

In the Compensation of  
**Joshua T. Atkinson, Claimant**  
Contested Case No: 08-363H  
**PROPOSED & FINAL ORDER**

June 29, 2009

LIBERTY NORTHWEST INSURANCE CORP. , Petitioner  
JOSHUA T. ATKINSON, Respondent  
Before Terri Myzak, Administrative Law Judge

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Pursuant to notice, a hearing was convened on March 11, 2009 in Salem, Oregon and closed on May 28, 2009. The employer, Modem Building Systems, and its insurer, Liberty Northwest Insurance Corp. (Liberty), were represented by Meg Carmen. Claimant was represented by Randy Elmer. Bill Johnson was present as the employer representative. Exhibits 1 through 19, 1a, 1b, 1aa, 2a, 2b, and 2aa were admitted.

**ISSUE**

Eligibility for vocational assistance. More specifically, whether lack of suitable employment was not due to the work injury. Liberty appeals the director's Review and Order dated October 23, 2008.

**FINDINGS OF FACT**

On January 30, 2006, claimant suffered a compensable knee injury while working for this employer. He was temporarily released for and returned to modified work, including, but not limited to, a "will call" job that required him to drive an employer-owned vehicle off the employer's premises.

On October 10, 2006, claimant was "officially" warned that he could be disciplined up to and including termination for continued absences because he had accumulated 8.5 absences, or points, in the previous six months. Claimant did not miss work and was not tardy between October 10, 2006 and February 12, 2007, when he left work after his tooth became infected and had to be extracted. On February 14, 2007, claimant was terminated for six absences in the preceding six month period.

Effective October 1, 2007, the employer created one transportation pilot position for another employee, Michael, who was unable to return to his regular work after an illness. Because the employer did not have enough transportation pilot duties for a full time position, it added other work activities to its sole transportation pilot position. As of March 11, 2009, Michael continued to fill the employer's only transportation pilot position.

After claimant became medically stationary in the spring of 2008, he was permanently released to modified work. He has permanent restrictions that are a substantial handicap to employment. Claimant was awarded permanent partial disability as a result of his work injury.

On August 18, 2008, claimant's attending physician approved the employer's transportation pilot/will call worker job analysis. On August 25, 2008, Liberty issued a Notice of Ineligibility for vocational assistance, stating that the transportation pilot/will call worker position would have been available to claimant as a permanent, suitable job had he not been terminated for reasons not related to the work injury.

Bill Johnson is not credible.

### **Finding of Ultimate Fact**

The position of transportation pilot/will call worker was not available for claimant.

### **CONCLUSIONS OF LAW AND OPINION**

Liberty contends that the director's Review and Order violates each clause of ORS 656.283(2)(c). Liberty relies on William Helman, 7 CCHR 161 (2002), and OAR 436-120-0350(3).<sup>1</sup> Claimant responds that the employer did not have a permanent transportation pilot/will call worker position for claimant.

OAR 436-120-0320(11) provides, in relevant part, that the criteria for eligibility for vocational assistance include:

"(c) As a result of the limitations caused by the injury or aggravation, the worker:

"(A) Is not able to return to regular employment;

"(B) Is not able to return to any other suitable and available work with the employer at injury or aggravation; and[,]

"(C) Has a substantial handicap to employment and requires assistance to overcome that handicap."

The ultimate fact question in the instant case focuses on whether the employer had other permanent suitable and available work for claimant. I find that the employer did not have a permanent transportation pilot/will call work position for claimant.

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<sup>1</sup> OAR 436-120-0350(3) provides:

"The workers' lack of suitable employment is not due to the limitations caused by the injury or which existed before the injury. \* \* \*

OAR 436-120-0005(12)(a) defines "suitable employment" as employment or a job "[f]or which the worker has the necessary physical capacities, knowledge, skills and abilities[.]"

The employer's main witness was Bill Johnson, the plant manager. His testimony was internally inconsistent in several particulars; for example, Mr. Johnson testified that the number of pilot positions has increased, but also testified that the employer only had pilot position. Mr. Johnson admitted—finally—that it was difficult to answer whether the employer would have offered the pilot position to claimant. Mr. Johnson did not testify in a direct, open, honest, or forthright manner or with credible demeanor. Mr. Johnson was openly defiant at times, both in manner and demeanor and substance; for example, "I'm not going to answer that."

Debra Zeiler, the employer's controller, is likewise not helpful to persuasively carry Liberty's burden. She testified that she told the director's vocational reviewer that there was no pilot position open for claimant. Although Ms. Zeiler, like Mr. Johnson, represented that the employer permanently accommodated all injured workers, only one worker—*who "retired" shortly thereafter*--was identified as receiving a "permanent" work accommodation by this employer.

The employer did not and does not have enough work for one full time permanent transportation pilot/will call worker position. Unequivocally, the transportation pilot position is physically suitable for claimant. While the employer is to be commended for permanently accommodating Michael in its one full time transportation pilot position, after observing the employer witnesses, I am unpersuaded that a second transportation pilot position existed or that a second transportation pilot position would be created to accommodate claimant's permanent restrictions, that is, that the position was available.

Unlike Helman, I do not find the employer witnesses in this case to be credible. There is no persuasive evidence that the director violated any provision of ORS 656.283(2)(c). On this record, the director's Review and Order must be upheld.

### **ORDER**

IT IS HEREBY ORDERED that the director's Review and Order dated October 23, 2008 is affirmed. Claimant is eligible for vocational assistance.

IT IS FURTHER ORDERED that Liberty shall pay claimant's attorney a \$2,575 assessed attorney fee.