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In the ORS 656.340 Vocational Assistance Dispute of

**Christian R. Lundblad, Claimant**

Contested Case No: 11-123H

**PROPOSED & FINAL ORDER**

December 28, 2011

CHRISTIAN R. LUNDBLAD, Petitioner

SAIF CORPORATION, Respondent

Before Nicholas M. Sencer, Administrative Law Judge

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Pursuant to notice, the hearing convened on November 28, 2011, in Portland, Oregon before Administrative Law Judge Nicholas M. Sencer. Claimant was present and represented by his attorney, Donald M. Hooton. Jeff Gemer represented the employer, Walker Garbage Service, Inc., and its insurer, SAIF Corporation. Exhibits 1 through 31, together with interlineated exhibits 21A and 22A were admitted into the record. The record closed on November 28, 2011, following recorded closing arguments.

**ISSUE**

Claimant challenges the Director's Review and Order, VO 11-129, dated August 24, 2011. The issue concerns whether the insurer correctly ended claimant's eligibility for vocational assistance.

**FINDINGS OF FACT**

Claimant is 49 years of age. He began working for the employer in May of 1996. (Ex 1). Claimant sustained a compensable injury on February 2, 2009 when he stepped off of a garbage truck and slipped on gravel. On March 27, 2009, the insurer issued an Initial Notice of Acceptance of a disabling injury described as "focal left paracentral disc herniation at L5-S1." (Ex 3).

On June 11, 2010, the insurer issued a Notice of Eligibility for Vocational Assistance. (Ex 7). Claimant's vocational counselor was Kathy Wallace. Ms. Wallace prepared a comprehensive Authorized Training Plan Support Report dated September 15, 2010, that claimant signed on September 16, 2010. (Ex 8). The report set forth a training plan for the position of Waste Water System Operator and Drinking Water Operator. (Ex 8, p 14). The plan provided for training at Clackamas Community College. The plan also provided for an occupational skills training ("OST") site to be developed once the training site was identified. (Ex 8, p 12).

On March 28, 2011, claimant signed a revised return to work plan that identified his OST site as the City of Wilsonville Waste Water Treatment Plant. (Ex 10). As a condition of claimant's occupational skills training, claimant was required to comply with the City of Wilsonville's Anti-Drug and Anti-Alcohol Policy and Procedures. (Ex 9). In a monitoring report dated March 31, 2011, Ms. Wallace explained that prior to beginning his OST, claimant was to submit a urine sample for drug testing. (Ex 11, p 3). Initially, claimant was to provide the urine

sample on March 30, 2011. However, because claimant was at a hospital with his wife who was receiving cancer treatment, it was agreed that claimant would provide the urine sample on March 31, 2011. (Ex 11, p 3).

In an e-mail dated April 1, 2011, Andrea Villagrana, the human resources manager for the City of Wilsonville, explained to claimant's vocational counselor that there had been a problem when claimant went to the clinic to provide a urine sample. (Ex 12). Ms. Villagrana wrote,

"Christian went in for his pre-employment screening yesterday. The lab called me because they had some issues with his first specimen. They asked him for a second specimen, which was to be observed, and Christian refused. The lab technician did explain to him a refusal would be considered a positive result, and Christian acknowledged the fact, yet still refused. Needless to say, this causes reason for concern on our part." (Ex 12).

On April 5, 2011, the insurer issued a Notice of Training End, Effective 4/5/2011. (Ex 13). The notice advised claimant that he had failed to cooperate in meeting the requirements of his training plan and that under OAR 436-120-0447(1 )(b), his training had ended. The notice also advised claimant that pursuant to OAR 436-120-0165, his eligibility for further vocational assistance was also ending. (Ex 13).

Also on April 5, 2011, the insurer issued claimant a Notice of End of Eligibility for Vocational Assistance. (Ex 14). The notice asserted that claimant had declined and become unavailable for vocational assistance, and that pursuant to OAR 436-120-0165(7) he was no longer eligible for vocational assistance. The notice also asserted that claimant had refused a suitable training site after mutually agreeing with his vocational counselor in writing on a return to work goal. On that basis, the insurer asserted that pursuant to OAR 436-120-0165(8), claimant was no longer eligible for vocational assistance. (Ex 14).

Ms. Wallace prepared a report, dated April 19, 2011 and signed on April 20, 2011, in which she asserted that on April 2 and April 3, 2011, a Saturday and Sunday, respectively, she attempted to contact claimant for an explanation concerning the incident at the urine collection clinic. (Ex 16, p 2). Ms. Wallace noted that claimant had left a voice mail message and e-mail that she received on the morning of Monday, April 4, 2011. In the e-mail claimant wrote, "I'm sorry I went to the coast to get my head around my stupidity, and I forgot my phone. Are we still meeting?" (Ex 16, p 2). Ms. Wallace noted that she telephoned claimant who explained that his wife had ovarian cancer in 2007 and that they had learned on March 30, 2011 that the cancer had recurred and was widespread. Ms. Wallace then wrote, "The worker indicated that in his distress he partook of something he shouldn't have. Christian stated he got really drunk in sorrow, and 'the whole world fell down on me.'" (Ex 16, p 2).

On June 6, 2011, claimant's attorney wrote to the Workers' Compensation Division requesting an appeal of the insurer's Notice of Training End and Notice of End of Eligibility for Vocational Assistance. (Ex 18).

On June 8, 2011, the insurer issued an Amended Notice of End of Eligibility for Vocational Assistance. (Ex 19).

On June 29, 2011, Andre Allen, a vocational reviewer with the Workers' Compensation Division, prepared a memorandum of a telephone conference concerning claimant's appeal of the vocational notices. (Ex 20). Mr. Allen wrote,

"Mr. Lundblad admitted to having smoked marijuana two days before the drug screen, but he stated that it was a one time thing related to the stress of the moment. Mr. Lundblad told Mr. Runner [an attorney with SAIF] that he had tried marijuana years before but he was not a regular user, and he had maintained a commercial drivers license, regularly passing drug screens, for more than 20 years. Mr. Lundblad denied having attempted to falsify his drug screen by substituting a fraudulent urine sample." (Ex 20).

In a memorandum dated July 14, 2011, Mr. Runner asserted that the lab technician who collected claimant's urine "concluded, based on his direct observation of the sample provided by the worker, that the sample was not genuine, but a false substitute known as 'synthetic urine.'" (Ex 21, p 1).

On July 15, 2011, the insurer issued a second Amended Notice of End of Eligibility for Vocational Assistance that asserted, among other allegations, that claimant misrepresented a matter material to the provision of vocational assistance and was no longer eligible for assistance pursuant to OAR 436-120-0165(11) (Ex 21 A).

In an e-mail to Mr. Allen dated July 17, 2011, Mr. Runner asserted that the initial, allegedly synthetic, urine was submitted for testing and came back "clean." (Ex 22). Mr. Runner asserted that the technician explained that the clean report was not a surprise because "it confirmed that the sample was false, because if it had been genuine, the test would have been positive."

On July 20, 2011, the insurer issued a third Amended Notice of End of Eligibility for Vocational Assistance. (Ex 22A).

By letter dated August 8, 2011, claimant's attorney advised the Workers' Compensation Division that all of the notices of end of eligibility for vocational assistance and/or notices of training end, including any amended notices, had been consolidated in the case and considered appealed. (Ex 25).

On August 24, 2011, Mr. Allen issued a Directors Review and Order which asserts, "The director affirms SAIF's end of eligibility determination." (Ex 28, p 6). Mr. Allen concluded, "when he gave the lab technician a false urine sample, he misrepresented information relevant to providing vocational assistance; therefore, I conclude that Mr. Lundblad is no longer eligible for vocational assistance under [OAR 436-120-0165(11)]." (Ex 28, p 6).

On November 23, 2011, David K. Roberts, Ph.D. signed a concurrence report prepared by claimant's attorney. (Ex 30). Dr. Roberts agreed that a "naive" user of marijuana could

produce a negative urine test within two days of his consumption depending on a number of variables. (Ex 30, p 1). On that basis, depending on the facts, Dr. Roberts agreed that the negative result from claimant's allegedly synthetic urine sample did not necessarily demonstrate that the sample was not genuine. (Ex 30, p 2).

On November 25, 2011, Brent T. Burton, M.D. prepared a report for the insurer after reviewing various documents. (Ex 31). Dr. Burton asserted that a "naive" marijuana user can expect to have a positive urine test for 3-5 days and that a chronic marijuana user may have a positive urine result for as long as two months following their last use of marijuana. (Ex 31, p 2). Dr. Burton asserted, "Unless unrealistic assumptions about smoking behavior are invoked, it is highly unlikely that a valid urine sample obtained two days after smoking a marijuana cigarette will test negative." (Ex 31, p 2). Dr. Burton then wrote,

"It is also noted in the medical records that Mr. Lundblad was well aware of drug testing procedures when he commented to Dr. Harburg on 5 January 2010 that 'he knows he would have a positive drug screen at work.'" (Ex 31, p 3).

Several witnesses testified at the hearing. Based on my consideration of the testimony and review of the exhibits, I find that the preponderance of the evidence is consistent with the director's conclusion that claimant provided a synthetic urine sample for drug testing on March 31, 2011.

### **CONCLUSIONS OF LAW AND OPINION**

Claimant has appealed a director's order concerning his eligibility for vocational assistance. ORS 656.340(16)(d) governs such proceedings and provides in relevant part:

"At the hearing, the order of the director shall be modified only if it:

- (A) Violates a statute or rule;
- (B) Exceeds the statutory authority of the agency;
- (C) Was made upon unlawful procedure; or
- (D) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The director's order at issue concludes that the insurer properly ended claimant's vocational eligibility pursuant to OAR 436-120-0165(11). At hearing, the insurer argued that its action was appropriate under subparagraphs (7) and (8), as well as under OAR 436-120-0165(11). Claimant made several arguments at hearing. He asserts that he did not submit synthetic urine to the clinic, that the City of Wilsonville did not follow its own drug testing procedures; and that he neither failed to cooperate nor refused to participate in the OST.

As set forth in my findings of fact, I conclude that the preponderance of the evidence is consistent with the director's findings that claimant smoked marijuana and submitted a synthetic urine sample for testing. I also conclude that claimant was advised that his refusal to submit a second, observed urine sample would be construed as a positive test under the City of

Wilsonville's policies. Accordingly, I will only address the issue of whether, based on those facts, the director's order should be modified pursuant to the terms of ORS 656.340(16)(d).

The subparagraphs of OAR 436-120-0165 on which the insurer relies provide that a worker's eligibility for vocational services ends when any of the following conditions apply:

"(7) The worker declined or became unavailable for vocational assistance. The insurer must determine if the reasons are for reasonable or unreasonable cause prior to ending the worker's eligibility. If the reason was for incarceration, this reason must be cited in the notice to the worker. Declining vocational assistance to accept modified or new employment that results from an employer-at-injury activated use of the Preferred Worker Program, under OAR 436-110, is reasonable cause.

(8) The worker refused a suitable training site after the vocational counselor and worker have agreed in writing upon a return-to-work goal.

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(11) The worker misrepresented information relevant to providing vocational assistance."

I conclude that claimant neither declined nor made himself unavailable for vocational assistance. Accordingly, OAR 436-120-0165(7) is inapplicable. I also conclude that claimant did not refuse a suitable training site. In fact, the record is clear that claimant was enthusiastic about the OST and had performed well in the academic portion of his program. Accordingly, OAR 436-120-0165(8) is inapplicable.

The last basis for ending claimant's vocational services, and the only basis set forth in the director's order, is subparagraph (11), which requires that claimant be found to have misrepresented information relevant to providing vocational assistance.

Claimant knew that he would have to pass a urine drug test in order to begin his OST. His actions of submitting a questionable urine sample and then refusing to provide an observed urine sample strongly suggest that claimant was concerned that the test would detect his recent marijuana use. Under these facts, it is reasonable to conclude that claimant's actions were intended to hide his marijuana use from the City of Wilsonville.

To "misrepresent" is "to give false or misleading representation . . . with an intent to deceive or be unfair." *Webster's Ninth New Collegiate Dictionary*. Based on this common definition, as applied to claimant's actions, I conclude that the director's finding that

"when [claimant] gave the lab technician a false urine sample, he misrepresented information relevant to providing vocational assistance; therefore, I conclude that Mr. Lundblad is no longer eligible for vocational assistance"

does not violate a statute or rule and is not characterized by an abuse of discretion.

While I am truly sympathetic to claimant's circumstances concerning his wife's illness and his efforts to successfully complete his vocational training program, pursuant to ORS 656.340(16)(d), as set forth above, the scope of my review is limited. Based on the record before me, I conclude that there is no basis to modify the Director's Review and Order. Accordingly, it will be affirmed.

### **ORDER**

IT IS HEREBY ORDERED that the August 24, 2011 Director's Review and Order is affirmed.