
In the ORS 656.340 Vocational Assistance Dispute of

ROSA RAMIREZ, Claimant

Contested Case No: H04-095

PROPOSED AND FINAL ORDER

December 2, 2004

ROSA RAMIREZ, Petitioner

SAIF CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Order of Dismissal issued on April 6, 2004 by the Rehabilitation Review Unit (RRU), Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On August 6, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On November 16, 2004, Administrative Law Judge Catherine P. Coburn convened and continued a contested case hearing. Petitioner Rosa Ramirez (claimant) was represented by attorney Gail M. Gage. Respondent SAIF Corporation was represented by attorney David L. Runner. Leticia Blackburn served as certified interpreter and claimant testified on her own behalf. The record closed on November 17, 2004 following receipt of supplementary exhibits.

ISSUE

Whether RRU incorrectly dismissed claimant's request for administrative review pursuant to OAR 4360120-0008(1)(b)(A).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 5 as well as insurer's Supplementary Exhibits 2A through 6, 3A and 1A through 8 were admitted into the record without objection.

FINDINGS OF FACT

(1) On May 31, 2002, claimant fell down a stairway while working as a hotel housekeeper. (Ex. 1.) On July 31, 2002, insurer accepted a right shoulder strain. (Ex. 1A.) On June 6, 2003, insurer issued a modified notice of acceptance adding a partial tear, teres minor muscle, right shoulder. (Ex. 1B.)

(2) On September 12, 2003, insurer closed the claim with a 4 percent permanent partial disability (PPD) award. (Ex. 1C.) Claimant appealed and on January 26, 2004, an Order on Reconsideration increased the PPD award to 33 percent. (Ex. 2B.) Insurer appealed the extent of PPD. (Exs. 3 and 8.)

(3) Claimant has not worked since the date of injury and has received no income since temporary disability benefits terminated. She has lived with extended family members in

Oregon and California. (Testimony of claimant.)

(4) On September 30, 2003, insurer notified claimant that she was ineligible for vocational assistance because the treating physician had released her to return to regular work. (Ex. 2-2.) On October 27, 2003, claimant's attorney requested administrative review. (Ex. 2-1.)

(5) On December 26, 2003, claimant provided the following address to insurer: 326 SE 172nd Ave. #7, Portland, Oregon 97233. (Exs. 2A and 2B.) Claimant lived at this address with her daughter in the winter of 2003. In March 2004, claimant lived with her father in California. (Testimony of claimant.)

(6) In the course of an administrative investigation, RRU attempted unsuccessfully to reach claimant to ascertain information concerning her eligibility. On March 15, 2004, RRU sent a Letter of Warning to claimant asking her to contact the department during the week of March 29. The letter cited OAR 436-120-0008(1) verbatim and was sent to claimant at the last known address by regular and certified mail. (Ex. 3.) On March 17, 2004, claimant's attorney received a copy of the warning letter. (Ex. 3A.) Claimant's daughter received the warning letter, informed claimant by telephone that it had arrived, and forwarded it to claimant in California. Claimant received the warning letter in California and did not respond. (Testimony of claimant.)

(7) RRU received no response to the warning letter and on April 6, 2004, dismissed the request for administrative review. (Ex. 4.)

CONCLUSION OF LAW

RRU correctly dismissed claimant's request for administrative review pursuant to OAR 436-120-0008(1)(b)(A).

OPINION

Vocational assistance disputes arising under ORS 656.340 are reviewed pursuant to the limited scope of review specified by ORS 656.283. I may modify the administrative order 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. OAR 436-001-0225(5). In determining whether one of those criteria exist, I may admit evidence which was not before the RRU and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996). The burden of proof rests upon the proponent of that fact or position. ORS 183.450(2).

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. OAR 436-120-0008(1) provides in pertinent part:

- (1) Administrative review of vocational assistance matters: Under ORS 656.283(2) and 656.340(4), a worker wanting review of any vocational assistance matter must apply to the director for administrative review.

(b) The worker, insurer, employer at injury, and vocational assistance provider shall supply needed information, attend conferences and meetings, and participate in the administrative review process as required by the director. Upon the director's request, any party to the dispute shall provide available information within 14 days of the request. The insurer shall promptly schedule, pay for, and submit to the director any medical or vocational tests, consultations, or reports required by the director. The worker, insurer, employer at injury, or vocational assistance provider shall simultaneously send copies to the other parties to the dispute when sending material to the director. If necessary, the director will assist an unrepresented worker in sending copies to the appropriate parties. Failure to comply with this subsection may result in the following:

(A) If the worker fails to comply without reasonable cause, the director may dismiss the administrative review as described in subsection (d); or, the director may decide the issue on the basis of available information.

(d) The director may issue an order of dismissal under appropriate conditions.

In construing the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480 (1997); *Larry Hemenway*, 5 WCSR 33 (2000). See also *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) (court's task in determining the legislative intent is to first examine the statute, including text and context, and if the intent is clear, to proceed no further with its analysis.) Where an agency's interpretation of its own rule is plausible and not inconsistent with the wording of the rule itself, the rule's context or with any other source of law, there is no basis for asserting that the rule has been misinterpreted by the agency. *Don't Waste Oregon Com. v. Energy Siting Council*, 320 Or 132 (1994). Here, MRU interpreted OAR 436-120-0008(1)(b)(A) to mean that dismissal was appropriate. Having received additional evidence at hearing, I agree with RRU's conclusion.

Claimant's attorney timely requested administrative review of insurer's notice of ineligibility. RRU attempted unsuccessfully to reach claimant in the course its investigation. On March 15, 2004, RRU sent a Letter of Warning to claimant requesting her to make contact during the week of March 29. RRU properly sent the warning letter to claimant at the last known address by certified and regular mail and copied claimant's attorney. In the meantime, claimant had relocated from her daughter's house to her father's house, out of state. Claimant's daughter informed claimant by telephone that the warning letter had arrived and forwarded it to claimant. When claimant received the letter at her new residence, she still did not respond. On April 6, 2004, having received no response, RRU dismissed the request for administrative review

pursuant to OAR 436-120-0008(1)(b).

Claimant contends that her circumstances constitute reasonable cause justifying her failure to timely reply to RRU's inquiry. In support of her position, claimant argues that following the work injury, she was disabled, without income and lived with various extended family members, and therefore, she was unable to respond to RRU's request for information concerning her eligibility for vocational assistance. I find claimant's argument unpersuasive. RRU's interpretation of OAR 436-120-0008(1)(b) does not conflict with its plain meaning, context or any other source of law. Consequently, I defer. Moreover, under OAR 436-120-0350(6) and (7),¹ the director has ruled that financial hardship does not constitute good cause for failure to provide relevant information where an injured worker leaves the state without maintaining contact with insurer, her attorney and RRU. *Jeffrey G. Wiseman*, 6 WCSR 260 (2001); *aff'd* 7 WCSR 216 (2001). Similarly, claimant experienced financial need, left the state without maintaining contact, and failed to provide relevant information in a timely manner. Finally, inasmuch as claimant failed to carry the burden of proving that the administrative order is incorrect, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Order of Dismissal dated April 6, 2004 is affirmed.

¹ OAR 436-120-0350(6) and (7) (eff. 6/1/00) provide:

A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

(6) The worker has declined or has become unavailable for vocational assistance. If the insurer does not consider the reason for declining services or unavailability to be for good cause, the insurer shall warn the worker prior to finding the worker ineligible or ending the worker's eligibility under this section. Good cause shall include, but is not limited to, medically documented worker illness, the documented serious illness or death of an immediate family member.

(7) The worker has failed, after written warning, to participate in the vocational assistance process, or to provide relevant information. No written warning is required if the worker refuses a suitable training site after the vocational counselor and worker have agreed in writing upon a return-to-work goal.