

In the ORS 656.340 Vocational Assistance Dispute of

Chris D. Harder, Claimant

Contested Case No: 15-011H

Administrative Order No: VO15-013

FINAL ORDER

May 11, 2016

CHRIS D. HARDER, Petitioner
SAIF CORPORATION, Respondent

Before Louis Savage, Workers' Compensation Division Administrator

This matter comes before the director for review under ORS 656.704(2)(a) and OAR 436-001-0246. Chris Harder (claimant), through his attorney Brian Pocock, filed exceptions to Administrative Law Judge (ALJ) Kate Donnelly's May 14, 2015, Proposed and Final Order. SAIF Corporation (insurer), through its attorney Allison B. Lesh, filed a response.

The issue is whether claimant is eligible for vocational assistance benefits. The record has been reviewed, including the orders under review, the exhibits admitted into evidence, and the parties' written arguments. I adopt and affirm the ALJ's order with the following supplementation.

FACTUAL AND PROCEDURAL SUMMARY

I adopt the ALJ's findings of fact. Claimant held two jobs at the time of injury. He was injured on the job with the lower wage. As a result of his injury, he can no longer perform either job. His time loss benefits were based on wages from the lower-wage job, and he received supplemental disability benefits. Claimant was found ineligible for vocational assistance benefits based on the wage from the job at injury.

On Dec. 2, 2014, insurer issued a Notice of Ineligibility for Vocational Assistance finding claimant not eligible for vocational assistance because he did not have a substantial handicap to employment. Claimant requested review of insurer's determination by the Workers' Compensation Division's Employment Services Team (EST).

EST issued a Director's Review and Order on Feb. 5, 2015, which affirmed insurer's ineligibility determination. EST reasoned that under the rules, the wage used to determine temporary disability, and not supplemental disability, is used to determine suitable wage for purposes of eligibility for vocational assistance. Because claimant can be suitably employed working 23.8 hours per week at the rate of \$9.10 per hour, he does not have a substantial handicap to employment.

Claimant requested a hearing. ALJ Donnelly affirmed EST's order under ORS 656.340(16)(d).

Claimant contends there is no support for the proposition that because part of his time

loss was called “supplemental disability,” it cannot be included in the calculation of his adjusted weekly wage. According to claimant, time loss is calculated using all earnings from subject employment. Claimant further contends the rule at issue is *ultra vires* or is being interpreted to defeat the intention of the legislature that all employment be considered in determining vocational eligibility. He contends that his “regular employment” was as an EMT, and was not limited to the job on which he was injured.

CONCLUSIONS OF LAW

I recently addressed the issue of whether wages from other jobs the worker held at the time of injury should be considered in the determination of eligibility for vocational assistance benefits in the final contested case hearing order in the ORS 656.340 Vocational Assistance Dispute of [Jessie L. Chu, 20 CCHR 48 \(2015\)](#).¹ While the specific circumstances in that case were different than claimant’s circumstances here, the underlying legal issues are the same. That is, the meaning of “regular employment” as used in ORS 656.340 and the validity of OAR 436-120-0007 as it applies to workers who were employed in multiple jobs at the time of injury that were not seasonal or temporary. For the reasons explained in the final order in *Jessie L. Chu*, I uphold my interpretation and find no basis under ORS 656.340(16)(d) to modify EST’s order.²

IT IS HEREBY ORDERED the May 14, 2015, Proposed and Final Order is adopted and affirmed. Claimant is not eligible for vocational assistance.

¹ The director’s final order in the *Chu* matter is available on the Workers’ Compensation Division’s web site: www.cbs.state.or.us/wcd/policy/contested_cases/contested_cases_index.html

The director’s final order in the *Chu* matter is currently pending review by the Court of Appeals (*Chu v. SAIF Corporation*, CA A159901).

² I make the same conclusion in the final order in the ORS 656.340 Vocational Assistance Dispute of *Bernardita McTigrit*, 21 CCHR ____ (2016), which is also being issued today.