In the ORS 656.340 Vocational Assistance Dispute of

Bernardita McTigrit, Claimant

Contested Case No: 15-024H

Administrative Order No: VO 15-031

FINAL ORDER

May 11, 2016

BERNARDITA MCTIGRIT, Petitioner
SAIF CORPORATION, Respondent

Before Louis Savage, Workers' Compensation Division Administrator

---

The matter comes before the director for review under ORS 656.704(2)(a) and OAR 436-001-0246. Bernardita McTigrit (claimant), through her attorney Bennett P. Dalton, filed exceptions to Administrative Law Judge (ALJ) Aliza Bethlahmy's Aug. 24, 2015, Proposed and Final Order. SAIF Corporation (insurer), through its attorney Julie Masters, 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 with similar duties at the time of injury. As a result of her injury, she can no longer perform either job. Her time loss benefits were based on wages from the job at injury, and she received supplemental disability benefits. Claimant was found ineligible for vocational assistance benefits based on the wage from the job at injury.

On March 11, 2015, insurer issued a Notice of Ineligibility for Vocational Assistance finding claimant not eligible for vocational assistance because she did not have a substantial handicap to employment. Claimant requested review of insurer's determination by the Workers' Compensation Division Employment Services Team (EST).

EST issued a Director's Review and Order on April 29, 2015, which affirmed insurer's ineligibility determination. EST reasoned that under the rules, the wage used to determine temporary disability, not supplemental disability, is used to determine suitable wage for purposes of eligibility for vocational assistance. Because clamant can be suitably employed working 40 hours per week at the rate of $9.25 per hour, she does not have a substantial handicap to employment.

Claimant requested a hearing. ALJ Bethlahmy affirmed EST's order, finding claimant's argument that the wages must be based on all of her wages at the time of injury not persuasive.

Claimant contends her suitable wage must be calculated using the weekly wages of both of her jobs at the time of injury; OAR 436-120-0007(4) violates ORS 656.340(6) as applied to her; and she is eligible for vocational assistance because she has a substantial handicap to

employment. Claimant argues that "regular employment" as that term is used in ORS 656.340 means all employment held at the time of injury, not just the job at injury. Claimant's position is that OAR 436-120-0007 is inconsistent with the statute insofar as it limits the calculation of suitable wage to only the job at injury and the rule exceeds the authority of the director.

Insurer responds, in part, that the legislature did not intend that wages from a worker's second job be considered in calculating any benefit other than supplemental disability benefits. Claimant replies that the correct focus is on the legislative intent behind the phrase "employment held at the time of injury" in ORS 656.340.

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]

As claimant has not prevailed, she is not entitled to attorney fees under ORS 656.385(1).

IT IS HEREBY ORDERED the August 24, 2015, Proposed and Final Order is 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 *Chris D. Harder*, 21 CCHR ___ (2016), which is also being issued today.