

In the ORS 656.340 Vocational Assistance Dispute of

**Steven R. Holmes, Claimant**

Contested Case No: 08-284H

**FINAL ORDER**

February 9, 2010

RSG PRODUCTS, INC. , Petitioner

STEVEN R. HOLMES, Respondent

Before John Shilts, Workers' Compensation Division Administrator

---

Pinnacle RMS (insurer), on behalf of self-insured employer RSG Products, Inc. (employer), terminated claimant Steven R. Holmes' (claimant) eligibility for vocational services on the grounds claimant had missed two days of training and failed, without reasonable cause, to notify his vocational counselor of his absence. Former OAR 436-120-0350(10).<sup>1</sup> The Workers' Compensation Division's Employment Services Team (EST) reviewed the case and issued a Director's Review and Order on October 8, 2008, finding eligibility was improperly terminated. Employer requested a hearing. Administrative Law Judge (ALJ) Steve Rissberger issued a Proposed and Final Order on November 30, 2009, affirming EST's order. Employer requested a director's review of that order. I find in claimant's favor and affirm EST's Director's Review and Order and ALJ Rissberger's Proposed and Final Order.

**FACTUAL SUMMARY**

I adopt the facts as found in the Director's Review and Order and the Proposed and Final Order. Claimant's accepted conditions are lacerated scrotum, femoral artery lacerations, left-mid thigh amputation, left inferior pubic rami fracture and major depressive disorder. Claimant entered a training plan on March 18, 2008. Portland Community College administered the plan and a business called Latinos Unidos, in Longview, Washington, was to provide skills training. Mr. Jose Padrone operates Latinos Unidos. The PCC syllabus for claimant's training states "[h]olidays and breaks are determined by the training site." A representative of PCC also said that Latinos Unidos was not bound by the college schedule and that that organization could establish breaks and holidays. The plan required claimant to remain in contact with, and report training absences to, his vocational counselor Linda Hill.

On July 30, 2008, claimant was staying with Mr. Padrone. That evening claimant's sister called Mr. Padrone and told him claimant's mother had been hospitalized in another city.<sup>2</sup> Mr.

---

<sup>1</sup> Former OAR 436-120-0350 provided : 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.

This rule has been re-written and re-numbered. (See OAR 436-120-0145). The current version of the rule does not contain this specific provision. WCD Admin. Order No. 09-061, eff. 01/01/2010.

<sup>2</sup> The record contains conflicting statements as to where claimant's mother was located: Centralia – Ex. 13, Ronald Fontana letter, 8/20/08; or Chehalis, Ex. 19, Summary of 9/11/08 telephone conference.

Padrone told claimant this when he arrived home. Mr. Padrone authorized claimant to leave to visit his mother. Claimant borrowed a car with the intent of driving to the hospital and returning for work the next day.

Claimant was stopped by police for erratic driving while still in Longview. The police report states claimant said he was going to the store. The officer arrested claimant for suspicion of driving under the influence, driving with a suspended license, and outstanding warrants. Claimant told the officer he had drunk five beers.

Claimant remained in jail for several weeks until Mr. Padrone learned he was there and bailed him out. Claimant said he was unable to contact anyone because he could only make collect phone calls and had only telephone numbers for people with cell phones, which cannot accept collect calls.

On August 27, 2008, Ms. Hill sent claimant a notice ending his vocational assistance eligibility. Eligibility was terminated because Ms. Hill asserted claimant had been absent for two or more days from training and had not contacted her without reasonable cause.

### CONCLUSIONS OF LAW

I may only modify the prior order if it violates a statute or rule, exceeds the agency's statutory authority, was based on an unlawful procedure, or demonstrates an abuse or clearly unwarranted exercise of discretion. ORS 656.340(16). The party asserting error in the underlying order bears the burden of proving the error. *Marvin Wood Products v. Callow*, 171 Or App 175, 183-185 (2000).

Claimant argued before ALJ Rissberger that employer had failed to properly perfect its request for hearing on the EST order. ALJ Rissberger issued an interim order in employer's favor. In his response to employer's exceptions claimant argues the interim order was incorrect and that employer's request for a hearing should not have been honored. The interim order was issued on June 8, 2009, and the Proposed and Final Order was issued on November 30, 2009. Claimant filed no original exceptions to the Proposed and Final Order and filed his response to employer's exceptions on January 16, 2009. Exceptions must be filed within 30 days after the challenged order is mailed. OAR 436-001-0246(2)(a). Treating claimant's argument in his response on this point as exceptions, they were not timely filed.

EST and ALJ Rissberger found Mr. Padrone, who was responsible for scheduling, providing, and supervising claimant's training, had excused claimant from training for a period of time. Claimant therefore did not "fail to attend" training and was not required to report missed training days to Ms. Hill.

The record supports the findings in the orders at issue here. *Latinos Unidos* held the authority to establish claimant's training schedule. Jose Padrone, that organization's representative, authorized claimant to take a leave or break from training. Mr. Padrone never revoked that authorization or indicated claimant was absent from training without authorization. Since claimant was excused from attending training during the period in question he was not

obligated to report missing training days. His vocational services eligibility was therefore revoked erroneously.

Employer makes a series of arguments based on the premise that because claimant was allegedly going to the store instead of the hospital, had been drinking, or was jailed for driving violations, he was not within the scope of the reason for which Mr. Padrone granted the training break. The record unquestionably establishes Mr. Padrone was granted authority to determine claimant's training schedule. The record contains no evidence that Mr. Padrone ever revoked claimant's leave or expressed a view that claimant had exceeded the scope of the leave he had been granted. Whether Mr. Padrone considered claimant's full time away from training to be within the original leave granted or Mr. Padrone implicitly modified the leave to take into account claimant's need to resolve his legal issues, the person responsible for setting claimant's schedule granted claimant a leave from training and never revoked that grant or stated that it had been exceeded. Claimant was therefore authorized to be absent from training.

Employer also asserts claimant exceeded the leave granted because he allegedly told the arresting officer he was going to the store and did not mention his mother or the hospital. There is conflicting evidence in the record on this point. The arresting officer's report does state claimant said he was going to the store. However there is substantial evidence in the record supporting EST's factual findings. EST spoke directly with Mr. Padrone who said he had received the telephone call from claimant's sister informing him of the mother's illness, that he had told claimant this news, and had given claimant time off from training to visit his mother. At the telephone conference in this case and in several letters, claimant's attorney stated on claimant's behalf that claimant was driving to the hospital when he was detained. There is no evidence in the record to support the conclusion that claimant was going only to the store and not to the hospital afterwards. The weight of the evidence supports the conclusion that claimant's mother was hospitalized and that claimant was attempting to visit her when he was detained.

That the evidence is conflicting does not demonstrate that the orders at issue violate a statute, exceed the agency's authority or manifest an abuse of discretion. There is substantial evidence in the record supporting the orders' factual findings. Employer has not met its burden or proving error in the orders. Both orders will therefore be affirmed.

#### **ATTORNEY'S FEES**

Claimant's attorney requests a fee for his participation in this review. ORS 656.385(3). The factors to be considered in determining the fee are:

- the time devoted to the case;
- the complexity of the issues involved;
- the value of the interest involved;
- the skill of the attorney and the quality of the representation;
- the nature of the proceedings;
- the benefit secured to the worker;
- the risk in a particular case that an attorney's efforts may go uncompensated.

OAR 436-001-0400.

---

ALJ Rissberger previously awarded a fee of \$4,000.00 for counsel's services through the conclusion of the hearing. As of that time claimant's attorney stated he had spent 17.75 hours on the matter. In his statement to this division counsel represents that he has now spent a total of 32.8 hours on this case, or 15.05 hours since the hearing. The work product submitted to the division for this review consists of claimant's response to employer's exceptions and counsel's statement of services. Counsel submitted an estimate that the value to claimant of the services at issue here is approximately \$15,800. The legal issues were not unusually complex, and those issues were previously thoroughly explored in the initial review and in briefing for the hearing. Counsel has represented claimant skillfully and diligently. The benefit to claimant is substantial. Under these circumstances I deem a fee of \$1000.00 appropriate.

**IT IS HEREBY ORDERED** EST's October 8, 2008 Director's Review and Order and ALJ Rissberger's November 30, 2009 Proposed and Final Order are affirmed. Claimant's eligibility for vocational services is reinstated. Claimant's attorney is awarded a fee of \$1000.00 in addition to the fee awarded at hearing.