

In the Vocational Services of
Carmen Carreon, Claimant
Contested Case No: 07-020H
PROPOSED & FINAL ORDER

June 26, 2007

CARMEN CARREON, Petitioner
COMMERCE & INDUSTRY INS. CO., Respondent
Before Robert Pardington, Administrative Law Judge

The above-captioned case was scheduled for April 30, 2007, in Portland, Oregon, before Administrative Law Judge Robert Pardington. Claimant is represented by attorney R. Adian Martin. The employer, Premier Lincoln Mercury, and AIG Claims Services, are represented by their attorney, Jerry Keene. Prior to hearing, the parties arranged for the matter to be submitted on the record with written closing arguments. The record closed on receipt of claimant's reply argument on May 29, 2007.

Exhibits 1 through 17, submitted by the Workers' Compensation Division (WCD) are hereby admitted.

ISSUE

Eligibility for Vocational Assistance. Claimant appeals the November 20, 2006 Director's Review and Order, as amended on December 27, 2006. (Exs. 15, 16).

FINDINGS OF FACT

Claimant, age 38, compensably injured her right shoulder and both hands and wrists in an incident at work on March 28, 2005. (Exs. 1, 3, 5).

On June 8, 2006, the employer issued a notice of closure, awarding periods of temporary disability and 18 percent "whole person impairment" for the right shoulder and bilateral wrists. (Ex. 7).

On September 22, 2006, the employer (through a vocational counselor) issued a Notice of Ineligibility for Vocational Services. (Ex. 9).

Pursuant to an October 23, 2006 "Letter of Agreement," the employer/carrier agreed to redetermine claimant's eligibility for vocational assistance. (Ex. 11).

On November 1, 2006, the employer issued another Notice of Ineligibility, based on the assertion that claimant was not authorized to work in the United States, citing OAR 436-120-0320(10)(a). (Ex. 12). Claimant requested review by the WCD.

In a Director's Review and Order dated November 20, 2006, the WCD affirmed the employer's denial of vocational assistance based on the same administrative rule. (Ex. 15).

CONCLUSIONS OF LAW AND OPINION

ORS 656.283(2)(c) provides that the decision of the Director's administrative review shall be modified 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 436-120-0320(10)(a) provides that one of the criteria for eligibility for vocational services is that the worker be "authorized to work in the United States."

Claimant contends that the administrative rule "exceeds the statutory authority of [the Department,]" in that it exceeds the scope of the enabling statute, ORS 656.340. ORS 656.283(2)(c)(A). I agree.

ORS 656.726(4)(a) provides general authority for the Director to "[m]ake and declare all rules and issue orders which are reasonably required in the performance of the director's duties."

Specifically with regard to vocational benefits, the relevant sections of ORS 656.340 provide:

"(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 (5) of this section. The director shall adopt rules providing methods of calculating the

weekly wage currently being paid for the worker's regular employment for use in determining eligibility and for providing assistance to eligible workers. If the worker's regular employment was seasonal or temporary, the worker's wage shall be averaged based on a combination of the worker's earned income and any unemployment insurance payments. Only earned income evidenced by verifiable documentation such as federal or state tax returns shall be used in the calculation. Earned income does not include fringe benefits or reimbursement of the worker's employment expenses.

“(7) Vocational evaluation, help in directly obtaining employment and training shall be available under conditions prescribed by the director. The director may establish other conditions for providing vocational assistance, including those relating to the worker's availability for assistance, participation in previous assistance programs connected with the same claim and the nature and extent of assistance that may be provided. Such conditions shall give preference to direct employment assistance over training.

* * *

“(9) The director shall adopt rules providing:

- (a) Standards for and methods of certifying individuals and authorizing vocational assistance providers qualified by education, training, experience and plan of operation to provide vocational assistance to injured workers;
- (b) Conditions and procedures under which the certification of an individual or the authorization of a vocational assistance provider to provide vocational assistance services may be suspended or revoked for failure to maintain compliance with the certification or authorization standards;
- (c) Standards for the nature and extent of services a worker may receive, for plans for return to work and for determining when the worker has returned to work; and
- (d) Procedures, schedules and conditions relating to the payment for services performed by a vocational assistance provider, which shall be based on payment for specific services performed and not fees for services performed on an hourly basis. Fee schedules shall reflect a reasonable rate for direct worker purchases and for all vocational assistance providers and shall be the same within suitable geographic areas.”

Claimant contends that the term “worker,” used several times in ORS 656.340(6), (7) and (9), is defined as “any person, including a minor *whether lawfully or unlawfully employed*, who engages to furnish services for a remuneration * * *” (Emphasis added). ORS 656.005(30).

In interpreting a statute, the goal is “simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted[.]” ORS 656.174.010; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993). The text and context of a statute should be examined first, as “the best evidence of the legislature’s intent.” 317 Or at 610. The relevant context of a statute may include judicial interpretations of the statute in question and related statutes. *See State v. Toevs*, 327 Or 525, 532 (1998). Only if that inquiry fails to yield an unambiguous result, then consideration may be given to pertinent maxims of construction. *PGE*, 317 Or at 612.

The text of ORS 656.005(30) is unambiguous. A “worker” includes those “unlawfully employed.” *Id.* Absent further limitation somewhere in ORS 656.340, or another statute addressing vocational services, the term must be given this meaning when referenced in ORS 656.340(6), (7) and (9).

An administrative rule may not be inconsistent with the statute. In other words, an administrative agency may not, by its rules, “amend, alter, enlarge or limit the terms of a statute.” *Cook v. Workers’ Compensation Department*, 306 Or 134, 138 (1988). If there is a conflict between an administrative rule and a statute, the statute controls. *See Anthony D. Cayton*, 59 Van Natta 1455, 1461 (June 13, 2007) (finding OAR 436-060-0060(1) inconsistent with ORS 656.230(1), because the rule limited a term referenced in the statute, where the statute did not set forth such a limitation); *Julio C. Garcia-Caro*, 50 Van Natta 160 (1998).

The Director has been given authority to “establish other conditions for providing vocational assistance,” and to adopt rules providing “standards for the nature and extent of services a worker may receive.” ORS 656.340(7), ORS 656.340(9)(c). However, those rules may not be inconsistent with, or limit, the statute, specifically ORS 656.340(6), (7) and (9), which refer to a “worker,” which is, again, defined in ORS 656.005(30) as one who is “lawfully or unlawfully employed.” The statutes specifically delegating authority to the Director contain the term “worker” and “workers.” ORS 656.340(7), (9). It follows that the adopted rules cannot limit these statutorily defined terms.

The employer notes that ORS 656.340(7) delegates the authority to establish other conditions for assistance, “including those related to the worker’s availability for assistance,” and contends that the Director could thereby determine that a worker who is not authorized to work in the United States is not “available” for vocational assistance. OAR 436-120-0320(10)(a). Nevertheless, the administrative rule still cannot conflict with the definition of “worker” in ORS 656.005(30), unless further limited by statute.¹

¹ OAR 436-120-0320(10)(b), requiring that the worker be “available in Oregon for vocational assistance[.]” would appear to be a valid “condition” related to the worker’s availability for assistance, which does not conflict with the statute. ORS 656.340(7).

OAR 436-120-0320(10)(a), requiring a worker to be “authorized to work in the United States” as a condition of eligibility, is directly contrary to the definition of “worker” in ORS 656.005(30), as used in ORS 656.340(6), (7) and (9).

Claimant also correctly contends that, when it has intended to do so, the legislature has included limitations on benefits for “illegal” workers elsewhere in the workers’ compensation statute. *See* ORS 656.325(5)(c) (limiting temporary disability benefits when the “worker” is “a person present in the United States in violation of federal immigration laws[.]”) *See, e.g., Orr v. City of Eugene*, 151 Or App 541, 545 (1997).

By contrast, ORS 656.340 repeatedly refers to “worker” or “workers” without qualification, and does not further limit the definition of “worker” to those employed lawfully, or exclude, for example, those workers “present in the United States in violation of federal immigration laws.” ORS 656.340(6), (7), (9). *Cf.* ORS 656.325(5)(c).

Based on the above reasoning, I conclude that OAR 436-120-0320(10)(a) conflicts with ORS 656.005(30) and ORS 656.340(6), (7) and (9), and cannot be given effect. *Cook*, 306 Or at 138, 144. Stated in terms of the standard of review, the Director’s Review and Order “violates a statute or rule,” and/or “exceeds the statutory authority of the agency.” ORS 656.283(2)(c)(A), (B).

The employer’s policy arguments on this issue have merit. Nevertheless, it is the ALJ’s task merely to interpret the statute and administrative rules as written, consistent with the above legal framework. It is the legislature’s prerogative to change the statute. Moreover, this Order does not, of course, require any employer to employ claimant illegally, if that is still her status if and when she might qualify for vocational services.

Finally, because the WCD concluded that claimant was not entitled to vocational assistance under OAR 436-120-0320(10)(a), it did not proceed to determine claimant’s eligibility “on the merits;” *i.e.*, whether she meets the additional eligibility criteria in the statute and administrative rules, such as having a “substantial handicap to employment,” etc. (Ex. 15); ORS 656.340(6). Remand is appropriate for it to engage in that analysis.

For this same reason, claimant has not yet “finally prevail[ed] after a proceeding has commenced,” under the terms of ORS 656.385(1), and an assessed attorney fee under that statute is not awardable at this stage.

Accordingly, the November 20, 2006 Director’s Review and Order, as amended on December 27, 2006, is reversed and remanded to the Director for further proceedings consistent with this Order.

IT IS SO ORDERED.