

In the Vocational Assistance of

John E. Tannehill, Claimant

Contested Case No: 08-101H

PROPOSED & FINAL ORDER

September 23, 2008

JOHN E. TANNEHILL, Petitioner

CNA CLAIMPLUS, Respondent

Before Darren L. Otto, Administrative Law Judge

A hearing was convened and concluded in the above entitled matter on September 3, 2008 in Portland, Oregon before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was present and was represented by his attorney, James Dodge. The employer, Performance Contracting Inc., and its processing agent, CNA ClaimPlus, were represented by their attorney, Jerald P. Keene. Exhibits 1 through 29, 9A, 11A, 18A, 21A, and 21B were received into evidence.

ISSUES

Claimant appeals the May 8, 2008 Director's Review and Order of abatement, withdrawal and republication. The issue is whether claimant's purchases of a laptop computer, protective cover, ink cartridges, and backpack were mandatory for his vocational training program.

FINDINGS OF FACT

On May 3, 2006, claimant injured his heel while working as a permanent year around taper for the employer (Exs. 1 & 3-1). The employer accepted a right heel fracture and authorized vocational assistance (Ex. 3, pgs. 1-2). A vocational rehabilitation counselor, Mario Scopacasa, was assigned to claimant who developed a return-to-work training plan for the building inspection technology (BIT) program (Ex. 3). The RTW plan was based on claimant obtaining an associates of applied science (AAS) degree in building technology through formal training at Portland Community College (PCC). On January 11, 2008, the Director ordered the employer to approve claimant's training for building inspector and provide up to 21 months of training (Ex. 3-8). Additionally, the employer was ordered to reimburse claimant the PCC costs he had incurred including tuition, books, and supplies. *Id.*

On February 22, 2008, the employer denied claimant's request to pay for a laptop computer, protective cover, ink cartridges, and backpack (Ex. 5). Although it would provide claimant with a great advantage, a laptop computer was not mandatory for his vocational training (Exs. 7, 8, 9, 11A & 14). PCC's computer lab was sufficient for claimant's needs (Ex. 20).

On April 29, 2008, the Director's Review and Order approved the employer's denial of payment for a laptop computer, a protective cover, ink cartridges, and backpack (Ex. 21). In arriving at that conclusion, the Director found that none of those supplies was mandatory for claimant's program and PCC's computer lab was sufficient for the computing needs of students

in the building inspector program (Ex. 23-5).

FINDINGS OF ULTIMATE FACT

Claimant's purchases of a laptop, protective cover, ink cartridges, and backpack were not mandatory for his building inspector program. Also, PCC's computer lab provided a less expensive, adequate alternative to purchasing a laptop computer.

CONCLUSIONS OF LAW AND OPINIONS

Claimant contends that the May 8, 2008 Director's Review and Order, which approved the employer's denial of payment for a laptop computer, protective cover, ink cartridges, and backpack should be reversed because those supplies were mandatory for him to complete the building inspector program. The employer asserts that there is no persuasive evidence establishing that those supplies were mandatory, there was a less expensive adequate alternative to purchasing a new laptop computer, and the Director's Review and Order should be approved.

The scope of review of the Director's Review and Order by the Workers' Compensation Board's Hearings Division is limited by OAR 436-001-0225 which provides in relevant part as follows:

- (3) In vocational assistance disputes under ORS 656.340, new evidence may be admitted and considered. Under ORS 656.283(2), the administrative law judge may modify the director's order only if it:
 - (a) Violates a statute or rule;
 - (b) Exceeds the director's statutory authority;
 - (c) Was made upon unlawful procedure; or
 - (d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court has further explained that review of the Director's Order in a vocational assistance dispute is "only for errors of law and substantial evidence." Liberty Northwest Ins. Corp., v. Jacobson, 164 Or App 37, 39 (1999).

OAR 436-120-0710 specifies the kinds of direct worker purchases insurers are required to provide for workers who participating in vocational training, including:

- (1) **Tuition, fees, books and supplies for training or studies.** Payment is limited to those items identified as mandatory by the instructional facility, trainer or employer. The insurer must pay the cost in full, and will not require the worker

to apply for grants to pay for tuition, books or other expenses associated with training.

* * *

(4) **Tools and equipment for training or employment.** Payment is limited to items identified as mandatory for the training***

OAR 436-120-0700(3) also provides, “In making its decision regarding a direct worker purchase, the insurer may choose the least expensive, adequate alternative. If the worker wants a direct worker purchase which is more expensive than that authorized by the insurer, the worker may select that alternative, and the worker shall pay the difference in costs.”

The Director concluded that, although claimant’s PCC instructors described several ways in which a building inspector student benefits from having a laptop computer, the instructional facility, trainer, or employer did not state that access to a laptop computer was required for participation in the BIT studies (Ex. 23-5). Additionally, the Director concluded that PCC’s computer lab provided sufficient computing and distance-learning resources for claimant to participate in the BIT program. *Id.* The Director’s conclusions were supported by substantial evidence in the record.

Debra Anderson, chair of the BIT program, recommended that claimant have a laptop to give him the best opportunity to succeed in college and job placement, but she did not state that having a laptop was mandatory for the BIT program (Ex. 7). Also, Ms. Anderson stated that PCC’s computer lab was sufficient for the computing needs of BIT students. She did, however, concede that a student who depended solely on the computer lab was limited in terms of schedule flexibility (Ex. 20-1). One of claimant’s vocational consultants, Andre Allen, concluded that, although strongly recommended, a laptop computer did not appear to be “mandatory,” since claimant could wait his turn for an available machine in the PCC computer lab (Ex. 11A-2). Samuel Anderson, an Office Assistant I with PCC also stated, “Students are responsible for their own software and computer equipment maintenance and setup.” (Ex. 14-2).

Claimant’s instructional facility staff, trainer, or employer did not state that the purchase of a laptop computer was required for claimant in his BIT program. Also, PCC’s instructional staff believed that PCC’s computer lab provided a less expensive, adequate alternative. Therefore, the employer was not required to reimburse claimant for his laptop computer, protective cover, ink cartridges, and backpack. Accordingly, the May 8, 2008 Director’s Review and Order will be approved.

ORDER

IT IS HEREBY ORDERED that the May 8, 2008 Director’s Review and Order is approved in its entirety.