

In the ORS 656.340 Vocational Assistance Dispute of  
**Jason T. Lehman, Claimant**

Contested Case No: 08-059H

**PROPOSED & FINAL ORDER**

September 19, 2008

JASON T. LEHMAN, Petitioner  
LIBERTY NW INSURANCE CORP., Respondent  
Before John P. McCullough, Administrative Law Judge

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A hearing in the above-captioned case was held in Bend, Oregon on June 11, 2008 before the undersigned Administrative Law Judge. Claimant was not present, but was represented by his attorney, Jeffrey Ratliff. The employer, Nelson Roofing Enterprises/Palmer Roofing and Siding, and its insurer, Liberty Northwest, were represented by their attorney, Ray Smitke.

This case involves claimant's July 12, 2004 injury claim with the employer and Liberty. Claimant has appealed the April 15, 2008 "Director's Review and Order" issued by the Workers' Compensation Division of the Department of Consumer and Business Services. That Order affirmed Liberty's decision ending claimant's eligibility for vocational assistance in connection with his July 12, 2004 injury claim. Claimant contends that the Director's Order is erroneous. Liberty contends that the Order should be upheld.

At the hearing, Exhibits 1-19, including 6A, 6B, 6C, 13A, and 13B, were admitted in evidence. No testimony was presented at the hearing. Following the hearing, the record was kept open for the submission of the transcript of a Umatilla County Circuit Court proceeding involving claimant on January 7, 2008, and for closing arguments. On June 25, 2008 the parties submitted said transcript, and it (with an attached CD) has been admitted as Exhibit 6D.

All of the exhibits that have been admitted in this case are identified in the "ALJ's Master Exhibit List" contained in WCB File Number 08-00059H.

On September 8, 2008 the parties' attorneys presented unrecorded closing arguments during a teleconference. The record was closed on that date.

**FINDINGS OF FACT**

On July 12, 2004 claimant suffered multiple physical injuries as a result of his employment with Palmer Roofing and Siding/Nelson Roofing Enterprises. The injury occurred when he slipped and fell off a roof.

Claimant filed a workers' compensation claim for his July 12, 2004 injury. The claim was ultimately accepted by the employer's insurer, Liberty Northwest, for a right elbow contusion, a right thigh contusion, and disc protrusions in claimant's neck and low back.

On July 17, 2007 Liberty issued a Notice of Closure concerning claimant's claim. Claimant was awarded temporary disability compensation from July 12, 2004 through April 12,

2007. He also was awarded 42 percent unscheduled permanent partial disability for his low back and neck. On September 27, 2007 Liberty advised claimant that he was eligible for vocational assistance. Claimant was advised that a vocational counselor from Bostwick/Carter/Krier would be contacting him to begin developing a return to work plan. Claimant also was advised that to remain eligible for vocational assistance, he had to maintain regular contact with his vocational counselor and cooperate with the counselor in developing a return to work plan. A copy of Liberty's letter to claimant was sent to claimant's attorney.

On November 20, 2007 Julie Blanchard, a vocational counselor with the rehabilitation counseling firm, Bostwick, Carter & Krier, met with claimant to begin developing a return to work plan. During the meeting they discussed potential vocational goals. On December 6, 2007 claimant met with Blanchard at two training sites in Portland. Thereafter, claimant advised Blanchard that he was interested in pursuing training either as a medical assistant or a cost estimator. He told her he would make a decision within the next week. Blanchard advised Liberty that a finalized training plan would be submitted by January 18, 2008.

On January 7, 2008 claimant appeared in Umatilla County Circuit Court regarding an indictment concerning alleged conduct by claimant involving Liberty Northwest. During the court proceeding, the Judge ordered that, pending further proceedings, claimant be released on condition that he have no contact with Liberty Northwest except through his attorney.

On January 8, 2008 Blanchard advised Liberty that claimant's doctor had approved the cost estimator job regarding the physical requirements, and that claimant had decided to pursue cost estimator as a vocational goal and would complete the training in Portland. Blanchard advised Liberty that she had scheduled a telephone appointment with claimant on January 15, 2008 to finalize the details of the training plan, and she anticipated the start date would be February 25, 2008.

On January 8, 2008 Blanchard sent claimant a letter with an attached extension agreement for his return to work plan, and asked claimant to sign the agreement and return it to her. Blanchard also advised claimant about the January 15, 2008 telephone appointment. A copy of the letter was sent to claimant's attorney.

On January 16, 2008 Blanchard had a teleconference with claimant concerning his vocational assistance. They agreed to meet at the training site in Portland on January 21, 2008 to finalize the details of the training plan.

Claimant did not appear for the meeting with Blanchard on January 21, 2008, and he did not call her prior to or on that date.

On January 29, 2008 Blanchard called claimant, but his phone was not in service. She also sent him a memo on that date, asking him to call her when he received the memo so they could move forward with the training plan. On February 7, 2008 Blanchard sent claimant a warning letter, advising that she had not heard from him since January 16, 2008, and that failure to contact her by telephone on February 15, 2008 would result in ending his eligibility for vocational assistance. Blanchard also advised claimant that she had not yet received the signed

training plan extension agreement. A copy of Blanchard's letter was sent to claimant's attorney.

Claimant did not contact Blanchard prior to or on February 15, 2008. On February 15 Blanchard called claimant's attorney, and at his request she delayed ending claimant's vocational eligibility for a week.

On February 25, 2008 Blanchard sent claimant a letter advising that she had not heard from him since January 16, 2008, that he still had not returned the signed training plan extension agreement, and that, consequently, his eligibility for vocational assistance was being ended. A copy of the letter was sent to claimant's attorney.

On February 29, 2008 claimant's attorney sent a letter to the Rehabilitation Review Unit of the Workers' Compensation Division of the Department of Consumer and Business Services, appealing the February 25, 2008 Notice of Ineligibility for Vocational Assistance.

On March 25, 2008 the Rehabilitation Review Unit held a telephone conference with claimant, claimant's attorney, a Liberty Northwest claim representative, and Blanchard.

On April 15, 2008 the Rehabilitation Review Unit issued a "Director's Review and Order" that affirmed Liberty's end-of-eligibility decision. The Order was based on a determination that claimant had failed, after written warning, to participate in the vocational assistance process.

### **OPINION AND CONCLUSIONS**

Claimant contends that the April 15, 2008 Director's Order, which affirmed Liberty's decision ending claimant's eligibility for vocational assistance, is erroneous. Liberty contends to the contrary.

The Director's Order is based on OAR 436-120-0350(9), which provides that a worker's eligibility for vocational assistance ends where the worker "has failed, after written warning, to participate in the vocational assistance process or to provide relevant information". In that regard, the Director, through the Rehabilitation Review Unit, determined that based on claimant's actions/inactions in early 2008, claimant failed, after written warning, to participate in the vocational assistance process (Ex. 18, p. 5).

On review before the Workers' Compensation Board's Hearings Division, a Director's Order concerning vocational assistance may be modified 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.

See ORS 656.283(2) and OAR 436-001-0225(3). Claimant has not argued, and the record does not establish, that the Director's Order exceeds the Director's authority or was made upon unlawful procedure. Although claimant did not explicitly so argue at the hearing or during closing arguments, his contention appears to be that the Director's Order violates a statute or rule -- specifically, OAR 436-120-0350(9) -- and/or the Order is characterized by abuse of discretion or clearly unwarranted exercise of discretion.

During the March 25, 2008 teleconference with the Rehabilitation Review Unit (Ex. 17, pgs. 2 and 3), and during the September 8, 2008 closing arguments, claimant contended that the "no contact order" he got from the Umatilla County Circuit Court in early 2008 prevented him from participating in the vocational assistance process. For the following reasons, I do not find claimant's contention persuasive.

The transcript of the January 7, 2008 Umatilla County Circuit Court proceeding shows that the no contact order pertained to Liberty Northwest (Ex. 6D, p. 2). I construe that to mean any employee of Liberty. However, claimant's vocational counselor, Julie Blanchard, was not a Liberty employee. She was employed with the rehabilitation counseling firm (Bostwick, Carter & Krier) that Liberty hired to provide vocational assistance to claimant. After claimant was ordered on January 7, 2008 to have no contact with Liberty, he apparently did not consider his vocational counselor to be within the no contact order, because he spoke with her in a teleconference on January 16, 2008 and agreed to meet her at a training site in Portland on January 21, 2008 (Ex. 10, p. 1 and Ex. 15). The evidence in the record does not establish that after January 16, 2008 claimant received any supplemental/clarifying order from the Circuit Court that would have led him to conclude that the no contact order included his vocational counselor. Further, even if it could be concluded (though I do not so conclude) that claimant reasonably believed, at some point after the January 7, 2008 court proceeding, that the no contact order included his vocational counselor, the Court's order explicitly allowed contact with Liberty through claimant's attorney. The evidence in the record does not establish that claimant could not have 1) had his attorney contact Blanchard between January 16 and February 15, 2008, and 2) had his attorney send the signed training plan extension agreement to Blanchard.

Based on the evidence in the record, I find that claimant did not maintain regular contact with his vocational counselor and cooperate in developing his return to work plan, which he was advised in September 2008 that he must do in order to remain eligible for vocational assistance (Ex. 6, p. 1). I find that claimant failed, after written warning, to participate in the vocational assistance process. I conclude that the Director's Order affirming Liberty's end-of-eligibility decision did not violate OAR 436-120-0350(9) or any other applicable rule or statute. I further conclude that the Director's Order is not characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### **ORDER**

**IT IS THEREFORE ORDERED** that the April 15, 2008 Director's Review and Order is affirmed.