
In the ORS 656.340 Vocational Assistance Dispute of

Francisco Perez, Claimant

Contested Case No: 07-112H

PROPOSED & FINAL ORDER

February 4, 2009

FRANCISCO PEREZ, Petitioner
SAIF CORPORATION, Respondent

Before Douglas Crummé, Administrative Law Judge

Pursuant to notice, the Board convened a hearing on the record in this matter on February 12, 2008, in Pendleton, Oregon. Donald M. Hooton, Attorney at Law, represented claimant, Francisco Perez, who appeared personally. Leah Sideras, Trial Counsel, represented the employer, Sam LeFore Fruit Farms, and the insurer, SAIF Corporation. Carlos Vega interpreted at the hearing. Administrative Law Judge Douglas Crummé presided. The hearing was continued to receive additional evidence and argument. Exhibits 1 through 26, including 14A, are admitted.¹ The hearing record closed with the parties' presentations of recorded closing argument on January 5, 2009.

ISSUES

Claimant challenges the Workers' Compensation Division's (WCD's) Director's Review and Order dated September 7, 2007, that affirmed insurer's denial of his eligibility for vocational assistance. Claimant argues that the Director's Review and Order should be remanded to WCD for further evaluation of his eligibility. Insurer argues that the Director's Review and Order should be affirmed. Claimant seeks the award of attorney fees if he finally prevails on this issue.

FINDINGS OF FACT

Claimant is 51 years old. He grew up in Mexico. He graduated from the sixth grade. He came to the United States in 1979. He speaks only limited English. (Ex. 9.)

In 1986, claimant began working for employer as an orchard worker. His duties included pruning, thinning, and picking apple and cherry trees. Employer laid him off intermittently when work was not available. He usually actually worked a total of eight or nine months a year. (Exs. 9-3 and 22-3.) He received unemployment insurance benefits during the times when employer laid him off. (Testimony of claimant.)

In 2005, employer paid claimant a wage of \$8.00 an hour. For the 52 weeks prior to May 31, 2005, claimant did not work other than for employer. During that 52-week period, he worked 35 weeks and employer paid him wages of \$14,000.15. (Ex. 19.) The record does not prove the amount of unemployment insurance benefits that he received or the weeks when he

¹ In vocational assistance disputes under ORS 656.340, the Board may admit and consider new evidence beyond the WCD's record for the Director's Review and Order. OAR 436-001-0225(1) and (3).

received such benefits during that 52-week period.²

On May 31, 2005, claimant was injured during his work for employer when he fell from a ladder. (Ex. 1.) Insurer accepted his workers' compensation claim as disabling for a "comminuted right calcaneal fracture" condition. (Ex. 7.)

On June 24, 2005, insurer filed a "1502" report with the WCD stating that claimant's "weekly wage" was \$269.23. (Ex. 2.)

Beginning in about August 2005, claimant began working for employer in a modified job as a label applier. In that job, he applied labels to fruit. In about November 2005, employer laid him off when the work ended for the season. (Ex. 22-2.)

In November 2005, a physical therapist, Mr. Parr, performed a Work Performance Evaluation (WPE) of claimant. (Ex. 4.)

In December 2005, claimant's attending physician for his accepted condition, Dr. Dietrich, concurred with Mr. Parr's WPE. (Ex. 5.)

On January 4, 2006, insurer issued a Notice of Closure finding claimant medically stationary on November 2, 2005, and awarding temporary and permanent partial disability. (Ex. 6.) Subsequent litigation affirmed claimant's medically stationary date. (Exs. 10, 14A, and 25.)

In March 2006, Mary Barros-Bailey, a rehabilitation counselor, began investigating claimant's eligibility for vocational assistance. (Ex. 9.) She concludes that claimant has no transferrable skills given his history of unskilled work and his functional limitations. (Exs. 9-5 and 16-3.)

In August 2006, Mr. Parr concluded that claimant had the physical capacity to perform a label applier job but did not have the physical capacity to perform a bag filler job with employer. (Exs. 11, 12, and 13.)

In September 2006, employer offered a modified job to claimant in writing. The job hours were from 7 a.m. to 4 p.m., five days a week. The pay was \$8.00 per hour. The duties were as a label applier and, up to two hours per day, as a bag filler. (Ex. 14.) Employer anticipated that the modified job would end by the end of November 2006. (Exs. 14 and 22-4.) Claimant did not accept that employment.

In June 2007, insurer issued a "Notice of Ineligibility for Vocational Assistance" to claimant. The Notice asserted, in part, that claimant did not have a substantial handicap to employment and that claimant had refused an offer of suitable employment. (Ex. 17.) At that time, employer had not adjusted the wage for claimant's regular job as an orchard worker. Claimant requested that WCD review insurer's ineligibility determination. (Ex. 18.)

² The record proves that claimant received \$1,561 in unemployment insurance benefits for the 2005 calendar year. (Ex. 9-3.) However, the record does not prove the amount of his unemployment insurance benefits or the number of weeks when he received such benefits during the 52-week period through May 31, 2005.

On September 7, 2007, WCD issued a “Director’s Review and Order” regarding insurer’s determination that claimant was ineligible for vocational assistance. WCD concluded that claimant was ineligible for two reasons. First, WCD concluded that claimant was ineligible under OAR 436-120-0350(5) because he refused employer’s September 2006 offer of the label applier job which, WCD concluded, was suitable employment. Second, WCD essentially concluded that claimant was ineligible under ORS 656.340(6)(a) because he was able to return to available, suitable employment as a label applier with the employer at the time of injury and he did not have a substantial handicap to employment. WCD concluded that claimant’s “adjusted weekly wage” was \$269.23. WCD so found based on its understanding that claimant had not received any unemployment insurance benefits, that employer had not currently adjusted the salary for his regular job, and that claimant’s average weekly wage for purposes of calculating his temporary disability benefit was \$269.23. The WCD reasoned that the label applier job that employer had offered in 2006 would pay more wages during the likely duration of that job than claimant had earned in his regular job during the same period in 2004. The WCD also reasoned that the offered label applier job would pay more than 80 percent of his adjusted weekly wage of \$269.23. (Ex. 23.)

CONCLUSIONS OF LAW AND OPINION

Claimant challenges the Director’s Review and Order dated September 7, 2007, that affirmed insurer’s denial of his eligibility for vocational assistance. Claimant argues that the Director’s Review and Order should be remanded to WCD for further evaluation of his eligibility. Insurer argues that the Director’s Review and Order should be affirmed.

This dispute should be remanded to WCD for further administrative action. An administrative law judge may so remand a dispute where appropriate. OAR 436-035-0170(5).

Remand is appropriate here because, in its Director’s Review and Order, WCD misapplies statutes and rules and exercises unwarranted discretion in concluding that the modified label applier job that employer offered claimant paid a “suitable wage.” An administrative law judge may modify a director’s vocational assistance order, among other grounds, if the order violates a statute or rule or was characterized by a “clearly unwarranted exercise of discretion.” ORS 656.283(2)(c)(A); OAR 436-001-0225(3)(a).

Both of the grounds under which WCD found claimant ineligible ultimately rely on the conclusion that the label applier job that employer offered is suitable employment that would pay a suitable wage. Under WCD’s first ground, a worker is ineligible for vocational assistance if “[t]he worker, prior to beginning an authorized return-to-work plan, refused an offer of suitable employment...for a reason unrelated to the limitations due to the compensable injury.” OAR 436-120-0350(5).³ Under WCD’s second ground, a worker is ineligible for vocational assistance if the worker will be able to return to available, suitable employment with the employer at the time of the injury and the worker does not have a substantial handicap to employment. ORS 656.340(6)(a). A “substantial handicap to employment” exists when, due to the injury, the

³ If the worker is not medically stationary, OAR 326-120-0350(5) requires that the employer-at-injury offer the suitable employment in accordance with OAR 436-060.

worker lacks the physical capacities, knowledge, skills, and abilities for suitable employment. ORS 656.340(6)(b)(A).

“Suitable employment” requires, among other factors, a weekly wage within 20 percent of what the employer is currently paying for the worker’s job at the time of injury, according to the WCD’s rules. ORS 656.340(6)(b)(B). The WCD’s rules provide that, for the purpose of vocational assistance eligibility, suitable employment must pay or average such a “suitable wage” on a year-round basis. OAR 436-120-0005(12)(c). A wage is suitable if it is “at least 80 percent of the “adjusted weekly wage” as defined in OAR 436-120-0007.” OAR 436-120-0005(13).

OAR 436-120-0007(3)(d) and (6) provide that where, like here, the worker’s regular job on the date of injury was seasonal, the employer is still in business, the employer has not adjusted the current wage for the worker’s regular job, and the worker received unemployment insurance benefits during the 52 weeks prior to the injury, the “adjusted weekly wage” is the amount of earned income and unemployment insurance benefits for the prior 52 weeks divided by the number of those weeks when the claimant worked or received unemployment insurance payments.

In the Director’s Review and Order, WCD misapplied statutes and rules and exercised unwarranted discretion in concluding that the label applier job would pay a suitable wage. In so concluding, WCD reasoned that claimant’s adjusted weekly wage would be \$269.23, in part, because claimant had not received unemployment benefits during the 52 weeks prior to his injury. However, claimant probably did receive unemployment insurance benefits during the 52 weeks prior to the injury. He worked during only 35 of those 52 weeks and he testified that he received unemployment insurance benefits during the periods when employer laid him off.

OAR 436-120-0007(3)(d) and (6) base claimant’s adjusted weekly wage on his average wages and unemployment insurance benefits for the 52 weeks prior to the injury divided by the number of weeks when he worked and received such benefits. Since the record does not prove the amount of claimant’s unemployment insurance benefits or the number of weeks when he received those benefits during the 52-week period, there was insufficient information for WCD to calculate claimant’s adjusted weekly wage and the amount that would be a suitable wage to determine eligibility for vocational services.

The Director’s Review and Order also misapplies the Director’s rules by basing its suitable-wage analysis, in part, on a comparison of claimant’s projected earnings in the label applier job that employer offered him in September 2006 with his actual earnings during the same period in 2004. As noted above, OAR 436-120-0007(3)(d) provides that the average of wages and unemployment insurance benefits during the 52 weeks prior to the injury for the weeks when he received such wages and benefits determines the adjusted weekly wage. Further, OAR 436-120-0005(12)(c) requires a comparison from that 52-week period with the worker’s projected average on a year-round basis to determine if that would constitute a suitable wage. Those rules do not provide for a comparison from shorter periods such as the WCD does here.

Based on the foregoing, the Director’s Review and Order should be modified.

Claimant's request that the matter be remanded to the WCD for further evaluation of his eligibility for vocational assistance should be granted.⁴

Attorney Fees

Claimant's attorney, Mr. Hooton, is not entitled to an assessed attorney fee in this matter pursuant to ORS 656.385(1). That section allows a fee where the claimant finally prevails in a vocational rehabilitation case. Here though, claimant has not finally prevailed because this Order remands the case to WCD for further evaluation. As a result, this Order does not finally determine that claimant is eligible for vocational assistance.

ORDER

IT IS THEREFORE ORDERED that this case is remanded to WCD to further evaluate claimant's eligibility for vocational assistance. Claimant's request that insurer be ordered to pay an attorney fee is denied.

⁴ In closing argument, claimant withdrew his earlier argument that WCD had incorrectly relied on the evaluation of the physical therapist, Mr. Parr. Claimant agreed that Mr. Parr's evaluation was allowed because of the unavailability of claimant's former attending physician, Dr. Dietrich.