

In the Matter of the Vocational Services Dispute of

**Robert J. Fontana, Claimant**

Contested Case No: 08-078H

**PROPOSED & FINAL ORDER**

December 1, 2008

ROBERT J. FONTANA, Petitioner

LIBERTY NW, Respondent

Before John Mark Mills, Administrative Law Judge

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Hearing in this matter was set before Administrative Law Judge John Mark Mills in Portland, Oregon on August 15, 2008. Prior to the time of hearing the parties advised that the matter could be submitted on the documentary record. Claimant was represented by his attorney, Ronald Fontana. The employer, Basic Fire Protection Inc., and their insurer, Liberty Northwest, were represented by their attorney, Sally A. Curey. No proceedings were recorded. Exhibits 1 through 11, 1A, 1B, 2A through 2H, 3A, 3B, 3C, 3D, 4A, 4B, 4C, 12 and 13 were submitted and received into evidence. Written arguments were submitted by the parties. Claimant waived his right of rebuttal on November 5, 2008 and the record was closed on that date.

**ISSUE**

Claimant contests the Director's Order of May 12, 2008, which denied claimant's request for an award of attorney fees arising from a vocational services dispute.<sup>1</sup>

**FINDINGS OF FACT**

Claimant has an accepted claim. A modified Notice of Acceptance was issued on January 8, 2008 for a right recurrent rotator cuff tear condition. (Ex. 2H). At that point medical evidence had been generated which documented that claimant was unlikely to be able to return to his regular employment. (Exs. 1B, 2A, 2G).

On January 29, 2008, claimant's counsel wrote the insurer's counsel an email and, among other things, asked that claimant's vocational eligibility be determined. (Ex. 3A). The insurer's counsel responded that she would see what she could do.

The insurer did not contact claimant to determine his vocational eligibility or otherwise respond to claimant's request for such a determination. Accordingly, on April 4, 2008, claimant, through counsel, requested that the Rehabilitation Review Unit (RRU) review the insurer's failure to determine claimant's eligibility. (Ex. 4).

The eligibility issue was resolved by a letter of agreement dated April 17, 2008 prepared by an RRU consultant. (Ex.6). It provided that the insurer would determine claimant's eligibility within 35 days of receiving of a medical report from his attending physician setting

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<sup>1</sup> The Director's Order is actually not dated other than to indicate that was signed on the twelfth day of blank. However, the record and Order were certified on May 12, 2008. (Ex. 11-5).

forth his physical limitations. (Ex. 6).

Claimant's counsel had requested an award of an attorney fee as part of the review process. The insurer objected. Accordingly, an Order on Review was issued with regard to that matter on May 12, 2008. (Ex. 11). The Order denied claimant's request for an award of an attorney fee.

### CONCLUSIONS AND OPINION

This is a request by claimant for review of a vocational order under ORS 656.283(2)(c). I may modify the Director's Order 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 an abuse of discretion or clearly unwarranted exercise of discretion. I review the Order pursuant to that statute and the comparable Administrative Rule, OAR 436-001-0225(3).

As claimant asserts and the Order acknowledged, the insurer was obligated under ORS 656.340 to contact the worker within five days of notification from the worker for an evaluation of the workers' eligibility for vocational assistance. For whatever reason the insurer did not respond to claimant's request although counsel for the insurer acknowledged the request. During the proceedings before RRU, the insurer's representative indicated that the insurer had not received this request, but the Order correctly concludes that that assertion is not factually accurate.

Because of the failure to respond to the request for an eligibility determination claimant requested RRU review of the insurer's inaction. During the proceedings before RRU a Letter of Agreement was entered into in which the insurer agreed to a specific time frame for determining claimant's eligibility. Based on obtaining this resolution claimant requests an assessed attorney fee under ORS 656.385(1) and OAR 438-120-0008(2). Under the statute, "where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director or an Administrative Law Judge, the director or Administrative Law Judge shall require the insurer . . . to pay a reasonable attorney fee . . ."

The Order in this case concluded that claimant's counsel was not instrumental in obtaining the agreement in this dispute. The Order explains, that at the time of claimant's original request for the vocational eligibility determination, and this continued to be true during the RRU review process, the insurer had not yet received sufficient medical evidence upon which to base an eligibility determination. Accordingly, the Order concluded that the Letter of Agreement simply reflected the insurer's agreement to do what it was obligated to do under the rules and statutes and did not arise from claimant's counsel's efforts. That ruling is not consistent with the applicable statutes and rules.

The insurer was obligated to respond within five days to claimant's request for determination. The insurer failed to comply. As the Order itself notes, if the insurer did not feel that it had sufficient data to determine eligibility, it was required to notify the worker in writing of that assertion. OAR 436-120-320(7). The insurer did not do this either. The fact that the

insurer may not have had or may not yet have enough information upon which to base a determination of eligibility does not, under any provision of the applicable statutes and rules, release it from its obligation to respond to claimant's request for a determination.

The Letter of Agreement represents that response. The agreement requires the insurer to determine eligibility within a specific time frame under specific factual circumstances.

Prior to claimant's counsel's request for RRU review the insurer was not in compliance with applicable statutes and rules. By requesting review, claimant's counsel obtained a Letter of Agreement in which the insurer agreed to comply. The Letter of Agreement settled the lack of compliance by the insurer which was the issue before RRU. Claimant's counsel was instrumental, by requesting and pursuing the review, in obtaining that Letter of Agreement. He is entitled to a fee under the statute. The order's refusal to award a fee is inconsistent with and violates statutes and rules and is, therefore, subject to modification under ORS 656.283(2)(a).

Claimant's counsel in his written brief indicates that he has spent in excess of seven hours on this matter and that his usual billing rate is \$275.00 per hour. He represents that he has been an attorney for 32 years in Oregon and has been practicing workers' compensation law for 25 of those years. Claimant's counsel is experienced and faced the risk of going uncompensated in this matter. Claimant's counsel's request for a fee in the sum of \$2,000.00 is reasonable.

### **ORDER**

IT IS HEREBY ORDERED as follows:

1. The May 12, 2008 Order in this matter is modified. Claimant's counsel is awarded an assessed fee in the sum of \$2,000.00.