

In the Vocational Services of
Tommy H. Dorcy, Claimant
Contested Case No: 06-141H

PROPOSED & FINAL ORDER

December 29, 2006

AMERICAN HOME ASSURANCE CO, Petitioner
TOMMY H. DORCY, Respondent

Before Elizabeth Fulsher, Administrative Law Judge

Pursuant to notice, a hearing was scheduled for November 29, 2006 in Portland, Oregon before Administrative Law Judge Fulsher. Prior to the scheduled hearing, the parties agreed to submit this matter on the documentary record with telephonic closing arguments. Claimant was represented by his attorney, Scott Supperstein. The employer, American Airlines, and its claim processing agent, Specialty Risk Services, were represented by their attorney, Brad Garber. The record closed following closing arguments on November 29, 2006.

Exhibits 1 through 20, including 5A, 5B and 16A were admitted into evidence at the time of the telephonic closing arguments.

ISSUES

Whether the employer's failure to refer to the Director's August 31, 2006 amended order should result in dismissal of the request for hearing.

Whether the August 29, 2006 Director's Review and Order, as amended on August 31, 2006, that set aside the employer's denial of vocational assistance should be modified.

FINDINGS OF FACT

Claimant compensably injured his low back on September 29, 2004 while loading cargo. The claim was accepted for a disabling low back strain. (Ex. 2). The employer denied an L5-S1 disc condition on April 22, 2005. (Ex. 5).

Claimant saw Dr. Verzosa on October 25, 2005 regarding his back condition. Dr. Verzosa indicated that claimant was medically stationary and had restricted lumbar range of motion. Dr. Verzosa was not sure if claimant had impairment from his previous work injuries with restricted range of motion. Dr. Verzosa indicated that claimant had functional impairment because he was only able to return to a medium level of work while his job at injury was heavy. (Ex. 5A). On December 2, 2005, Dr. Verzosa indicated that claimant had permanent impairment secondary to range of motion and functional capacity due to chronic lumbar sprain. (Ex. 5B).

Claimant was found eligible for vocational assistance on December 15, 2005. (Ex. 6). On January 18, 2006, Dr. Verzosa wrote to the claim processing agent stating that claimant had a prior impairment and that the doctor needed information to compare whether claimant had more impairment from his 2004 work injury or whether the impairment was from his prior injury. (Ex.

9).

Claimant was examined at the employer's request by Dr. Kaesche, an orthopedic surgeon, on May 16, 2006. Dr. Kaesche opined that claimant did not suffer any permanent impairment due to his accepted lumbar strain. (Ex. 10). Dr. Verzosa did not concur with Dr. Kaesche's report, stating that pain from a lumbar sprain combined with the disc herniation precluded claimant from heavy lifting. (Ex. 11).

The Director issued a Director's Review and Order on August 29, 2006 setting aside the employer's denial of vocational services and finding that claimant remained eligible for vocational services. (Ex. 16). On August 31, 2006, the Director issued an amended order that corrected a typographical error. (Ex. 16A). In a letter dated September 1, 2006, the employer requested a hearing regarding the August 29, 2006 Director's Review and Order.

On September 26, 2006, the employer closed claimant's claim without an award of permanent disability relying on Dr. Kaesche's May 16, 2006 examination. (Ex. 18). By letter dated November 22, 2006, claimant requested reconsideration of the Notice of Closure. (Ex. 20).

CONCLUSIONS OF LAW AND OPINION

Motion to Dismiss

When the employer requested a hearing regarding the Director's order, it referred only to the Director's August 29, 2006 order and did not reference the amended order that was issued on August 31, 2006. The amended order corrected a typographical error and did not otherwise alter the August 29, 2006 order. Claimant argued that the failure to appeal the amended order should result in dismissal of the request for hearing. The employer cites *Mark A. Klouda*, 51 Van Natta 265 (1999) to argue that the motion should be denied because the amended order did not change the original order.

For the following reasons, I agree with the employer that the motion to dismiss should be denied. While *Klouda* concerned a request for review by the Workers' Compensation Board of an ALJ's order and did not involve a request for hearing from a Director's order, I find the reasoning in *Klouda* persuasive. In *Klouda*, the insurer requested Board review of an ALJ's July 22, 1998 order without mention of a subsequent July 23, 1998 amended order. The Board treated the insurer's appeal of the July 22, 1998 order as an appeal of the original order as amended by the later order. Because the appeal was within 30 days of the July 22, 1998 order, the Board concluded that it had jurisdiction to consider the matter.

Here, the employer appealed the Director's August 29, 2006 order, but did not mention the August 31, 2006 amended order. The amended order corrected a typographical error, but did not otherwise change the original order. As in *Klouda*, I interpret the employer's appeal of the August 29, 2006 order as an appeal of that order as amended by the August 31, 2006 amended order. Accordingly, because the appeal of the August 29, 2006 order was timely, the motion to dismiss is denied.

Vocational Assistance

Pursuant to OAR 436-001-0225(3) and ORS 656.283(2), the administrative law judge may modify the director's order only if it: (a) violates a statute or rule; (b) exceeds the director's statutory authority; (c) was made upon unlawful procedure; or (d) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(3) also provides that new evidence may be admitted and considered in vocational disputes.

OAR 436-120-0350(1) and (2) provide: "A worker is ineligible or the worker's eligibility ends when any of the following conditions apply: (1) The worker does not or no longer meets the eligibility requirements as defined in OAR 436-120-0320. The insurer must have obtained new information which did not exist or which the insurer could not have discovered with reasonable effort at the time the insurer determined eligibility. (2) The worker is determined not to have permanent disability after a finding of eligibility."

Subsequent to the Director's Review and Order, the employer closed claimant's claim without an award of permanent disability. Claimant has requested reconsideration of the employer's Notice of Closure. OAR 436-120-0350(2) specifically provides that a worker's eligibility ends if the worker is determined not to have permanent disability *after a finding of eligibility*. Thus, if the claim is subsequently closed without an award of permanent disability, the worker's eligibility ends.

In this case, the claim was closed after the Director's order was issued and thus the closure could not have been considered in the Director's decision. However, new evidence is allowed in vocational disputes and can be considered. OAR 436-001-0225(3). OAR 436-120-0350(2) provides that if the worker is determined not to have permanent disability after an eligibility finding, the worker's eligibility ends. Because a determination has now been made that claimant does not have permanent disability, his eligibility for vocational assistance has ended. Under these circumstances and based on the new evidence, the order Director's order violates OAR 436-120-0350(2) and must be modified.¹

ORDER

The Director's Review and Order dated August 29, 2006, as amended on August 31, 2006, is reversed. The Notice of Ineligibility dated June 14, 2006 is reinstated and upheld.

¹ Based on the evidence submitted in this record, the claim was closed based on a non-attending physician's impairment findings. The attending physician did not concur with those findings. Claimant has requested reconsideration of the Notice of Closure. Thus, it appears likely that the claim closure will be set aside. However, the Notice of Closure is not before me and OAR 436-120-0350(2) states only that the worker's eligibility ends when the worker is determined not to have permanent disability after a finding of eligibility. That circumstance occurred in this case when the claim was closed without permanent impairment.