
In the ORS 656.340 Vocational Services Dispute of

ARMANDO REYES, Claimant

Contested Case No: H04-142

PROPOSED AND FINAL ORDER

December 15, 2004

J.R. SIMPLOT CO. & PINNACLE RISK MANAGEMENT, Petitioner

ARMANDO REYES, Respondent

Before Ella D. Johnson, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Self-insured employer appeals the Director's Review and Order issued on July 29, 2004 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or the department). On September 15, 2004, the department referred the matter to the Office of Administrative Hearings. On October 24, 2004, Administrative Law Judge Ella D. Johnson conducted a contested case hearing. Attorney Brad Garber represented petitioner self-insured employer J.R. Simplot (Simplot or employer) and its claims processing agent Pinnacle Risk Management (Pinnacle). Attorney R. Adrian Martin represented respondent Armando Reyes (claimant). No witnesses testified and the record was left open until November 15, 2004 to allow the parties to submit briefs concerning the constitutional issue. The record closed on November 15, 2004.

ISSUE

Whether RRU's decision that claimant was entitled to vocational assistance even though he allegedly returned to suitable work for 60 days following his injury exceeds WCD's statutory authority and violates Article 1, section 20 of the Oregon Constitution.

EVIDENTIARY RULING

WCD Exhibits 1 through 17 and claimant's supplemental Exhibits 6A and 18 were admitted into the record without objection.

FINDINGS OF FACT

I adopt the Findings of Fact set forth in RRU's July 29, 2004 Director's Review and Order with the following supplementation:

(1) Claimant was compensably injured on September 13, 2000. (Ex. 1.) Pinnacle accepted a right rotator cuff tear. (Ex. 4.)

(2) The claim was closed on March 4, 2003 with 37 percent permanent partial disability. (Ex. 2.) The award was increased to 49 percent by a July 17, 2003 Order on Reconsideration.

(Ex. 4.)

(3) When he was injured, claimant worked as a fryer operator with an average weekly wage of \$428.25, which was subsequently increased to \$465.38. He returned to work on the trim line, with an average weekly wage of \$356.63. Claimant was found eligible for vocational assistance by a February 12, 2004 Director Review and Order because his new job with employer was not within 80 percent of his adjusted average weekly wage. (Ex. 5.)

(4) Thereafter, claimant was offered a job with employer as lubricator/roof maintenance worker. He started the new job on April 16, 2004. (Exs. 6, 9.)

(5) On June 16, 2004, Pinnacle found that claimant was ineligible for vocational assistance because he had now returned to suitable employment and had performed the job for sixty days. (Ex. 11.)

(6) Claimant requested review by the director of the ineligibility determination. (Ex. 12.)

(7) On March 5, 2004, employer notified the employees of the projected closure of the plant in November 2004. (Ex. 6A.)

(8) On July 29, 2004, RRU issued a Director Review and Order that set aside employer's vocational ineligibility determination, finding that claimant was not offered "suitable employment" because the position offered was not permanent. (Ex. 16.)

CONCLUSION OF LAW

RRU's decision that claimant is entitled to vocational assistance even though he returned to suitable work for 60 days following his injury does not exceed WCD's statutory authority and violate Article 1, section 20 of the Oregon Constitution.

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, employer bears the burden of proving by a preponderance of the evidence that RRU's decision should be modified because it allegedly exceeds WCD's statutory authority and violates the equal protection provision of the Oregon Constitution. *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). Proof by a preponderance of evidence means that the factfinder

is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.* 303 Or 390 (1989). I conclude that employer has failed to meet its burden.

The facts are not in dispute. Employer argues, however, that adding the requirement that the work be “permanent” exceeds the department’s statutory authority and results in a violation of the equal protection clause of the Oregon Constitution. ORS 656.340(6) defines “suitable employment” in relevant part:

(6)(a) A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment or to **any other available and suitable employment** with the employer at the time of injury or aggravation, and the worker has a substantial handicap to employment.

(b) As used in this subsection:

(A) A “substantial handicap to employment” exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

(B) “Suitable employment” means:

(i) Employment of the kind for which the worker has the necessary physical capacity, knowledge, skills and abilities;

(ii) Employment that is located where the worker customarily worked or is within reasonable commuting distance of the worker’s residence; and

(iii) Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment as defined in subsection.

(Emphasis added.)

Additionally, OAR 436-120-005(12) further defines “suitable employment” in material part to be:

(12) "Suitable employment" or "suitable job" means employment or a job:

(a) For which the worker has the necessary physical capacities, knowledge, skills and abilities;

(b) Located where the worker customarily worked, or within reasonable commuting distance of the worker's residence.

* * * * *;

(c) Which pays or would average on a year-round basis a suitable wage as defined in section (13) of this rule; and

(d) Which is permanent. Temporary work is suitable if the worker's job at injury was temporary; and the worker has transferable skills to earn, on a year-round basis, a suitable wage as defined in section (13) of this rule.

(Emphasis added.)

Finally, Article I, section 20 of the Oregon Constitution states:

No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.

Pointing to the Oregon Supreme Court's opinion in *Nutbrown v. Munn*, 311 Or 328 (1991), employer encourages me exercise my authority to declare OAR 436-120-0005(12)(d) unconstitutional. Employer argues that subsection (12)(d) is unconstitutional because it grants claimant and other injured workers similarly situated, privileges which do not equally belong to his co-workers.

In order to prove that OAR 436-120-0005(12)(d) violates the equal protection clause of the Oregon Constitution, employer must establish that: (1) the director exceeded her authority to promulgate the rule; (2) claimant and other injured workers similarly situated as a class received privileges that the other class of workers not injured did not receive; and (3) the disparate treatment has no rational basis. *See Crocker and Crocker*, 332 Or 42 (2001)(setting forth the proper analysis in determining a violation of Article I, section 20 of the Oregon Constitution).

Employer argument that by adding the requirement that the job be permanent, the department has granted privileges to the class of injured workers not available to remaining class of uninjured workers. However, employer's argument fails for three reasons. First, the director has broad statutory authority under ORS 656.726(4) to promulgate rules that implement and enforce the Oregon Workers' Compensation system. I find that the rule at issue is within the director's authority based a the highlighted portion of the statute. As set forth in claimant's brief, the legislative intent as expressed in the inexact word "available." This terms indicates the legislature's policy that this employment be available, not a sham which does not actually exist or end upon the injured worker's completion of 60 days of employment. I find claimant's argument persuasive in this regard and adopt and incorporate the analysis and reasoning as part of this opinion.

Second, the class described by employer is not a valid class. As set forth in claimant's brief, the class of injured workers is not a valid class because it is created by the statute itself. *State v. Clark*, 291 Or 231 (1981). Moreover, it is not a valid class because the characteristics do not exist apart from the challenged law itself. *Id.* at 240. A valid class is one that is defined by immutable characteristics such as sex, ethnic background, race, etc. *Id.* I find claimant's argument in this regard to persuasive and again adopt and incorporate the analysis and reasoning as part of this opinion.

Third, even if injured workers are a valid class, I find that there is no Article I, section 20 violation because the department's reason for adopting the rule to provide for disparate treatment as applied to claimant and his co-workers is rational. The legislative policy as expressed in ORS 656.012 concerning the findings and policy underlying the Workers' Compensation Law and as reflected in the language of the ORS 656.340(6) is to ensure that injured workers are not denied vocational assistance based only on a temporarily available job. I find this purpose to be rational and appropriate. Accordingly, finding no basis to modify RRU's order, I affirm.

ATTORNEY FEES

Claimant has prevailed in defending RRU's order and is entitled to an assessed fee for work performed during the administrative review and the contested case. ORS 656.385(1). Applying the factors set forth in OAR 436-120-008, I find that claimant's counsel is entitled to an assessed fee of \$500 for the administrative review and \$1,500 for his services on appeal of RRU's order. In awarding this attorney fee at the contested case level, I particularly note the excellence of the brief submitted concerning employer's constitutional argument and the value of the benefit to claimant.

ORDER

IT IS HEREBY ORDERED that:

- (1) The Directors Review and Order dated July 29, 2004 is AFFIRMED.
- (2) Employer shall pay claimant's counsel an assessed attorney fee totally \$2,000 for work performed at the administrative and contested case proceedings.