

In the Matter of the Vocational Assistance of

**Jose L. Olvera-Chavez, Claimant**

Contested Case No: 11-003H

**PROPOSED & FINAL ORDER**

June 7, 2011

JOSE L. OLVERA-CHAVEZ, Petitioner  
LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent  
Before Keith Kekauoha, Administrative Law Judge

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Hearing was scheduled for April 20, 2011 before the undersigned Administrative Law Judge. However, the parties agreed to submit this matter on the documentary record with written closing arguments, in lieu of personally appearing at hearing. Claimant is represented by his attorney, Ronald Fontana. The employer, Hallmark Inns & Resorts, and the insurer, Liberty Northwest Insurance Corporation, are represented by their attorney, Sally Curey. Exhibits 1-15 were admitted into evidence. After receipt of written closing arguments, the record closed on May 17, 2011.

**ISSUE**

Attorney Fees. Claimant requested a hearing on the Director's January 10, 2011 Review and Order which declined to award his attorney an assessed attorney fee for services rendered in this vocational assistance case.

**FINDINGS OF FACT**

Claimant has an accepted claim for a low back injury occurring on June 28, 2007. The accepted conditions are lumbar strain and L5-S1 disc protrusion, and he has been awarded 18 percent loss of the whole person for impairment to his low back. (Exs. 1, 2, 6).

In November 2009, the insurer determined that claimant was eligible for vocational assistance and entitled to training. The parties agreed that vocational rehabilitation services would be provided by Bostwick, Carter & Krier. (Ex. 5).

On February 3, 2010, claimant signed a return-to-work plan with the vocational goals of Office Clerk, Customer Service Representative and Medical Receptionist. The plan provided for 12 months of formal ("academic") training at Clatsop Community College and then three months of Occupational Skills Training (OST) through Chemeketa Community College. (Ex. 7).

On October 1, 2010, claimant's attorney, Ronald Fontana, sent a letter to the Workers' Compensation Division requesting help to "resolve a conflict" which had arisen in claimant's authorized training plan. Fontana stated that claimant had reported an error in communication between his vocational counselor, Betsy Carillo, and Clatsop Community College regarding whether claimant was registered for classes. He explained that Carillo had apparently attempted to register claimant for the Fall term under a different name ("Jose Luis Olvera-Chavez") than the name ("Jose Chavez") under which she had previously registered him. He stated that the college did not consider claimant to be registered and was not allowing him to attend classes, but

that Carillo was insisting he had been registered and was upset with him for not attending classes. Fontana also raised a further conflict regarding Carillo's requirement that claimant work on a Spanish book for several hours a day, in addition to his class work. He requested "a review of this matter so that we might reach an early resolution of the problem." (Ex. 8).

On October 8, 2010, in response to Fontana's letter, Carillo and Ann Krier, a rehabilitation consultant, performed a review of claimant's authorized training program. They confirmed that claimant reported being told by college instructors that he was not registered for classes, but stated that, when they contacted college administrative staff on multiple occasions, they were told that claimant was registered. They reported contacting the college instructors and discussing claimant's prospects for catching up on the material he had missed and passing the classes. They discussed arrangements for assigning a tutor to claimant. They also explained that the requirement for claimant to work on a Spanish book concurrently with his class work was consistent with claimant's agreement under the return-to-work plan to prepare for his GED test concurrently with his academic classes. There is no mention in Carillo and Krier's report of terminating claimant's training program. (Ex. 9).

On October 20, 2010, the Workers' Compensation Division's Employment Services Team (EST), on behalf of the Director, held a telephonic conference with claimant; Fontana; the insurer's senior rehabilitation consultant, Bob Black; and claimant's new vocational counselor, Lisa Broten. Broten and claimant reported that, due to the confusion about his registration for the Fall term, he would be unable to complete those classes (Keyboarding, 10-Key, and Office Skills in a Medical Setting). Claimant reported that he had contacted the college earlier that day and that they had acknowledged he was registered and, due to the mix-up, would allow him to drop those classes. Broten made several recommendations for amending claimant's training plan, and all parties agreed with her recommendations. (Ex. 10).

On November 9, 2010, Fontana sent an email to EST, indicating that he was entitled to an assessed attorney fee payable by the insurer for his services in this matter. He stated that, when he had contacted the Department, Carillo was threatening claimant with ending his vocational training and accusing him of not attending classes she had registered him for. He stated that claimant finally got registered only after Fontana had sought the Department's assistance, that claimant subsequently got a new vocational counselor and was able to withdraw from the classes he had started late due to the registration problem, and that the college refunded the tuition to the insurer. Fontana asserted that his services had benefited claimant in that claimant was now going to benefit more from training, whereas he was previously at risk of losing vocational services. Fontana argued that the value he had obtained for claimant was the value of the training program. (Ex. 11).

On November 24, 2010, EST held a follow-up telephonic conference with claimant, Fontana, Black and Broten. Broten confirmed that claimant was able to drop the classes he had not been able to attend due to the registration problem and that the insurer got its tuition money back. She made several recommendations for amending claimant's training plan, including revising the vocational goal of "Medical Receptionist" to "Receptionist" and extending his training by another term due to the registration problem. Her recommendations were apparently approved without objection. (Ex. 12).

On January 3, 2011, Fontana provided his retainer agreement to EST and reported devoting 4.3 hours in attorney time to this vocational matter. (Ex. 13).

On January 10, 2011, EST issued a Director's Review and Order which declined to award Fontana an assessed attorney fee for his services in this matter. EST acknowledged that Fontana was instrumental in resolving the problems that arose in claimant's training program, but concluded that, because no dollar value could be placed on the benefit claimant received due to Fontana's involvement, no assessed attorney fee could be awarded under ORS 656.385(1). (Ex. 14).

### CONCLUSIONS OF LAW AND OPINION

Claimant's attorney seeks modification of the Director's order, contending that he is entitled to an assessed attorney fee payable by the insurer for his services in this vocational assistance case. The insurer responds that the Director's order is correct because claimant's attorney's services did not result in any direct benefit to claimant. Based on the following opinion, I affirm the Director's order.

Under ORS 656.340(16), the Director's order may be modified only if it: (1) violates a statute or rule; (2) exceeds the Director's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(3) (WCD Admin. Order 09-053).

In declining to award an assessed attorney fee, the Director's order reasoned that, although claimant's attorney had been instrumental in resolving the problems that arose during claimant's training program, no dollar value could be placed on the benefit claimant received due his attorney's involvement. (Ex. 14-3). Claimant's attorney argues, however, that as a result of his request for review claimant was able to change vocational counselors, to change the primary vocational goal, to add a term of community college training, to purchase a new laptop, to change the college which would administer the occupational skills training, and avoid having his vocational services ended by the vocational counselor who had caused the problem that prevented him from attending the classes. Citing the Director's own finding that he was instrumental in resolving the training problems, he contends that he is entitled to an assessed attorney fee under ORS 656.385(1) and that the fee should be set at the highest range of the Director's attorney fee matrix for "benefit achieved" because his services resulted in significant improvement and extension of claimant's training plan. *See* OAR 436-001-0410(3) ("For purposes of applying the matrix in vocational disputes under ORS 656.340, the value of vocational assistance or a training plan, unless determined to be otherwise, falls within the highest range of the matrix for 'benefit achieved.'").

Based on my review of the statutes and this record, I agree that claimant's attorney is not entitled to an assessed attorney fee. However, in lieu of the reasoning in the Director's order, I reason that ORS 656.385(1) does not authorize an assessed attorney fee in these circumstances.

ORS 656.385(1) provides:

*“In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services or the Administrative Law Judge shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant’s attorney. In such cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director or an Administrative Law Judge, the director or Administrative Law Judge shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant’s attorney. The attorney fee must be based on all work the claimant’s attorney has done relative to the proceeding at all levels before the department. The attorney fee assessed under this section must be proportionate to the benefit to the injured worker. The director shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$3,000 absent a showing of extraordinary circumstances. The maximum attorney fee awarded under this subsection shall be adjusted annually on July 1 by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any.”* (Italics supplied.)

Citing the italicized portion of the statute, claimant’s attorney argues that the Director is *required* to award an assessed attorney fee either where a claimant finally prevails after a proceeding has commenced before the Director or where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the Director.

However, the italicized language also indicates that an additional prerequisite for an assessed attorney fee award is that the case involves a “dispute over compensation benefits pursuant to” one of several listed statutes. The listed statute applicable to this case, ORS 656.340, prescribes the eligibility criteria for vocational assistance and the procedure for resolving vocational assistance disputes. Subsection (16)(b) provides that the worker must apply to the Director for administrative review if “the worker is dissatisfied with an action of the insurer or self-insured employer regarding vocational assistance.” Based on my reading of those statutes, I conclude that ORS 656.385(1) authorizes an assessed attorney fee in only those cases that involve a dispute arising from an “action” of the insurer regarding vocational assistance.

In this case, I do not find a dispute arising from an action of the insurer, or the vocational services provider, regarding vocational assistance. As claimant’s attorney explained in his October 1, 2010 letter requesting the Director’s review, the interruption in claimant’s training program stemmed from an apparent miscommunication between the vocational counselor and the training college over whether he was registered for classes. (Ex. 8). However, the evidence

in this record does not persuasively establish that either the insurer or the vocational counselor took any action to terminate or otherwise restrict claimant's vocational training. In response to claimant's attorney's request for review, the vocational counselor, Carillo, reported the efforts she made to confirm that claimant was registered for classes and to explore his options for catching up in those classes and completing his training program. (Ex. 9). There is no suggestion in Carillo's report that she wished to terminate the training program. On the contrary, her report indicates that she wanted claimant to continue his training and complete the program prescribed in his return-to-work plan.

The only mention in this record of terminating claimant's training was made by *claimant's attorney* in his November 9, 2010 email to EST. In that email, he alleged that, when he had contacted the Department, Carillo was orally threatening claimant with ending his training for non-cooperation. (Ex. 11). However, claimant presented no persuasive evidence to establish this allegation. Claimant waived testimony, and his attorney's representation is insufficient to establish that a threat of termination was actually made. Hence, I agree with the insurer that the record does not establish claimant was in danger of having his training terminated.

Claimant's attorney is correct in asserting that his request for review resulted in a change of vocational providers/counselors and then the modification and extension of claimant's training program. However, I find no persuasive evidence to establish that the insurer or the vocational services provider opposed any of those changes. On the contrary, according to the Director's order, all parties agreed to the change of vocational providers/counselors and then, after the new vocational counselor recommended modification and extension of the training program, all parties agreed with those recommendations. There is simply no persuasive evidence of any dispute over either claimant's continued eligibility for vocational training or the extent of his vocational training.

In summary, based on my review of the record, I do not find that this case involves a dispute arising from an action of the insurer (or vocational services provider) regarding vocational assistance. Accordingly, no assessed attorney fee is authorized under ORS 656.385(1), and claimant's request for modification of the Director's order will be denied.

### **ORDER**

Claimant's request for relief is denied, and the Director's Review and Order dated January 10, 2011 is affirmed.