

In the ORS 656.340 Vocational Services Dispute of  
**Drewey T Bush, Claimant**

Contested Case No: 08-055H

**FINAL ORDER**

December 11, 2008

Drewey T. Bush, Petitioner  
SAIF Corp., Respondent

Before John Shilts, Workers' Compensation Division Administrator

Insurer SAIF Corporation (insurer) terminated claimant Drewey T. Bush's participation in a vocational training program because of claimant's alleged failure to timely report missing two consecutive days of training. OAR 436-120-0350(10).<sup>1</sup> In a March 26, 2008 order, the Rehabilitation Review Unit (RRU)<sup>2</sup> upheld insurer's decision. Administrative Law Judge (ALJ) Martha J. Brown issued a proposed and final order on August 1, 2008, reversing the RRU order, setting aside insurer's notice ending vocational assistance, and ordering insurer to process the claim. Insurer filed exceptions to the ALJ's order. The parties agree claimant several times missed two consecutive days of training and did not report that to his vocational counselor on the missed days or by the next business day. The issue is whether claimant's actions violated the training agreement or Workers' Compensation Division (WCD) rules, justifying insurer's terminating claimant's eligibility for vocational training. I find claimant's actions did not violate a rule or the training agreement and affirm the ALJ's order.

**FACTUAL SUMMARY**

I adopt the ALJ's factual findings. Claimant compensably injured his back in 2005 and on September 6, 2007 signed a work training plan. Under the plan claimant agreed to "advise" his counselor each day he was ill or had an emergency problem that prevented him from attending training.

Claimant's vocational counselor, Ms. Wallace, sent claimant a letter on October 2, 2007. The letter stated claimant could note on his weekly report any dates he was unable to attend class. The letter also told claimant to notify Ms. Wallace "immediately" if he missed two consecutive days of training. Ms. Wallace advised claimant about a rule under which claimant's eligibility for training could be terminated without written warning if he missed two consecutive days of training and "fail[ed], without reasonable cause, to notify the vocational counselor or insurer."

Claimant submitted weekly training progress reports on September 28, October 5,

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<sup>1</sup> OAR 436-120-0350 provides in part:

"A worker is ineligible or the worker's eligibility [for vocational assistance] ends when any of the following conditions apply:

\* \* \* \* \*

(10) . . . [T]he worker fails to attend 2 consecutive training days and fails, without reasonable cause, to notify the vocational counselor or the insurer. "

<sup>2</sup> The Rehabilitation Review Unit (RRU) is now subsumed within the Workers' Compensation Division's Employment Services Team. As the unit was titled RRU at the time the unit issued its order in this case I will use that term in this decision.

October 11, October 19, October 26, November 5, and November 8, 2007. These reports listed the days on which claimant attended or was absent from training. The November 5 report was for the period of October 29 through November 2 and indicated absences for October 29 and 30. The November 8 report covered the period of November 5 through November 9 and showed absences on November 6, 7, and 8. Many of the reports included comments from claimant that he was having difficulty because of his back pain.

On October 9 a Dr. Blome documented that claimant should be excused from several classes because of his back pain. On November 7 a Dr. Gullo excused claimant from “work” from November 6 through 8.

On November 8 claimant faxed Ms. Wallace a letter telling her he had fallen on Monday and had missed several days of classes that week as a result. The fax included a letter from Dr. Gullo excusing claimant from work.

Insurer issued two notices to claimant on November 8 ending his eligibility for training. The stated grounds were that claimant had not notified his counselor on the days he missed training and that claimant had missed two consecutive days of training and had not immediately notified his counselor or insurer. The days of absence were listed as October 29 and 30 and November 6 and 7. The letters referred to OAR’s 436-120-0440(15)(b) and 436-120-0350(10) as authority for this action.<sup>3</sup>

RRU upheld insurer’s decision for several reasons. RRU’s order states claimant failed to notify his counselor each day that he was absent, as the training agreement required. The order also asserts claimant failed to notify his counselor of missed training days by the close of the next business day as required under OAR 436-120-0520(1).<sup>4</sup> RRU also referred to the requirement of OAR 436-120-0350(10) that a worker must notify their counselor or insurer if they miss two consecutive days of training. RRU concluded claimant could have telephoned his counselor each day he missed training, or at least by the end of the next work day, and therefore had not met his reporting responsibilities.

ALJ Brown found the controlling rule was OAR 436-120-0350(10) and that that rule does not contain a specific time limit within which a worker must provide notice of two consecutive missed training days. As claimant consistently notified his counselor of his absences through the weekly reports ALJ Brown concluded claimant had satisfied his reporting responsibilities. The ALJ therefore found the RRU order constituted an abuse of discretion.

## CONCLUSIONS OF LAW

RRU’s order may only be modified if it violates a statute or rule, exceeds the agency’s statutory authority, relied on an unlawful procedure, or constituted an abuse or clearly unwarranted exercise of discretion. ORS 656.283(2)(c); OAR 436-001-0225.<sup>5</sup>

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<sup>3</sup> Insurer’s letter actually refers to OAR 436-120-0440(14)(b), however that rule does not contain a subsection 14(b). There is a subsection 15(b) that may have been insurer’s intended reference. That subsection states:

“Training will end if any of the following applies:  
\* \* \* \* \*

(b) The worker’s eligibility has ended under OAR 436-120-0350 . . . .”

<sup>4</sup> OAR 436-120-0520(1) states in part: “. . . If the worker stops attending training for any reason, the worker must notify the vocational counselor by the close of the next working day.”

<sup>5</sup> ORS 656.283(2)(c) provides in part: “[T]he decision of the director’s administrative review shall be modified only if it:

(A) Violates a statute or rule;

OAR 436-120-0350(10) is the controlling rule. That rule provides that a worker's eligibility ends if the worker misses two consecutive days of training and does not notify the counselor or insurer "without reasonable cause." The rule does not state a time limit within which the worker must provide notice. Claimant not only did provide notice of his absences, he provided notice through the specific mechanism, and on the schedule, which his counselor had assigned. Claimant therefore fulfilled his obligations under the rule and should not have been terminated from training. The RRU order added terms to the rule that the rule does not contain, and thereby violated that rule, in requiring claimant to report his absence by the end of the next business day or each day as the absences occurred.

The RRU order relies on OAR 436-120-0520(1) in finding claimant at fault for not notifying his counselor of his absences by the close of the following business day.<sup>6</sup> That rule applies when a worker stops attending training. As claimant continued to attend training after his absences and never expressed an intent to discontinue training he never "stopped attending" training. RRU also erroneously mixed the terms of two separate rules by finding claimant in violation of OAR 436-0120-0350(10) for not providing notice of his absences by the end of the next business day.

It is true that claimant signed a training plan in which he agreed to notify the counselor each day he had a problem that prevented him from attending training. However, the counselor subsequently wrote claimant a letter in which she stated that completing his weekly report would be adequate to report absences. Claimant is not at fault for adhering to the reporting procedure his counselor established for him.

The vocational counselor's October 2 letter also told claimant he should report "immediately" if he missed training for two consecutive days. Claimant never signed that letter or agreed to its terms as requirements of his training plan. In addition, there is no rule that authorizes the letter's immediate notice requirement. The vocational counselor arbitrarily imposed a training plan requirement that is not required by the relevant rule. A trainee must violate the terms of OAR 436-120-0350(10) before an insurer can terminate the trainee's eligibility under that rule. In addition, it was left to claimant to guess what "immediate" meant at the risk of having the counselor or insurer subsequently end his training eligibility based on a retroactive and subjective interpretation of what constituted "immediate" notice. The obligations and requirements a training plan imposes on a worker must be clear before the worker can be sanctioned for violating them.

**IT IS HEREBY ORDERED** that the ALJ's August 1, 2008 proposed and final order is

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- (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.
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OAR 436-001-0225(3) provides in part:

“. . . Under 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.”

<sup>6</sup> OAR 436-120-0520(1) provides in part that “[i]f the worker stops attending training for any reason, the worker must notify the vocational counselor by the close of the next working day.”

adopted and affirmed. Insurer is to proceed as instructed by the ALJ order.

DATED this 11<sup>th</sup> day of December, 2008.