

In the ORS 656.340 Vocational Assistance Dispute of

Drewey T. Bush, Claimant

Contested Case No: 08-055H

PROPOSED & FINAL ORDER

August 1, 2008

DREWEY T. BUSH, Petitioner

SAIF CORPORATION, Respondent

Before Martha J. Brown , Administrative Law Judge

Pursuant to notice, a hearing was held and the record closed on July 16, 2008 in Portland, Oregon before Administrative Law Judge Martha J. Brown. Claimant was present and was represented by his attorney, Michael Gilbertson. The employer, North Star Industries, Inc., and its insurer, the SAIF Corporation, were represented by their attorney, Larry Schucht.

At hearing, Exhibits 1 through 29 were admitted into the record.

ISSUE

Vocational Training. Claimant has appealed the March 26, 2008 Director's Review and Order affirming SAIF's Notice Ending Vocational Training. (Ex. 22).

FINDINGS OF FACT

Claimant was compensably injured on March 10, 2005 while working for the employer as a detailer/car washer. On August 22, 2005, a Modified Notice of Acceptance issued, which provided that SAIF accepted claimant's claim as a lumbar sprain combined with preexisting disc protrusions at L4-5 and L5-S1.

An August 29, 2007 Notice of Closure awarded temporary disability and 17 percent loss of the whole person for impairment to the lumbosacral back.

On September 6, 2007, claimant signed a return to work training plan. Pursuant to the plan, claimant agreed to advise his counselor each day he was ill or had an emergency problem, which prevented him from attending training.

On October 2, 2007, Ms. Wallace, claimant's vocational rehabilitation counselor, sent claimant a letter that provided that, if he was unable to attend class it should be noted on his weekly report. The letter further provided that if claimant was absent for two consecutive days, he should notify her immediately.

On October 5, 2007, claimant signed a weekly progress report providing that he had been unable to attend Tuesday and Thursday classes in the afternoon due to severe pain.

On October 9, 2007, Dr. Blome reported that he was claimant's treating doctor and

claimant needed to be excused from his Monday and Wednesday afternoon classes because of his back pain.

On October 11, 2007, claimant signed a weekly progress report providing that he had been excused from his Monday and Wednesday afternoon classes and was having severe pain due to sitting, driving and standing.

On October 19, 2007, claimant signed a weekly progress report and stated that he had a scheduled steroid injection on November 7.

On November 5, 2007, claimant signed a progress report providing that he had been absent on October 29 and October 30 and was having severe pain and had increased his pain medication.

On November 7, 2007, Ms. Wallace reported that claimant had noted significant physical problems and his doctor had removed him from two classes. Due to those issues, she reported that claimant's prognosis for successful completion of training was still guarded.

On November 7, 2007, Dr. Gullo reported that claimant was excused from work effective November 6, 2007, and could return to work November 9, 2007.

On November 8, 2007, claimant signed a progress report providing that he was absent on November 6, 7 and 8 and had moderate to severe pain due to sitting, standing and driving.

On November 8, 2007, claimant faxed a letter to Ms. Wallace stating that he had fallen on Monday before class and had injured himself. He reported that he would not be in class that day.

On November 8, 2007, SAIF issued a Notice of End of Eligibility for Vocational Assistance effective November 8, 2007. The notice provided that assistance was ended because claimant failed to attend two consecutive training days on two occasions and failed to provide notice of his absences.

On December 6, 2007, claimant requested review of the Notice ending vocational assistance.

A March 26, 2008 Director's Review and Order issued that affirmed SAIF's Notice ending vocational assistance.

CONCLUSIONS OF LAW AND OPINION

Claimant argues that it was an abuse of discretion for the Director to uphold SAIF's termination of his vocational assistance. Specifically, claimant argues that there is no specific requirement in the administrative rule providing that the counselor or SAIF must be notified the same day as the absence. SAIF contends, however, the claimant signed a return to work plan and agreed to notify his counselor "immediately" if he was absent from his program for two

consecutive days.

Pursuant to ORS 656.283(2)(c), at a contested case hearing regarding a director's order concerning vocational services, the decision of the director's review shall be modified only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The administrative rule relied on by SAIF is OAR 436-120-0350(10), which provides that a worker is ineligible or the eligibility ends when the worker has failed, after written warning, to comply with the return to work plan. The rule further provides that no written warning is required if the worker fails to attend two consecutive training days and fails, without reasonable cause, to notify the vocational counselor or the insurer.

Here, claimant does not dispute the fact that he missed two consecutive training days. Nor does he dispute the fact that he signed a training plan or that Ms. Wallace sent him a letter stating that he should notify her in the event of an absence. Claimant's disagreement is based on his argument that the rule does not provide for a specific period of response, such as requiring that claimant must notify the counselor on the date of his absence, or within one day of his absence, etc.

I agree with claimant that the rule does not provide for a specific response or notification time and therefore, it was an abuse of discretion for the director to conclude otherwise. Furthermore, while claimant agreed, pursuant to his plan, to notify the counselor "immediately" if he missed two consecutive days, the word "immediately" could be construed to mean as soon as possible, which claimant in this case appeared to do. Claimant could have missed one day, but intended to attend the next day, which then did not turn out to be possible due to his physical condition. Furthermore, the training report provides claimant the opportunity to communicate his absences to his counselor, and he complied with that on each occasion. Based on the weekly report structure of the plan, it cannot be said that claimant failed to comply with the requirement that he notify his counselor or SAIF.

Therefore, I conclude that the Director's order must be modified and SAIF's Notice ending vocational assistance must be set aside.

Pursuant to OAR 436-001-0265(1) and the Department's matrix, I conclude that claimant's counsel is entitled to an assessed attorney fee of \$1,500, to be paid by SAIF.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2008 Director's Review and Order is modified. The SAIF Corporation's Notice Ending Vocational Assistance is set aside and the claim is remanded to SAIF for processing according to law. Claimant's counsel is awarded an assessed attorney fee of \$1,500 for services at hearing, to be paid by SAIF.