

In the Vocational Assistance of  
**Justin Hayes, Claimant**  
Contested Case No: 08-324H  
**PROPOSED & FINAL ORDER**  
May 5, 2009

Justin Hayes, Petitioner  
SAIF CORP., Respondent  
Before Robert A. Davis, Administrative Law Judge

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This matter has been submitted on the documentary record and written arguments. Claimant has been represented by his attorney, Christopher D. Moore. The employer, Rose Logging Inc, and its insurer, SAIF Corporation, have been represented by their attorney, James Booth. The record closed on April 2, 2009, upon receipt by the Hearings Division of the final written argument from counsel.

Exhibits: The Hearings Division has received Exhibits 1 through 13 as complied by the Workers' Compensation Division. Claimant's attorney has also offered Exhibit 14. There has been no objection to any of the exhibits. Consequently, Exhibits 1 through 14 are admitted.

#### **FINDINGS OF FACT**

In making the following findings, I rely upon the above-mentioned exhibits and the uncontested facts referred to in the Workers' Compensation Division Order at issue in this proceeding:

Claimant sustained a compensable injury on July 18, 2006, when he stepped on some limbs and fell over a log. The insurer accepted as disabling a strain of the posterior tibialis tendon of the right foot.

From September of 2007 to January of 2008, claimant attended a technical institute and completed a program in cost estimating and project management. Claimant paid for the program himself.

In June of 2008, claimant's doctor expressed the opinion that claimant could not return to his job at injury due to physical limitations resulting from the compensable injury.

In mid June of 2008, a vocational counselor assigned to complete an eligibility evaluation sought information from claimant's doctor concerning those limitations.

On August 4, 2008, the vocational consultant recommended that claimant be determined ineligible for vocational services because conditions for establishing eligibility had not been satisfied. The counselor noted that claimant was employed full time as a cost estimator/project manager for a firm apparently providing glass windows. He was earning \$20 per hour. The counselor noted that if claimant had not participated in the training program as to cost estimating and project management, he would have been eligible for vocational assistance. The counselor noted, however, that claimant was suitably employed and had been so for at least 60 days.

Claimant sought reimbursement for his training-program tuition, fees, books, and supplies and for his relocation from Portland to Bend to accept a job in a position for which he had trained.

On August 13, 2008, the insurer issued a Notice of Ineligibility for Vocational Assistance.

Claimant, through counsel, sought review by the Director of the insurer's ineligibility notice.

On September 19, 2008, a vocational reviewer for the Workers' Compensation Division (WCD) arranged a telephone conference that included claimant, claimant's representative, and a vocational coordinator for the insurer. Claimant's representative asserted that claimant should be reimbursed for the training costs for which he had paid. The vocational coordinator asserted there was no determination that claimant would receive training and further, his claim was in open status. The vocational coordinator indicated that the insurer was reviewing the matter and that if claimant was found eligible for vocational assistance, the reimbursement issue would be addressed.

On September 26, 2008, the vocational reviewer for WCD issued a Letter of Agreement indicating that the assistant to claimant's attorney and the vocational coordinator for SAIF Corporation had agreed as follows:

The insurer will make a determination on the issues of reimbursement if claimant becomes eligible for vocational assistance. The parties did not agree on the issue of an attorney fee for claimant's attorney, and there would be an administrative order on the issue of attorney fees.

On October 16, 2008, the vocational reviewer issued a Director's Review and Order concluding that claimant had prevailed in the vocational issue before the Director because the insurer agreed to redetermine claimant's vocational-services eligibility and that if claimant is found eligible for vocational services, the insurer would also make a determination on the reimbursement issue.

The reviewer, however, declined to award an attorney fee because it was unknown if there would be any benefit for claimant. The reviewer noted that if claimant became eligible for vocational assistance, the insurer would address the reimbursement issue. It was unknown if claimant would be reimbursed for the training costs, and it was not known what the amount of any reimbursement would be. The reviewer left open the possibility that if claimant is reimbursed for his training costs, the benefit would be established, and claimant's attorney could file a request for review as to an attorney fee.

### **OPINION AND ORDER**

I have limited ability to reverse or otherwise modify the Director's Review and Order. Vocational-assistance orders from the Director are reviewed pursuant to the scope of review specified by ORS 656.283(2)(c). I may modify the order only if it violates a statute or rule,

exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

I conclude that the order violates OAR 436-120-0008(2), which provides in relevant part that in any dispute in which a represented worker prevails after a proceeding has commenced before the director, “the director shall award an attorney fee to be paid by the insurer or self-insured employer as provided in ORS 656.385.” The rule also requires that the fee be proportionate to the benefit to the worker, with primary consideration given to the results and the time devoted to the case. The rule includes a matrix and provides that the fee may not exceed \$2,000 and may not fall outside the matrix unless there are extraordinary circumstances or there is agreement by the parties. The matrix has on one plane the estimated benefit achieved and on the other, the hours devoted to the matter.

I conclude that it is mandatory for the Director to award an attorney fee if a represented worker prevails in a proceeding. The Director’s Order concludes that claimant has prevailed by obtaining the insurer’s agreement that it will redetermine claimant’s eligibility for vocational services (Exhibit 12-3). Consequently, because the worker prevailed as found by the order, the director “shall award an attorney fee.” I must interpret the word “shall” as creating a requirement for the awarding of a fee.

It is not possible to calculate the fee based on the matrix, because it is not possible to estimate the benefit claimant has received. That situation creates extraordinary circumstances that allow the Director to award a fee outside the matrix. Claimant has requested a fee of \$500, and I conclude that the request is reasonable given that fact that the insurer issued a Notice of Ineligibility and has agreed to reevaluate claimant’s eligibility.

I am aware that the Director’s Review and Order offers claimant’s attorney the opportunity to file a request for review if claimant prevails and is reimbursed for his training costs (Exhibit 12-3), but the possibility exists that claimant will not be reimbursed by the insurer for his training costs. In that circumstance, claimant’s attorney would continue to be uncompensated for prevailing in the present proceeding.

## **ORDER**

### **IT IS HEREBY ORDERED:**

The October 16, 2008 Director’s Review and Order is modified in the following particular: Claimant’s attorney is awarded a reasonable fee of \$500, to be paid by the insurer.