly understood, in case of inability to attend the program, is understandable and explainable by claimant’s documented learning and comprehension deficiencies. The fact that claimant was prompt and diligent in attending reading tutoring sessions does not change these facts or provide satisfactory evidence that the results of the testing performed by Drs. Fishman and Schneider should somehow be discounted. The same goes for claimant’s “disappearance” after February 28, although it is not clear that claimant disappeared so much as just simply did not contact Mr. Reigel or SAIF.

³ Further, the director may waive procedural rules, “as justice so requires.” See OAR 436-120-0003(6).

In summary, I do not find that the factors set forth at page seven of the Director's Review and Order provide an adequate basis for the conclusion that claimant's failure to contact Mr. Reigel within one day (or two) of February 28, 2007 was not reasonable. Consequently, for this reason, and independently of my reasoning with respect to the language of the rule's notification requirement, I conclude that written warning should have been provided prior to ending claimant's eligibility for vocational services.

Conclusion

The Director misinterpreted the requirements of OAR 436-120-0360(10), by "reading into" the rule a requirement that is not there, which is that the worker notify the counselor or insurer within the same two days of failure to attend the training, of the non-attendance. I further conclude that SAIF's more stringent plan requirement requiring claimant immediately to contact Mr. Reigel if he missed more than one day of the program, is not permissible under the terms of OAR 436-120-0350(10), and of the purposes of the vocational rules under OAR 436-120-0002 to prescribe uniform standards for determining eligibility and delivery of vocational services to injured workers. For these reasons, the Director's Order in essence results in the violation of these two rules, and exceeds the statutory authority of the agency, under ORS 656.283(2)(c)(A) and (B), and OAR 436-120-0225(3)(a) and (b).

In addition, I conclude that the Director's Order does not provide sufficient bases for concluding that there was a lack of reasonable cause for claimant's failure to contact Mr. Reigel or SAIF within one or two days (assuming for the sake of argument that SAIF could impose a one-day notification requirement, or that the rule could be read as requiring notification in two days), because it does not adequately consider claimant's objectively documented mental deficiencies, deficiencies which, taken together with claimant's limited understanding of his duties and manner in which he was advised of those duties, provide reasonable cause for failure to comply as defined in OAR 436-120-0005(8). Accordingly, I further conclude that the Order is characterized by a clearly unwarranted exercise of discretion, and for that reason, must be modified, under ORS 656.283(2)(c)(D) and OAR 436-001-0225(3)(d).

Claimant's counsel seeks an attorney fee of \$13,450.00, as provided in his affidavit setting forth the number of hours he spent, totaling 53.8. While SAIF did not challenge the fee request, I must determine an appropriate fee based on the factors set forth in OAR 438-015-0010(4). Considering those factors, including the time devoted to the case, the complexity of the issues, value of interest involved and benefits obtained, and the risk that claimant's counsel's efforts might go uncompensated, I find that a reasonable attorney fee is \$10,000.00.

ORDER

IT IS THEREFORE ORDERED that the May 4, 2007 Director's Review and Order is modified as follows. SAIF's March 5, 2007 notices of end of eligibility for vocational assistance and end of training are hereby set aside. Counsel for claimant is awarded an assessed fee of \$10,000.00, to be paid in addition to, and not out of, compensation. The claim is remanded for SAIF for further processing according to law.