

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

**Tran, Tin T., Claimant**

Contested Case No: H02-119

**FINAL ORDER**

August 27, 2003

TIN T. TRAN, Petitioner

SAFECO INSURANCE CORP., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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Claimant, Mr. Tran, timely filed exceptions to Administrative Law Judge Paul Vincent's April 10, 2003 Proposed and Final Contested Case Hearing Order. Mr. Tran's exceptions were translated from Vietnamese into English. Insurer timely responded, and Mr. Tran timely submitted a reply, which was also translated from Vietnamese into English.

The hearing record has been reviewed, including the exhibits admitted into evidence, the underlying orders, the audio tapes of the hearing, and the parties' written submissions. The April 10, 2003 proposed order is adopted and affirmed with the following supplementation.

One correction is made to the proposed order in that, in addition to the other witnesses listed by Judge Vincent, Mr. Tran testified at hearing on his own behalf, and Larry Malmgren testified at hearing on insurer's behalf.

Mr. Tran, who is no longer represented by an attorney, has many questions regarding his workers' compensation claim and the applicable law.<sup>1</sup> The following is offered to clarify the status of this matter.

The law that applies to on-the-job injuries in Oregon is the workers' compensation law. Under the workers' compensation law, an injured worker qualifies to receive certain benefits if the worker's circumstances meet the statutory and rule requirements.<sup>2</sup> In cases regarding vocational assistance benefits the insurer, in this case Safeco, makes the initial eligibility determination. The insurer's determination can be appealed, first to the Rehabilitation Review Unit of the division, then to a contested case hearing. At hearing, the judge is limited by law, ORS 656.283, in what he can do. The judge also has to weigh all the evidence in the record to determine what facts he finds to be true. Here, while Mr. Tran and the other witnesses may have different understandings of what is and what is not true, the overwhelming weight of the evidence in the record stacks against Mr. Tran's eligibility for vocational assistance under the statute and rules.

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<sup>1</sup> Mr. Tran may want to contact the Ombudsman for Injured Workers, who helps injured workers dealing with the workers' compensation system. The phone number is (503) 378-3351 or toll-free (800) 927-1271.

<sup>2</sup> The statute and the rules containing the requirements for vocational assistance benefits are Oregon Revised Statutes (ORS) 656.340 and Oregon Administrative Rules (OAR) 436-120.

Mr. Tran may very well continue to experience pain as a result of the injury to his right finger.<sup>3</sup> However, pain alone is not a basis for awarding vocational assistance benefits. On the other hand, as Judge Vincent found, the fact that Mr. Tran returned to his job after the injury for as long as he did disqualifies him for vocational assistance benefits. The law provides that a worker is eligible for vocational assistance if the worker will not be able to return to his previous employment. ORS 656.340(6)(a); OAR 436-120-0320(2)(b), 436-120-0320(9)(c)(A). Mr. Tran did return to his previous employment for several months.

Moreover, as determined by the Rehabilitation Review Unit and affirmed by Judge Vincent, Mr. Tran's lack of suitable employment is not due to the work injury, and he is also ineligible under OAR 436-120-0350(3). While Mr. Tran argues that he left his employment with Dieter Franck because of his hand, Judge Vincent found this argument unpersuasive after weighing all the evidence in the record.

In his exceptions and reply, Mr. Tran argues that the following facts are true: Mr. Malmgren erred in not using an interpreter; the job analysis is inaccurate; Mr. Tran supervised 10% of the time and did production work the other 90% of the time; he did not work in his wife's deli; he did not ask to return to work in October 2002. However, even if these facts were true, they do not change the conclusion that Mr. Tran is ineligible for vocational assistance. Therefore, Judge Vincent's findings of fact and conclusions of law are adopted in their entirety.

Mr. Tran also raises many other issues and questions that do not change the outcome of this matter. Specific to Judge Vincent's order, Mr. Tran argues that he left work in June 2001 rather than June 2000. The finding is supported by a preponderance of the evidence in the record, and the director declines to change it.<sup>4</sup> Mr. Tran also argues that his doctor allowed him to be off work from September 29, 1999 until November 25, 1999, and submits copies of pages from Exhibit 19 in support of his argument. However, Exhibit 19 shows that Mr. Tran was released to modified work during that time, not that he was restricted from working at all.

Mr. Tran also raises issues regarding his left thumb. However, this dispute over vocational assistance is limited to his right finger injury. Mr. Tran also submits copies of additional documents not included in the record, including check stubs from Safeco issued November 4, 1999 and December 3, 1999; tax papers for 1999, 2000, and 2001; and a wage statement on a Safeco form. However, under the circumstance the director declines to consider these documents.<sup>5</sup>

Finally, Mr. Tran raises questions about the safety of the other workers at Dieter Franck, particularly as to the Formica glue. However, this issue is not within the director's jurisdiction

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<sup>3</sup> Mr. Tran states that he would like to have his finger amputated so he can go back to work. Mr. Tran can always submit a request to Safeco for additional medical services under ORS 656.245.

<sup>4</sup> See OAR 137-003-0665(4) limiting the director's authority to change the ALJ's findings of fact. The record contains references to June 2000 throughout, including the eligibility evaluation (Ex. 12-6), the unit's memo to claim file (Ex. 18-1, 18-2), Mr. Tran's own affidavit (Ex. 19-1), the Director's Review and Order (Ex. 22-1, 22-4, 22-5, 22-6), and insurer's opening statement. Two other affidavits signed by Mr. Tran do refer to June 2001 (Ex. 8B-1, 16-2). The discrepancy in dates may simply be due to a clerical error that has been carried throughout.

<sup>5</sup> See OAR 137-003-0655(5).

over vocational assistance disputes under the workers' compensation statutes, and is not appropriately addressed in this forum.<sup>6</sup>

**IT IS HEREBY ORDERED** that the April 10, 2003 Proposed and Final Contested Case Hearing Order is adopted and affirmed in its entirety. Mr. Tran is not eligible for vocational assistance.

DATED this 27<sup>th</sup> day of August, 2003.

**CORY STREISINGER, DIRECTOR**  
**DEPT. OF CONSUMER AND BUSINESS SERVICES**

By: \_\_\_\_\_  
John Shilts, Administrator  
Workers' Compensation Division

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<sup>6</sup> However, it may be within the director's jurisdiction under ORS chapter 654, the Oregon Safe Employment Act, administered by the Oregon Occupational Safety and Health Division (OR-OSHA) of the Department of Consumer and Business Services.