

In the ORS 656.340 Vocational Assistance Dispute of

DANIEL SHANE MURRAY Claimant

Contested Case No: H04-075

FINAL ORDER

August 15, 2005

DANIEL SHANE MURRAY, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent
Before John Shilts, Administrator, Workers' Compensation Division

Claimant, through his attorney Ronald A. Fontana, submitted exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Ella D. Johnson's January 5, 2005 Amended Proposed and Final Order. Insurer, through its attorney Sally Anne Curey, submitted a response. This matter comes before the director for a final order. The record has been reviewed, except those portions pertaining to pre-hearing matters, but including the exhibits in evidence, the audio tapes of the hearing, and the parties' post-hearing written submissions. The director adopts and affirms the amended proposed order as modified and supplemented below.

The director may only modify the ALJ's findings of historical fact if they are not supported by a preponderance of evidence in the record. ORS 183.650(3); OAR 137-003-0665(4). The director modifies the ALJ's findings of fact in two ways. First, findings of fact numbered (3) and (4) in the proposed order refer to an evaluation on February 15, 2004. The record shows that the actual date of the evaluation was February 5, 2004 (Exs. 14-2, 16-1, 17-2, 20-121-3). Based on the context of the findings, it simply appears to be a typographical error. Findings (3) and (4) are modified accordingly.

Second, I do not adopt footnote 3 of the proposed order, which states,

“Claimant testified that, when he received Broderick's call on January 13, 2004 [t]o remind him about the SAGE evaluation scheduled for January 15, 2004, he could not take the time off because he did not have enough notice of the reschedule to take time off. However, I do not find claimant's testimony persuasive. The record establishes that both claimant and his attorney receiving notice of the rescheduled date on January 22, 2004, which provided ample notice for claimant to request time off.”

What the record establishes is that claimant and his attorney received notice of the February 5, 2004 evaluation on January 22, 2004. (Ex. 14-3, 15-1.) However, that is not what I read footnote 3 to say. Accordingly, I decline to adopt it.

At issue in this matter is whether claimant's eligibility for vocational services should be ended because he failed to attend scheduled examinations. OAR 436-120-0350 (eff. 7/1/02) provides, in relevant part:

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

* * * * *

“(9) The worker has failed, after written warning, to participate in the vocational assistance process * * *.”

Insurer ended claimant’s eligibility for failure to participate in a required evaluation. The Rehabilitation Review Unit upheld insurer’s action, by Director’s Review and Order dated April 30, 2004. The ALJ affirmed the unit, finding claimant’s arguments not persuasive and concluding that claimant failed to meet his burden of proving that the unit’s order should be modified.¹ Claimant raises several arguments in his exceptions, none of which persuade the director to modify the ALJ’s order.

Claimant argues the ALJ erred in allowing exhibit 16A into the record after the record had closed, and takes issue with the ALJ’s characterization of his counsel’s representation regarding the exhibit. Claimant argues he was deprived of his constitutional rights to due process because he was not able to cross-examine or offer rebuttal testimony regarding the exhibit. Insurer responds that it never withdrew exhibit 16A, and the ALJ properly admitted it. The director finds that claimant’s counsel represented that the first two pages of exhibit 16A appeared to be identical to the first two pages of exhibit 16. The director further finds that exhibit 16A does not affect the outcome of this matter. Therefore, the ALJ’s ruling on its admissibility stands.

The ALJ ruled:

“Exhibit 16A is the signed copy of a letter sent by Plummer to claimant. Claimant’s counsel objected to the inclusion of 16A, representing that it was identical to WCD’s Exhibit 16. Based on this representation, Liberty agreed to include in the exhibits only the last two pages of Exhibit 16A. At closing claimant’s counsel made much of the fact that the document marked as Exhibit 16 was unsigned, and was therefore, void and legally insufficient. On October 13, 2004, I admitted all of Exhibit 16A into the record, finding that Liberty did not withdraw the exhibit and that claimant’s counsel had misrepresented that it was identical to Exhibit 16.”

The following exchange occurred at hearing regarding exhibit 16A:

ALJ:	Liberty has offered. . .exhibit 16A 1 through 4. Mr. Fontana did you receive a copy of those?
Mr. Fontana:	I did your honor.
ALJ:	Did you have any objection?
Mr. Fontana:	It seems to be just what we have in the file already.

¹ An order of the Rehabilitation Review Unit may only be modified at hearing if it violates a statute or rule, exceeds the director’s statutory authority, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c).

ALJ: I think it's more of a complete packet.
Ms. Curey: Correct.
ALJ: Yeah. It has everything in it.
Ms. Curey: I don't believe the certified receipts are in the existing packet on this. .
.on the warning letter.
Mr. Fontana: **Why don't we just add those then rather than have it duplicate. . .**
Ms. Curey: Because the letter is only. . .shown by half of the first page and I'd like
the whole letter to be submitted which shows it was copied to you and
indicated copies were to go to you on the bottom of the letter.
Mr. Fontana: Well, I don't see that. . .first page is **the first two pages seem to be
identical.**
Ms. Curey: Let me take a look.
Mr. Fontana: And the. . .what's missing from what you added is the third page with
the preferred worker. . .I have no objection to these return receipt cards
being added as pages 4 and 5.
Ms. Curey: Well exhibit 14. . .hang on just a second. Exhibit 14 is the warning
letter not the notice of end of eligibility.
Mr. Fontana: Right. I was talking about 16.
Ms. Curey: Alright that is there so what we are missing now is just the last two
pages.
Mr. Fontana: So that's the two return receipt cards.
Ms. Curey: Correct.
Mr. Fontana: And they would be then 16-4 and 16-5.
ALJ: Is that correct Ms. Curey?
Ms. Curey: That would be fine.
ALJ: OK. 16-4 and 16-5. OK. And Mr. Fontana did you have any objection
to those exhibits?
Mr. Fontana: No objection to the 16-4 and 16-5.
ALJ: OK very good.

(Emphasis added.) Based on this exchange, I find the ALJ did not err.

Moreover, I do not find that exhibit 16A has any bearing on the outcome of this matter. Exhibit 16 is a Notice of End of Eligibility for Vocational Assistance. As discussed below, the director's rules require that notices to the worker be signed, and that copies be sent to the department. Exhibit 16 is the copy of the notice that was in the Rehabilitation Review Unit's file. It is not signed. It only goes to show that the copy received by the department was not signed. Exhibit 16A is a signed copy of the notice that insurer offered at hearing. It only goes to show that the copy in insurer's counsel's file was signed. Neither exhibit goes to show whether the copy sent to the worker was signed, as required by the rules. Only the copy actually sent to and received by the worker would establish whether or not the worker's copy was signed, and whether or not insurer complied with the rules. Claimant did not offer a copy of the notice he received into the record. Accordingly, the record does not support claimant's argument that the notice was void for lack of signature.

Claimant argues the ALJ erred in finding that the January 16, 2004 warning letter and the

February 6, 2004 Notice of End of Eligibility complied with the requirements of the rules. Insurer responds that the letter and notice are in compliance with the rules and are valid. I agree.

OAR 436-120-0004(2) provides, in relevant part:

“All notices and warnings to the worker issued pursuant to OAR 436-120 shall be in writing, signed and dated, and state the basis for the decision, the effective date of the action, the relevant rule(s), the worker’s appeal rights required pursuant to this rule, and the telephone number of the Ombudsman for Injured Workers.

* * * All notices and warning are subject to the following conditions:

“* * * * *

“(b) Warning letters do not require specific language in the headings but should include a heading clearly indicating the purpose of the warning.

“(c) The insurer shall simultaneously send a copy to the worker’s representative. Failure to send a copy of the notice to the worker’s representative stays the appeal period until the worker’s representative receives actual notice.

* * * * *

“(12) The insurer shall simultaneously send a copy of the following notices to the department:

* * * * *

“(e) Notice of Ending Eligibility for Vocational Assistance.”

Claimant contends if a letter does not meet these requirements, it is void. Further, according to claimant, the vocational counselor should have done more to make sure claimant attended the rescheduled evaluation. Claimant asks the director to strictly construe the rules against the insurer.

The January 16, 2004 warning letter is marked as exhibit 14 in the record. Contrary to claimant’s contentions, it meets the requirements of the rules. It is in writing. It is signed on behalf of Mr. Broderick. It bears the date it was prepared as well as the “shipped,” or mailing, date.² It states the basis of the insurer’s decision and includes the crucial dates, including the date

² The notice is dated January 16, 2004 and was shipped January 20, 2004. January 16, 2004 was a Friday. The following Monday, January 19, 2004, was a federal holiday (Martin Luther King, Jr. Day). The next business day was Tuesday, January 20, 2004. That a notice was prepared one day and mailed on the next business day does not render the notice invalid or void.

of the letter and the date of the next scheduled exam. It includes a reference to the relevant administrative rules. It provides directions for claimant to follow if he disagrees with the insurer's decision, as well as the phone number for the Ombudsman. The heading of the letter clearly indicates that it is a warning and that claimant's eligibility for assistance is at risk. The director finds the letter to be in compliance with the rules and valid.

Because the January 16, 2004 warning letter is valid, claimant's argument that the Notice of End of Eligibility cannot be based on a void warning letter fails. Claimant further contends the February 6, 2004 Notice of End of Eligibility also failed to meet the requirements of OAR 436-120-0004 in that it was not signed and not simultaneously sent to the division and counsel.

The copy of the notice in the division's file, marked as exhibit 16 in the record, is not signed. However, as discussed above, the rule requires that the notice to the worker be signed, not the copy to the department. The notice received by claimant is not in the record.

The notice itself indicates it was copied to the Rehabilitation Review Unit as well as claimant's attorney, by certified mail. Insurer stated that the notice was sent to the division and to claimant's attorney at the same time (Ex. 19-2), and I find support for insurer's contention in the record. February 6, 2004 was a Friday. It's possible the notice was prepared on February 6 but not mailed until the next business day, February 9, 2004. Moreover, if the notice was not simultaneously mailed to claimant's attorney, it would not be void. Rather, the rules provide a remedy. Under OAR 436-120-0004(2)(c), the appeal period is stayed until claimant's attorney receives actual notice; the notice is not void.

Claimant argues the ALJ erred in finding that claimant agreed to reschedule the evaluation for January 15, 2004. Insurer responds that it is irrelevant whether claimant agreed to reschedule; what matters is that he did not attend this or the next scheduled evaluation. The evidence in the record is conflicting. However, I find evidence to support the ALJ's finding, including the January 16, 2004 warning letter and the February 23, 2004 report to insurer. Accordingly, I decline to modify the ALJ's finding. *See* ORS 183.650(3), OAR 137-003-0665(4).

Claimant also argues that the unit made factual errors. Insurer responds that the facts in the record support the outcome of this case. I agree. Claimant has not shown that the unit's order violated a statute or rule, exceeded the director's statutory authority, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. Therefore, the order must be affirmed.

Claimant's counsel seeks a fee in the amount of \$15,840. However, because claimant has not prevailed, he is not entitled to a fee. ORS 656.385(1).

IT IS HEREBY ORDERED the January 5, 2005 Amended Proposed and Final Order, as modified and supplemented, is adopted and affirmed.