
In the ORS 656.340 Vocational Services Dispute of
ANGELA C. CHANCE, Claimant

Contested Case No: H04-112

INTERIM ORDER

November 03, 2004

LIBERTY NORTHWEST INSURANCE CORP., Petitioner

ANGELA C. CHANCE, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Insurer appeals the Director's Review and Order issued on June 11, 2004 by the Rehabilitation Review Unit (RRU), Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On August 30, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 13, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioner Liberty Northwest Insurance Corporation (insurer) was represented by attorney Meg Carman. Respondent Angela C. Chance failed to appear. Senior Rehabilitation Consultant Jan Plummer testified on insurer's behalf. The record closed on the date of hearing.

ISSUE

Whether a default order is warranted pursuant to OAR 137-003-0670(1)(c).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 13, as well as insurer's Supplementary Exhibits 1a through 14 were received into the record without objection.

FINDINGS OF FACT

On September 3, 2004, OAH issued a Notice of Hearing listing the hearing date October 13, 2004. After the hearing, it came to light that claimant's hearing notice was sent by certified mail only and was returned unclaimed.

CONCLUSION OF LAW

A default order is not warranted pursuant to OAR 137-003-0670(1)(c).

OPINION

Jurisdiction lies with the director. ORS 656.340(4). Pursuant to ORS 656.283(2)(c), I may modify the administrative order 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. OAR 436-001-0225(5). The burden of proof falls upon the proponent of a fact or position. ORS 183.450(2). In that regard, insurer bears the burden of proving by a preponderance of the evidence that RRU abused its discretion or exercised clearly unwarranted discretion in determining that claimant is eligible for vocational services. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is by a preponderance of the evidence).

ORS 183.415 provides:

- (1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice, served personally or by registered certified mail.
- (2) The notice shall include:
 - (a) A statement of the party's right to hearing, or a statement of the time and place of the hearing;

Additionally, OAR 137-003-0670 provides:

- (1) The agency or, if authorized, the administrative law judge may issue a final order by default:

- (c) Except as provided in section (2)¹ of this rule, when the agency or administrative law judge notified the party of the time and place of the hearing and the party fails to appear at the hearing;

Claimant was not duly notified of the time and place of the hearing. Therefore, I conclude that a default order is not appropriate. Accordingly, OAH shall retain jurisdiction and set a new hearing date.

ORDER

IT IS HEREBY ORDERED that:

The Office of Administrative Hearings shall set a new hearing date.

¹ OAR 137-003-0670(2) provides: If the party failed to appear at the hearing after being notified of the time and place of the hearing and, before issuing a final order by default, the agency or administrative law judge finds that the failure of the party to appear was caused by circumstances beyond the party's reasonable control, the agency or administrative law judge may not issue a final order by default under section (1)(c) of this rule. In this case, the administrative law judge shall schedule a new hearing.