

In the Vocational Assistance of

**Steven R. Holmes, Claimant**

Contested Case No: 08-284H

**PROPOSED & FINAL ORDER**

November 30, 2009

PINNACLE RISK MANAGEMENT, Petitioner

STEVEN R. HOLMES, Respondent

Before Steve Rissberger, Administrative Law Judge

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Pursuant to notice, an initial hearing was held on May 22, 2009 and a continued hearing on October 30, 2009 in Portland, Oregon before Administrative Law Judge Rissberger. Claimant was represented by his attorney, Ron Fontana. RSG Products Inc. and Pinnacle Risk Management were represented by their attorney, Scott Monfils. Exhibits A, B, 1-31, 5A, 9A, 9B, 11A, 17A and 17B were admitted into the record. The record remained open following the October 30 hearing for the submission of final written argument. The record closed on November 6, 2009.

**ISSUE**

Whether Pinnacle has demonstrated, based on a preponderance of the evidence, that the Workers Compensation Division erred when it determined that claimant had not violated the terms of his vocational services program pursuant to OAR 436-120-0005(8) and, as a consequence, set aside Pinnacle's end of eligibility determination?

**FINDINGS OF FACT**

The Findings of Fact set forth in the Director's Review and Order of March 16, 2009 are hereby adopted and incorporated by reference. *See Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006).<sup>1</sup>

Claimant appealed Pinnacle's End of Eligibility determination. The Workers Compensation Division's Employment Services Team (EST) began a review process. On October 8, 2008, the Director issued a Review and Order in regards to claimant's continued eligibility. That Order set aside Pinnacle's end of eligibility determination, concluding that claimant had obtained permission from his training supervisor for leave for an indeterminate period prior to missing work on two or more consecutive training days. (Ex. 26.) Pinnacle requested a hearing before the Hearing Division.

**CONCLUSIONS OF LAW AND OPINION**

Claimant's continued eligibility for vocational services was the primary issue at hearing. Pinnacle contends that the Director's Order erred in setting aside Pinnacle's end of eligibility

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<sup>1</sup> Many of the factual findings contained in the Director's Order amount to little more than recitation of evidence. However, neither party objected to any specific factual findings at hearing or introduced any new evidence with respect to the merits of the parties' vocational services dispute.

determination, because claimant did not establish reasonable cause for his failure to inform his vocational counselor, or other Pinnacle representatives, about his plans to miss two or more consecutive training days within the meaning of OAR 436-120-0005(8). Claimant argues that the Director's Order should be affirmed. If claimant prevails in this proceeding, and the Director's Order is sustained, claimant is also entitled to an award of assessed attorney fees under ORS 656.385(3) .

### **1. Continued Eligibility for Vocational Assistance**

As the party appealing the Director's order, Pinnacle has the burden of proving error in the Director's determination. See *Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000). The Director's decision may be modified only if it: (1) violates a statute or rule; (2) exceeds the statutory authority of the agency; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c)

Pinnacle argues that WCD, in effect, misapplied and thus violated its own rules in setting aside Pinnacle's end of eligibility determination. The relevant rules are OAR 436-120-0350 and OAR 436-120-0005(8). OAR 436-120-0350 is the applicable rule governing continued eligibility for vocational training. It provides, in part, that a worker is no longer eligible when:

(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 436-120-0005(8) defines "reasonable cause" as:

"Reasonable cause" may include, but is not limited to, a medically documented limitation in a worker's activities due to illness or medical condition of the worker or the worker's family, financial hardship, or circumstances beyond the reasonable control of the worker. "Reasonable cause" for failure to provide information or participate in activities related to vocational assistance will be determined based upon individual circumstances of the case."

At hearing, Pinnacle pointed out that OAR 436-120-0005(8) requires that a worker notify the vocational counselor or the insurer when the worker fails to attend two consecutive training days, unless the worker demonstrates reasonable cause for his failure to do so. Much of the remainder of Pinnacle's argument focused on the issue of reasonable cause. Pinnacle argued—quite understandably—that claimant created the circumstances that eventually caused him to miss several consecutive potential training days, without contacting his vocational counselor, or other Pinnacle representatives, because he knowingly drove a car while his license was suspended and was jailed as a result.

Pinnacle's point is well taken. However, Pinnacle's reasonable cause argument misses the crux of the Director's analysis in the October 8, 2008 order. The Director's Order never reached the question of whether claimant had reasonable cause for his failure to notify Pinnacle of his absence. Instead, the Director concluded that claimant's training supervisor, Padrone,

authorized claimant to take time off from training “for an undetermined period of time” to visit his mother, who had been hospitalized in Chehalis, Washington. The Director’s Order found that Padrone had authority to provide claimant with time off from training because a Portland Community College Syllabus provided that a training supervisor could determine what “holidays and breaks” a worker could take. The order’s author concluded: “[therefore, I am not persuaded that Mr. Holmes failed to comply with his return-to-work plan and I conclude that *he was not required to notify his counselor or insurer of his absence.*” (Ex. 26, p. 9) [emphasis added.]

Pinnacle also noted that claimant never visited his mother because he was jailed before he could do so. However, there is no evidence that Padrone subsequently sought to revoke or curtail claimant’s leave for this reason, or for any other reason. Pinnacle did not expressly challenge at hearing Padrone’s ability to authorize leave and, thus, in effect, decide what were training days and what were not training days within the meaning of OAR 436-120-0350(10).

Claimant challenged my interim ruling finding that Pinnacle had filed a valid hearing request in this case. To the extent that it is necessary, the full text of my interim Order of June 8, 2009 is incorporated into this Proposed Opinion and Order so as to address this issue.

## **2. Attorney Fees**

Claimant is entitled to an award of assessed attorney fees pursuant to ORS 656.385(3). This provision applies where, as here, a contested case hearing is initiated by a self-insured employer and an ALJ finds that compensation ordered pursuant to a Director’s Order should not be disallowed or reduced. It should be noted here that \$2,000 attorney fee limitation under ORS 656.385(1) and OAR 436-001-0265(1) does not apply here.<sup>2</sup>

In determining a reasonable fee amount, I consider the factors in OAR 436-001-0265(2) and OAR 438-015-0010(4), particularly the time devoted to the case (as represented by the record), the complexity of the issues, the value of the interest involved, the benefits obtained, and the risk that claimant’s attorney’s efforts might go uncompensated. This case involved an evidentiary hearing on a valid appeal issue. However, the merits of Pinnacle’s appeal were decided on the written record. The written record was of average length, the legal and factual issues raised by this case were of slightly greater than average complexity and claimant’s legal counsel’s presentation of claimant’s case reflected a thoughtful and skillful analysis of the legal issues posed by this dispute.

Claimant’s legal counsel submitted a statement of services and requested an assessed fee in excess of \$9,000. However, it is unclear how much of the time reported by claimant’s counsel was devoted to his representation of claimant before the Director, rather than at hearing. Further, claimant’s counsel has already been awarded an out-of-compensation fee for his representation of claimant with respect to a time-loss issue and claimant did not prevail with respect to his

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<sup>2</sup> Arguably the language of ORS 656.385(1) is broad enough that it could be construed to apply to this case. However, since the language of ORS 656.385(3) applies more closely to the circumstance presented here, I am persuaded that it provides the appropriate standard for determining a reasonable attorney fee in this case.

efforts to obtain a penalty.<sup>3</sup> In light of these considerations, I find that an appropriate attorney fee in this case is \$4,000.

### **ORDER**

The Director's Review and Order of October 8, 2008 is affirmed without modification.

Claimant is allowed an assessed attorney fee of \$4,000.

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<sup>3</sup> See the Opinion and Order I also issued in companion case, WCB No. 08-06902