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In the ORS 656.340 Vocational Assistance Dispute of

**Camron J. Horner, Claimant**

Contested Case Nos: 11-008H & 11-061H

**FINAL ORDER**

January 31, 2012

SAIF CORPORATION, Petitioner

CAMRON J. HORNER, Respondent

Before John Shilts, Workers' Compensation Division Administrator

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SAIF Corporation (insurer) challenges the validity of a Director's Review and Order that required insurer to provide Camron J. Horner (claimant) with a revised return to work training plan. I affirm that order and the Proposed and Final Order that upheld the director's order.<sup>1</sup>

**FACTUAL SUMMARY**

Claimant has an accepted compensable injury. Claimant's pre-injury average weekly wage was \$1007.90. Insurer found him eligible for vocational assistance. A vocational counselor submitted a fifteen month return to work plan on November 17, 2010 that had the occupational goal of accounting clerk. The expected wage for this position was \$10.18 an hour, or \$407.20 per week. Claimant objected to the plan on the grounds the proposed job would not pay enough. He requested administrative review.

Following a review, the Workers' Compensation Division's Employment Services Team issued a Director's Review and Order on January 13, 2011. That order found the proposed return to work plan was inadequate because claimant had an exceptional loss of earning capacity and because the job which was the goal of the training plan would not provide a sufficient wage. The order required insurer to develop a return to work plan "of 21 months or less" that would pay claimant a wage as close as possible to his wage at injury. Insurer requested a hearing.

Administrative Law Judge Crummé issued a Proposed and Final Order on October 31, 2011. ALJ Crummé found that, between the time the Director's Review and Order issued, and when the hearing was held, a vocational counselor submitted a revised return to work plan with the additional vocational objective of Payroll Technician. The expected wage for this position was \$483.60 per week. Claimant agreed with this plan.

The ALJ found the director's order proper on the issue of the invalidity of the initial training plan. The ALJ held the director's order did not require insurer to provide a return to work plan of more than 16 months or to pay temporary disability compensation or other training costs longer than is required by statute or rule. ALJ Crummé also rejected insurer's contention

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<sup>1</sup> Initially, this case involved multiple disputes and administrative orders and both claimant and insurer requested hearings. Administrative Law Judge Crummé's October 31, 2011 Proposed and Final Order addressed multiple orders and issues. Only insurer filed exceptions. Insurer's exceptions are limited to challenging the conclusions of the January 13, 2011 Director's Review and Order, number VO 11-009, in case number 11-00008H, about the duration and validity of the November 17, 2010 return to work plan. This Final Order therefore addresses only that order and those issues.

that the original return to work plan did provide for a wage as close as possible to claimant's pre-injury wage. The ALJ pointed to the revised plan that had a vocational objective with a higher expected wage.

### CONCLUSIONS OF LAW

In an ORS 656.340 vocational services dispute I may only modify the administrative order if it violates a statute or rule, is based on an unlawful procedure, or demonstrates an abuse or unwarranted exercise of discretion. ORS 656.340(16)(d); OAR 436-001-0225(3). New evidence may be admitted and considered during the review. OAR 436-001-0225(3).

Insurer first asserts the director's order violates a statute or rule because insurer alleges the order requires insurer to provide a return to work plan longer than 16 months. Insurer contends the director lacks the authority to require a training plan longer than 16 months. The statute and rules permit paying training costs longer than 21 months. ORS 656.340(12); OAR 436-120-0443(14). One of the reasons for which training can be extended beyond 21 months is that there is an exceptional loss of earning capacity and a plan of 16 months or less will not eliminate the worker's substantial handicap to employment. OAR 436-120-0443(14).<sup>2</sup> The director has the authority to review and disapprove a training plan, and to order the insurer to develop an acceptable plan. OAR 436-120-0530.

The order at issue here states "[Insurer] is ORDERED to develop a [return to work plan] of 21 months or less that will pay [claimant] a wage as close as possible to his injury." Insurer's argument fails because it is factually incorrect. The director's order found claimant had an exceptional loss of earning capacity and that the original return to work plan would not result in a wage as close as possible to claimant's pre-injury wage. The law requires that a training plan have a vocational goal that will result in a wage as close as possible to the pre-injury wage. ORS 656.340(5); OAR 436-120-0005(17), (18), (19), 436-120-0145, 436-120-0443(14). For this reason, the director's order found the return to work plan invalid and ordered insurer to provide training that would result in a wage as close as possible to the pre-injury wage. The order does not require insurer to provide any specific period of training.

Insurer next argues the disputed director's order is a "nullity" because insurer "had already met the requirements of the [director's] Order in [the return to work plan] developed in exhibit 12 . . . ." Exhibit 12 is the original November 17, 2010 return to work training plan. This is the plan the Director's Review and Order found invalid because it would not have resulted in a wage that was as close as possible to the pre-injury wage. Insurer does not explain what requirements of the order had been met or how the training plan identified as Exhibit 12 met those requirements, given that that was the specific plan that had been found inadequate.

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<sup>2</sup> OAR 436-120-0443(14) provides in part:

"Training costs may be paid for periods longer than 21 months. Reasons for extending training include but are not limited to:

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(c) An 'exceptional loss of earning capacity' exists when no suitable training plan of 16 months or less is likely to eliminate the worker's substantial handicap to employment. The extension must allow the worker to obtain a wage as close as possible to the worker's adjusted weekly wage and at least 10 percent greater than could be expected with a shorter training program."

It may be that insurer intended to refer to the revised training plan of May 26, 2011. This document was originally Exhibit 24 but was renumbered to 30A at the hearing. This plan calls for a vocational objective with a higher wage and it appears all parties agreed to it. Insurer's having complied with the requirement of the Director's Review and Order to prepare a training plan that would provide an occupation with a higher wage does not render that order a "nullity." It is an order that was found valid after hearing, and with which insurer ultimately complied.

In his response to insurer's exceptions, claimant's attorney requested attorney fees for time spent preparing the response. Counsel stated he had spent three hours on the matter and requested a fee of \$825.00. ORS 656.385(1).<sup>3</sup> Insurer did not file a reply to claimant's response or oppose the request for attorney fees. The director must require the insurer to pay an attorney fee to a worker's attorney when the worker prevails in an ORS 656.340 vocational services dispute. The fee must be proportionate to the benefit achieved and, in determining the amount of the fee, the director must consider the results achieved and the time devoted to the case. ORS 656.385(1). The fee awarded must also fall within a permissible range set by rule. OAR 436-001-0410. The benefit obtained here is significant in that it will affect claimant's lifetime earnings. Additionally, in vocational service disputes, the value of the benefit obtained is presumed to fall at the highest end of the scheduled range. The requested fee is at the lower end of the range set in the matrix for the hours worked and value received. OAR 436-001-0410(3); Department of Consumer and Business Services Bulletin 356, May 25, 2011. The requested amount is proportionate and appropriate and will be awarded.

**IT IS HEREBY ORDERED** The January 13, 2011 Director's Review and Order, and the October 31, 2011 Proposed and Final Order are affirmed. Insurer is ordered to pay to claimant's attorney a fee of \$825.00 in addition to all fees previously awarded.

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<sup>3</sup> ORS 656.385(1) provides in part:

"In all cases involving a dispute over compensation benefits pursuant to ORS . . . 656.340, where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services . . . shall require the insurer . . . to pay a reasonable attorney fee to the claimant's attorney. . . ."