

In the ORS 656.340 Vocational Assistance Dispute of

Joshua T. Atkinson, Claimant

Contested Case No: 08-363H

FINAL ORDER

September 25, 2009

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner

JOSHUA T. ATKINSON, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Insurer Liberty Northwest Insurance Corporation found claimant Joshua T. Atkinson ineligible for vocational assistance on the grounds claimant's lack of suitable employment was not due to limitations caused by his accepted injury. OAR 436-120-0350(3).¹ Following administrative review, the Employment Services Team (EST) issued an order on October 23, 2008, reversing that decision. Administrative Law Judge (ALJ) I. Terri Myzak held a hearing on the matter and then affirmed EST's order on June 29, 2009. Insurer requested review of ALJ Myzak's order. ORS 656.283(2)(c); 656.704(2)(a); OAR 436-001-0246.

The issue on review is whether the employer-at-injury had suitable employment for claimant. ALJ Myzak specifically found the employer's witnesses were not credible on this point and that the evidence established there was not suitable employment for claimant. As the ALJ observed the witnesses and heard the testimony, and the record adequately supports the ALJ's conclusions, I affirm the orders of the ALJ and EST.

FACTUAL SUMMARY

Claimant was injured at work in January 2006. The employer terminated claimant's employment on February 14, 2007, for violating attendance rules. On October 29, 2007, the employer sent claimant a job offer letter for a modified job, titled only "Plant/site." The letter stated this job would have been offered to claimant had he not been fired. The attending physician released claimant to modified work on January 16, 2008. On January 23, 2008, the employer sent claimant another job offer letter for modified work with the same job title and again saying the job would have been offered to claimant if he had not been terminated. Insurer closed the claim on June 20, 2008. On August 5, 2008, a vocational counselor prepared a Job Analysis for a position with the employer titled "Transportation Pilot/Will Call Worker." Claimant's attending physician approved this job on August 18, 2008. Insurer issued the notice of ineligibility for vocational assistance on August 25, 2008.

The employer's representatives told EST during its review that the employer would have

¹ OAR 436-120-0350 states in part:

A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

* * * * *

(3)The worker's lack of suitable employment is not due to the limitations caused by the injury

been able to offer claimant the transportation pilot position at the time he was released to work, had he not been fired. Claimant said he had seen there was a pilot position open and applied for it but that he had never gotten a response to his application. In response to questions from EST the employer reported there had not been an open pilot position claimant could have applied for. The employer reported the pilot position was created at the end of September 2007. ALJ Myzak found the employer had added additional duties to the pilot position because there was not enough full-time work for even a single person in that job. An employee was placed in that position in October 2007 and remained in the single pilot position that existed when the hearing was held in this matter.

The hearing in this matter was held on March 11, 2009. The employer's construction manager and controller testified generally the transportation pilot position would have been suitable for and available to claimant. However they both admitted there was only one pilot position and it had remained filled for some time. Neither identified any other suitable positions that could have been offered to claimant. Neither described another specific position that could have been offered to claimant. The notice of ineligibility that insurer sent to claimant specifically states the permanent suitable job that would have been available to claimant was that of Transportation Pilot/Will Call Worker.

Mr. Billy Johnson is the employer's construction manager. He testified the employer has a formal policy of making accommodations to find or create work for injured employees who have work restrictions. Mr. Johnson's testimony suggested this type of accommodation was a regular occurrence in his experience with the employer. In conducting its review, EST sent a formal question to the employer asking about what action it had taken concerning five specific injured employees. The employer's response indicated that one had returned to his pre-injury work and the others no longer worked for the employer.

CONCLUSIONS OF LAW

I may only modify EST's order if it violates a statute or rule, exceeds the director's statutory authority, was based on an unlawful procedure, or demonstrates an abuse or clearly unwarranted exercise of discretion. ORS 656.283(2)(c); OAR 436-001-0225(3). As the party advocating for a fact, the party seeking a modification of the order bears the burden of proof. *See Harris v. SAIF*, 292 OR 683, 690 (1982); *Fernandez v. M&M Reforestation*, 124 Or App 38, 41 (1993).

An injured worker is not eligible for vocational assistance services if "[t]he worker's lack of suitable employment is not due to the limitations caused by the injury" OAR 436-120-0350(3). Insurer cited this rule in finding claimant ineligible for vocational services. The notice of ineligibility states suitable work was available as a transportation pilot and that claimant's termination was the reason for his ineligibility.

There is no basis under the controlling statute and rule to modify EST's order. The record supports the conclusions of the EST and the ALJ that there was not a pilot position available to claimant. Only one such position ever existed, there was not enough work to employ one person full time in that position, and the single existing position has been filled continually by one

person since it was created. There is no evidence in the record of any other suitable permanent position that was actually available to claimant. Even if the employer had not fired claimant the record supports the conclusion that the employer did not have a suitable permanent position it could have offered claimant. Claimant's injury, which left him unable to perform permanent, suitable work with the employer, therefore is the reason claimant lacks suitable employment. Insurer therefore erred in relying on these grounds to find claimant ineligible.

Insurer cites *William v. Helman*, 7 CCHR 161 (2002), in support of its position. While insurer is correct that order is relevant here, that decision contravenes insurer's position and supports affirming the orders of the ALJ and the EST. The issue in *Helman* was whether a claimant was properly found ineligible for vocational assistance because the unavailability of suitable work was not due to the worker's injury, where the worker had been terminated by the employer for cause and where there was a dispute about whether the employer actually had a suitable position available for the claimant.

While the reasoning of *Helman* is relevant here, the facts were significantly different. In *Helman* the controlling factual issue was whether or not the employer actually had a suitable position available. The hearing officer specifically found the employer's representatives credible and determined there had been suitable work available. The only reason that work was not available to the claimant was because he had been fired for cause.

The underlying reasoning from *Helman* applies here. If the termination were the controlling, or only, factor, in *Helman* it would not have been necessary for the hearing officer in that case to even consider whether the employer was able to offer suitable employment. The hearing officer would have looked only at the fact the claimant was terminated and found that decisive. Instead, the hearing officer weighed the evidence on the issue of whether the employer had a suitable position and only addressed the termination matter after finding the employer could offer suitable employment. Conversely, where the employer does not have suitable employment the worker's injuries are the reason the worker cannot work.

The facts here differ from those in *Helman*. In the present case the EST reviewer and the ALJ, who both had direct contact with the witnesses, concluded the employer's representatives were not credible on the issue of whether suitable work existed. They both found the employer did not have suitable work available. The termination was irrelevant. Even had the employer not fired claimant, there was no permanent, suitable work available with the employer-at-injury. The claimant's injuries therefore are the cause for his lack of suitable employment.

IT IS HEREBY ORDERED the June 29, 2009 order of ALJ Myzak and the October 23, 2008 order of the EST are affirmed.