
In the ORS 656.340 Vocational Assistance Dispute of

Carmen Flores, Claimant

Contested Case No: 08-165H

PROPOSED & FINAL ORDER

February 20, 2009

CARMEN FLORES, Petitioner

SAIF CORPORATION, Respondent

Before Emerson Fisher, Administrative Law Judge

Claimant appeals the Director's Review and Order issued on March 21, 2008 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

In lieu of proceeding to hearing on January 21, 2009, the parties submitted this matter to the undersigned Administrative Law Judge for a decision based on documentary evidence and written closing arguments. Claimant is represented in these proceedings by attorney Adian Martin. The employer, Earl E. Brown & Sons, and its insurer, the SAIF Corporation, are represented by attorney Larry Schucht.

The documentary evidence received consists of exhibits 1 through 20, 3A, 6A through 6D, 13A, 15A, 17A through 17D, and 18A.

The record closed on February 18, 2009.

ISSUE

Whether claimant is eligible for vocational assistance.

FINDINGS OF FACT

Claimant sustained compensable injuries to her left shoulder and left knee on July 14, 2006. (Exs. 3A; 6A; 11).

On January 11, 2008, claimant sought director's review challenging SAIF's determination that she was ineligible for vocational assistance because she was able to return to regular work and because she is not authorized to work in the United States. (Ex. 17-1).

On January 28, 2008, Dr. Gryler (attending physician) opined that due to the compensable injuries, claimant was unable to return to her regular work as a fruit picker. (Ex. 13). In doing so, Dr. Gryler explained that claimant was able to return to full time work within certain restrictions. (*Id.*)

SAIF closed the claim March 6, 2008, awarding, among other things, 18 percent whole person impairment. (Ex. 15). Claimant requested reconsideration.

Relying on OAR 436-120-0320(10)(a)(effective December 1, 2007 pursuant to Admin. Order 07-067), a March 21, 2008 Director's Review and Order determined that claimant was not eligible for vocational assistance because she was not authorized to work in the United States. (Ex. 17-3). Claimant requested a hearing.

An April 7, 2008 Order on Reconsideration increased the permanent disability award (as awarded by SAIF's Notice of Closure) by awarding a 30 percent work disability value. (Ex. 17D).

CONCLUSIONS OF LAW

A director's administrative review regarding vocational assistance may 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 an abuse of discretion or clearly unwarranted exercise of discretion.¹ ORS 656.283(2)(c). In determining whether any of the factors set forth in ORS 656.283(2)(c) were violated, the ALJ may admit evidence and make independent findings of fact. OAR 436-001-0225(3); *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993).

Arguing that OAR 436-120-0320(10)(a)² is beyond the Director's authority as set forth in ORS 656.340, claimant seeks reversal of the of the March 21, 2008 Director's Review and Order affirming the employer's denial of vocational assistance. For the reason stated below, I reject claimant's argument.

In *Carmen Carreon*, 12 CCHR 334 (2007), it was held that OAR 436-120-0320(10)(a) did not conflict with the definition of "worker" as set forth in ORS 656.005(30), nor did it

¹ "The phrase 'abuse of discretion' is a legal term of art meaning a discretion exercised to an end or purpose not justified by and clearly against reason or evidence; any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and laws pertaining to the matter submitted. BLACK'S LAW DICTIONARY 10-11(6th ed. 1990); *Jerry L. Bell*, 2 WCSR 394, 395 (1997), citing *Casciato v. Oregon Liquor Control Comm'n*, 181 Or 707, 717 (1947) and *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 663 (1979). On review for abuse of discretion, '[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made.' *Teresa Brooke*, 8 CCHR 240, 241 (2003) quoting *Liberty Northwest v. Jacobson*, 164 Or App 37, 45 (1999)." *Suzanne P. Blakley*, 9 CCHR 287, 294 (2004).

² At the time of the March 21, 2008 Director's Review and Order, OAR 436-120-0320(10), which is now OAR 436-120-0320(11), provided:

"(10) A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

"(a) The worker is authorized to work in the United States."

exceed the Director's authority under ORS 656.340. *Id.*, at 337. *Carreon* is controlling. Accordingly, the March 21, 2008 Director's Review and Order must be affirmed.

ORDER

The March 21, 2008 Director's Review and Order is affirmed.