

In the Vocational Assistance of
Luciano Velasquez-Gomez, Claimant

Contested Case No: 07-152H

PROPOSED & FINAL ORDER

June 24, 2008

LUCIANO VELASQUEZ-GOMEZ, Petitioner
AMERICAN FAMILY MUTUAL, Respondent

Before Emerson G. Fisher, Administrative Law Judge

Claimant appeals the Director's Review and Order issued on October 24, 2007 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

In lieu of proceeding to hearing on March 25, 2008, the parties submitted this matter to the undersigned Administrative Law Judge for a decision based on documentary evidence and written closing arguments. Claimant is represented in these proceedings by attorney Martin Alvey. The employer, Bronze Construction Services, and its claim processing agent, Intermountain Claims Inc., are represented by attorney Michael Bostwick.

The documentary evidence received consists of Exhibits 1 through 10.

The record closed on June 2, 2008.

ISSUE

Whether claimant is eligible for vocational assistance.

FINDINGS OF FACT

Claimant sustained compensable dislocation fractures at T-11 and T-12, and a right petrous temporal bone fracture on December 9, 2005. (Exs. 1; 2).

Asserting a failure to provide documentation of authority to work in the United States, the employer issued a Notice of Ineligibility for Vocational Services effective July 27, 2007. (Ex. 5). Claimant requested review. (Ex. 7).

Reasoning that claimant had failed to provide documentation that he was authorized to work in the United States, Rehabilitation Review Unit (RRU) applied OAR 436-120-0320(10)(a) and issued an October 24, 2007 Director's Review and Order affirming the employer's denial of vocational assistance. (Exs. 9-2; 9-3).

Claimant requested a hearing.

CONCLUSIONS OF LAW

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 ORS 656.283(2)(c). 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. OAR 436-001-0225(3); *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993).

Arguing that OAR 436-120-0320(10)(a)² is beyond the Director's authority as set forth in ORS 656.340(7), claimant seeks reversal of the of the October 24, 2007 Director's Review and Order affirming the employer's denial of vocational assistance. For the reason stated below, I reject claimant's argument.

In *Carmen Carreon*, 12 CCHR 334 (2007), it was held that OAR 436-120-0320(10)(a) did not conflict with the definition of "worker" as set forth in ORS 656.005(30), nor exceed the Director's authority under ORS 656.340(7). *Id.*, at 337. *Carreon* is controlling. Accordingly, the October 24, 2007 Director's Review and Order must be affirmed.

ORDER

The October 24, 2007 Director's Review and Order is affirmed.

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.' *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).

² At the time of the October 24, 2007 Director's Review and Order, OAR 436-120-0320(10), which is now OAR 436-120-0320(11), provided:

"(10) A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

"(a) The worker is authorized to work in the United States."