In the ORS 656.340 Vocational Assistance Dispute of

**Camron J. Horner, Claimant**

Contested Case No: 11-008H & 11-061H

**PROPOSED & FINAL ORDER**

October 31, 2011

SAIF CORPORATION, Petitioner
CAMRON J. HORNER, Respondent
Before Douglas C. Crumme, Administrative Law Judge

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The parties submitted this matter for hearing through written evidence and argument in lieu of an in-person hearing. Ronald Fontana, Attorney at Law, represents claimant, Camron J. Horner. Thomas Nash, Trial Counsel, represents the employer, Ryan Robert Knott LLC, and the insurer, SAIF Corporation (SAIF). The following Exhibits are admitted: 1 through 32, including 23A, 26A, 26B, and 30A and excluding 30.[1] The Administrative Law Judge (ALJ) is Douglas Crumme. Per letter to counsel on September 22, 2011, the hearing record closed with the end of claimant's opportunity to file reply argument in WCB Case No. 11-00061 H, on September 29, 2011.

## ISSUES

I. **Director's Review and Order dated January 13, 2011.** In WCB Case No. 11-00008H, SAIF challenges the director's January 2011 Order requiring a new vocational counselor and a new "Return to Work Plan" (RTWP) and awarding an attorney fee. Claimant argues that SAIF's request for hearing on these issues should be dismissed as unperfected. In the alternative, claimant argues that this Order should be affirmed on the merits. Claimant seeks an attorney fee if he prevails on this issue.

II. **Penalty.** In WCB Case No. 11-00008H, claimant seeks the award of a penalty on the grounds that SAIF's request for hearing challenging the January 2011 Order was unreasonable.

III. **Director's Review and Order dated February 23, 2011.** In WCB Case No. 11-00061H, claimant challenges the director's February 2011 Order that awarded no attorney fee for Mr. Fontana's efforts in securing the parties' agreement to a new vocational counselor.

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[1] In order to create one packet of exhibits for the consolidated cases, certain exhibits are deleted to eliminate duplications and other exhibits are renumbered to achieve chronological order. From the exhibits that insurer submitted on May 23, 2011, Exhibits 1, 2, and 3 are deleted and Exhibits 4, 5, 6, and 7 are renumbered 23A, 26A, 26B, and 28A respectively. Insurer's Exhibit 24 is renumbered 30A.

## FINDINGS OF FACT

In 2007, claimant injured his back in his employment as a concrete pump operator. Insurer accepted his workers' compensation claim. (Ex. 4.)

In September 2010, insurer notified claimant that he was eligible for vocational assistance benefits. (Ex. 7.)

Claimant's regular wage in his job at injury was $1,007.90 per week, or $25.20 per hour. (Ex. 6-5.)

On November 17, 2010, claimant's vocational counselor then, Ms. Bostwick, proposed an approximately 15-month RTWP for an "Accounting Clerk" goal with an expected hourly wage of $10.18 per hour. The plan consisted of academic training at a community college. (Exs. 12 and 13.)

On December 15, 2010, Mr. Fontana wrote to Ms. Bostwick that claimant appeared to have an "exceptional loss of earning capacity" under OAR 436-120-0443(14)(c) and that a labor market survey would probably show that more extensive training would enable claimant to earn closer to his regular wage. Mr. Fontana asked Ms. Bostwick to revise the proposed RTWP "to provide for a higher level target job and higher target wage and resulting in his obtaining an A.A. degree." (Ex. 14.)

Ms. Bostwick declined to revise the RTWP, explaining that administrative rule changes allowed a worker to receive only up to 16 months of temporary disability while in a RTWP. (Ex. 15.)

On December 15, 2010, Mr. Fontana requested that the director review Ms. Bostwick's proposed RTWP. (Ex. 16.)

On January 6, 2011, the director's representative conferred with the parties, their attorneys, and Ms. Bostwick as part of the director's review of Ms. Bostwick's RTWP. Ms. Bostwick said she did not believe any additional labor market information was necessary. She said that, based on her experience, there was no appropriate alternative RTWP with higher expected wages. In reaction, Mr. Fontana asked the director to assign a new vocational counselor. SAIF denied that claimant had an exceptional loss of earning capacity, that a new vocational counselor should be assigned, or that claimant's training options should be researched any further. SAIF asserted that any training plan should not last more than 16 months. (Ex. 17.)

On January 13, 2011, a "Director's Review and Order" set aside SAIF's denial that claimant had an exceptional loss of earning capacity. The director ordered SAW to develop a RTWP of 21 months or less, to select, by January 27, 2011, a new vocational counselor to whom claimant and SAIF both agreed, and to pay Mr. Fontana an attorney fee of $1,746. The director based the attorney fee award on a finding that Mr. Fontana had devoted 4.25 hours to the matter and that claimant had achieved a benefit of at least $6,000. (Ex. 21.)

SAIF requested a hearing to challenge the director's January 2011 Order. SAIF checked on the director's Request-for-Hearing form that the matter concerned "Vocational assistance - ORS 656.340." (Ex. 22.)

Initially after the January 2011 Order, claimant and SAIF did not agree on a new vocational counselor. (Exs. 23A and 26B.)

On January 24, 2011, Mr. Fontana requested that the director review the parties' dispute in selecting a new vocational counselor. (Ex. 26B.)

On February 8, 2011, claimant and SAIF agreed that Lisa Broten would be claimant's new vocational counselor. Mr. Fontana asked SAIF to pay a $450 attorney fee regarding his efforts in securing that agreement. SAIF declined to do so. (Ex. 26B.)

A Director's Review and Order dated February 23, 2011, denied an attorney fee to Mr. Fontana under ORS 656.385(1) for his efforts in the parties' selection of a new vocational counselor. (Ex. 26B.)

Claimant ultimately agreed to a RTWP authored by Ms. Broten. That RTWP was to again last about 15 months. The RTWP goals were Accounting and Payroll Clerk positions. Those had anticipated wages at the lower 10$^{th}$ percentile of $10.18 and $12.09, respectively. The RTWP included both academic courses and occupational skills training. Ms. Broten included occupational skills training because her labor market research indicated that claimant would need such skills to be competitive and employable in the Accounting Clerk and Payroll Clerk fields. The RTWP would not directly result in an A.A. degree. Claimant planned to later take additional academic courses to build upon those in the RTWP so that he would eventually obtain an A.A. degree. (Exs. 30A, 31, and 32.)

In its written closing argument concerning the February 2011 Order, SAIF initially asserted that, under ORS 656.385(1), the director "may" require an insurer to pay an attorney fee, making the award of such a fee discretionary rather than mandatory. (SAIF's written closing argument dated July 22, 2011.)

## CONCLUSIONS OF LAW AND OPINION

**I. Director's Order dated January 13, 2011**

In WCB Case No. 11-00008H, SAIF challenges the January 2011 Order requiring a new vocational counselor and a new RTWP and awarding attorney fees. Claimant argues that SAIF's request for hearing should be dismissed as unperfected. In the alternative, he argues that this Order should be affirmed on the merits. He seeks an attorney fee if he prevails on this issue.

Claimant's arguments are persuasive that the January 2011 Order should be affirmed on the merits.[2] In vocational assistance hearings under ORS 656.340, new evidence may be admitted and considered. OAR 436-001-0225(3). The ALJ may modify the director's order only if it: "(A) Violates a statute or rule; (B) Exceeds the statutory authority of the agency; (C) Was made upon unlawful procedure; or (D) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion." ORS 656.340(16)(d); OAR 436-001-0225(3).

SAIF argues that the January 2011 Order should be modified in that it ordered SAIF to provide a RTWP that was longer than 16 months. SAIF's argument is not persuasive. A worker who is actively engaged in vocational training may receive temporary disability compensation for a maximum of 16 months, although the insurer may voluntarily extend the payment of temporary disability compensation to 21 months. Other training costs may be paid for periods longer than 21 months. ORS 656.360(12); OAR 436-120-0443(13) and (14). By ordering SAIF to provide a RTWP of 21 months or less, the director did not require, as SAIF suggests, that SAIF's RTWP had to be longer than 16 months. In any case, the director did not require SAIF to pay temporary disability compensation or other training costs beyond the maximum periods allowed under the statute and rules.

SAIF argues that the January 2011 Order should be modified because there is no evidence that Ms. Bostwick's RTWP did not already provide for a wage that was as close as possible to claimant's regular wage. This argument is not persuasive. Since new evidence is admissible in the hearing under OAR 436-001-0225(3), the reports in the record by the new vocational counselor, Ms. Broten, may be considered. The Payroll Clerk goal that Ms. Broten identified offers a wage that is 18 percent higher than the only goal that Ms. Bostwick identified, for an Accounting Clerk.

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[2] In light of the conclusion that the January 2011 Order should be affirmed on the merits, it is not necessary to address claimant's argument that SAIF's request for hearing was unperfected and invalid under OAR 436-001-0019(2)(i). That section requires that a request for hearing regarding a director's order must include the reasons for requesting the hearing. Claimant argues that SAIF's checking the box indicating that its request for hearing concerned "Vocational assistance – ORS 656.340" was insufficient under OAR 436-001-0019(2)(i). In response, SAIF argues that claimant waived this issue because claimant first raised it in closing argument.

SAIF argues that the January 2011 Order should be modified as to its requirement for a new vocational counselor because claimant did not raise that issue in his request for director review. SAIF's argument is not persuasive. The director has discretion to review a vocational issue even if the worker did not provide written notice that he would raise that issue. OAR. 436-120-0008(1)(a). If the worker requests a change in a vocational assistance provider and the worker and insurer do not agree, the insurer must refer the dispute to the director. ORS 656.340(11); OAR 436-120-0185(2). In the course of the director's review leading to the January 2011 Order, claimant requested a change from Ms. Bostwick as his vocational counselor. SAIF opposed that request. Thus, the issue was one for the director to decide. The director reasonably addressed that issue in the course of the review leading to the January 2011 Order. It logically related to the issue that claimant had already raised about the adequacy of Ms. Bostwick's RTWP and Ms. Bostwick's statements during the review opposing changes to the RTWP.

SAIF argues that the January 2011 Order should be modified to eliminate the $1,746 attorney fee because claimant essentially received no benefit from the director's review. ORS 656.385(1) and OAR 436-001-400 to OAR 436001-0440 govern the award of attorney fees in the director's review of vocational assistance disputes. OAR 436-120-0008(2). ORS 656.385(1) allows a reasonable attorney fee when a claimant finally prevails in a case after the proceeding has commenced. Under that section, the amount of the fee must be proportionate to the benefit to the injured worker. The director may also consider the specific factors in OAR 436-001-0400(2) and (3) to determine a reasonable fee. Under ORS 656.385(1), a fee must fall within the ranges of the matrix in OAR 436-001-0410(1)(d) absent extraordinary circumstances. OAR 436-001-0410(1)(a).

SAIF's argument that claimant essentially received no benefit under the January 2011 Order is not persuasive. In that Order, the director concluded that claimant had an "exceptional loss of earning capacity," which made claimant eligible for the payment of training costs for an extended period. OAR 436-120-0443(14)(c). The director concluded that this determination had a value of over $6,000. The director's order that SAIF select a new, mutually agreeable vocational counselor led to the appointment of Ms. Broten. She considered claimant's circumstances further and crafted a RTWP with the additional occupational goal of Payroll Clerk. That occupation's wage is 18 percent higher than the wage for the only position that the prior vocational counselor, Ms. Bostwick, had identified. Further, based on her labor market investigation, Ms. Broten incorporated occupational skills training into claimant's revised RTWP to enable his employability. Ms. Bostwick's RTWP had not included such training. Based on these benefits and the 4.25 hours that Mr. Fontana indicated he devoted to this matter, the director's award of a $1,746 attorney fee was well within the director's discretion and authority under ORS 656.385(1) and OAR 436-001-0410(1)(d).

SAIF requests, if the January 2011 Order is otherwise affirmed, that the Order be remanded to the director to apportion the $1,746 attorney fee between the several issues on which the director based that fee. This request should be denied. Neither SAIF nor the record set out a persuasive basis to conclude that such apportionment is required pursuant to the criteria for modification of the Order under ORS 656.340(16)(d) and OAR 436-001-0225(3).

Accordingly, the director's January 2011 Order should be affirmed.

**Attorney Fee under ORS 656.385(3)**

Claimant is also entitled to a reasonable attorney fee under ORS 656.385(3) because SAIF has not prevailed on its challenge to the January 2011 Order. Unlike ORS 656.385(1), ORS 656.385(3) does not set a maximum attorney fee. The factors in OAR 436-001-0400(2) and (3) apply in determining a reasonable fee under ORS 656.385(3). In light of those factors, including a lack of a "statement of hours" from Mr. Fontana in defending the January 2011 Order pursuant to OAR 436-001-0400(2), the value of the interests involved in that Order, the high skill that the attorneys demonstrated in the record, and the risk that Mr. Fontana's efforts in this case might have gone uncompensated, a reasonable attorney fee is $3,400.

**II. Penalty**

In WCB Case No. 11-00008H, claimant seeks the award of a penalty under ORS 656.385(4) on the grounds that SAIF's request for hearing challenging the January 2011 Order was unreasonable.

ORS 656.385(4) provides,

> "If upon reaching a final contested case decision where such contested case was initiated by an insurer...it is found that the insurer...initiated the contested case hearing for the purpose of delay or other vexatious reason or without reasonable ground, the director or the Administrative Law Judge may order the insurer...to pay the claimant such penalty not exceeding $750 and not less than $100 as may be reasonable in the circumstances."

Claimant argues that a penalty is due under ORS 656.385(4) because SAIF based its challenge to the award of an attorney fee in the January 2011 Order, in part, on a misstatement of the law. Claimant contends that, in its argument concerning the attorney fee awarded in the

January 2011 Order, SAIF erroneously quoted ORS 656.385(1) to provide that the director "may" award an attorney fee under that section. Claimant notes that, in fact, ORS 656.385(1) provides that the director "shall" award an attorney fee.

Claimant is correct that SAIF misstated the law. However, claimant is incorrect that SAIF made that misstatement in its argument concerning the January 2011 Order. Rather, SAIF made that misstatement concerning the February 2011 Order. The February 2011 Order concerns claimant's request for director review and then claimant's request for a hearing. As a result, SAIF's misstatement does not concern a contested case that SAW initiated. Since ORS 656.385(4) only applies to cases which the insurer initiates, claimant is not entitled to the penalty that he seeks under that section. Accordingly, claimant's request for a penalty should be denied.

**III. Director's Review and Order dated February 23, 2011**

In WCB Case No. 11-00061H, claimant challenges the director's February 2011 Order that awarded no attorney fee for Mr. Fontana's efforts in securing the parties' agreement to Ms. Broten as claimant's new vocational counselor.

Claimant's arguments are not persuasive regarding this issue.[3] ORS 656.385(1) provides, in pertinent part,

> "In all cases involving a dispute over compensation benefits pursuant to ORS…656.340...where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director..., the director...shall require the insurer…to pay a reasonable attorney fee to the claimant's attorney...The attorney fee assessed under this section must be proportionate to the benefit to the injured worker..."

In the January 2011 Order, the director already ordered a change from Ms. Bostwick as claimant's vocational counselor and awarded attorney fees. The question whether the February 2011 Order should be modified to award further attorney fees based on Mr. Fontana's efforts to secure the parties' settlement for Ms. Broten to be claimant's new vocational counselor

[3] Claimant's request for director review underlying WCB Case No. 11-00061H was arguably premature. The director's January 2011 Order gave SAIF until January 27, 2011 to select a new, mutually agreeable vocational counselor. Claimant requested director review of that issue though on January 24, 2011. However, where the opposing party fails to object to a premature request for review, the director probably has jurisdiction. *See Thomas v. SAIF*, 640 Or App 193 (1983). SAIF did not, so far as the record proves, object to the director that claimant's request for review of the new vocational counselor selection was premature.

logically depends then on whether the selection of Ms. Broten produced some greater benefit than an alternative new counselor would have provided.

As noted above, where an insurer and a claimant are unable to agree on the selection of a vocational assistance provider, the insurer must notify the director and the director then selects a provider. ORS 656.340(11); OAR 436-1200185(1). Since SAIF and claimant agreed upon Ms. Broten as claimant's new counselor, the director did not need to do the selecting. It is completely speculative then who the director would have selected or whether that person would have provided claimant any greater benefit than Ms. Broten provided. The director logically concluded that no value could be placed upon the parties' settlement that Ms. Broten would be claimant's new vocational counselor.

This issue is distinguishable from the question above about whether the January 2011 Order requiring SAIF to select a new vocational counselor produced a benefit for claimant warranting an attorney fee under ORS 656.385(1). By the time of the hearing in this matter, Ms. Broten had been selected and had prepared her RTWP. Thus, there was evidence that Ms. Broten's efforts provided greater benefit to claimant than Ms. Bostwick's efforts provided. In contrast, with respect to whether Ms. Broten provided a greater benefit than an unknown alternative new vocational counselor would have provided, there is not substantial evidence in the record to evaluate that question. An alternative new counselor might have provided claimant greater benefit than Ms. Broten provided.

Accordingly, the record does not prove a basis under ORS 656.340(16)(d) and OAR 436-001-0225(3) to modify the February 2011 Order. That Order should be affirmed.[4]

## ORDER

**IT IS THEREFORE ORDERED** in WCB Case No. 11-00008H that the Director's Review and Order dated January 13, 2011, is affirmed. SAIF shall pay Mr. Fontana an assessed attorney fee of $3,400 under ORS 656.385(3). Claimant's request for a penalty is denied.

**IT IS FURTHER ORDERED** in WCB Case No. 11-00061H that the Director's Review and Order dated February 23, 2011, is affirmed.

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[4] If he had prevailed on his request for hearing challenging the February 2011 Order's failure to award an attorney fee, claimant would not be entitled to an assessed attorney fee for his efforts at the hearing level under ORS 656.385(1). That section applies to disputes over "compensation benefits." A dispute over entitlement to an attorney fee issue does not involve "compensation." *Saxton v. SAIF*, 80 Or app 631, *rev den* 320 Or 159 (1986); *Dotson v. Bohemia, Inc.,* 80 Or App 233, *rev den* 302 Or (1986); *Jonathan J. Lee*, 63 Van Natta 1913, 1921 (2011).