

FILED: October 26, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

KENNETH D. DUBRAY,
Petitioner,

v.

SAIF CORPORATION
and PETERSON PACIFIC CORPORATION,
Respondents.

Department of Consumer and Business Services
0800282H

A143368

Argued and submitted on December 15, 2010.

Dale C. Johnson argued the cause and filed the brief for petitioner.

David L. Runner argued the cause and filed the brief for respondents.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

ARMSTRONG, J.

Reversed and remanded for reconsideration.

1 ARMSTRONG, J.

2 Claimant seeks review of a final order of the director of the Department of
3 Consumer and Business Services (DCBS). The final order concluded that SAIF, the
4 insurer for claimant's employer, Peterson Pacific Corporation, had properly terminated
5 claimant's eligibility for vocational assistance. Because we conclude that the director's
6 final order was not supported by substantial reason, we reverse and remand for
7 reconsideration.

8 Claimant was injured in 2002, and SAIF determined in 2006 that claimant
9 was eligible for vocational retraining. Claimant went through a long process of
10 identifying a suitable occupation for which he could be trained, which ultimately led
11 MacLeod, claimant's vocational rehabilitation counselor, to prepare and mail to claimant
12 a "Notice of Possible End of Eligibility for Vocational Assistance" (the warning letter).
13 The warning letter stated, in part, "To remain eligible for services, you must select an
14 occupation from this or other lists within ten (10) days of receiving this letter." It further
15 provided that, if claimant did not "select an occupation for training and communicate [it]
16 to [his] counselor within that time period, [his] eligibility for vocational assistance may
17 end * * * due to [former] OAR 436-120-0350[(9)]."¹

18 It is unclear when MacLeod mailed the warning letter to claimant. The

¹ Throughout this opinion, we refer to *former* OAR 436-120-0350 (12/1/07) and the other pertinent administrative rules that were in effect when this dispute arose. *Former* OAR 436-120-0350 (12/1/07) was renumbered on January 10, 2010, as OAR 436-120-0165, and the newly numbered rule was amended on November 15, 2010.

1 administrative law judge (ALJ), whose proposed final order findings of fact the director
2 adopted in her final order, stated that the warning letter was sent on April 18, 2008,
3 notwithstanding the ALJ's acknowledgement that MacLeod had testified that he had
4 mailed the warning letter on April 21, 2008. Although the ALJ did not attempt to
5 reconcile those conflicting dates, he did find that claimant was out of town when the
6 warning letter was mailed.

7 On April 21, 2008, claimant participated by telephone in a return-to-work
8 conference with MacLeod. During the conference, MacLeod noted that he had mailed
9 the warning letter to claimant and would provide claimant with an updated labor market
10 survey. Claimant actually received the warning letter on April 28, 2008.²

11 On May 2, 2008, claimant's counsel wrote a response to the warning letter
12 in which he requested additional time for claimant to review the labor market survey
13 information, which claimant had recently received. The response further noted that
14 counsel had received the warning letter on April 22, 2008.

15 On May 5, 2008, claimant's counsel sent a letter to MacLeod selecting an
16 occupation for training. On the same day, SAIF issued a "Notice of End of Eligibility for
17 Vocational Assistance," which provided:

18 "Your return-to-work assistance is ending for the following reason(s): You
19 have failed, after written warning letter, to fully participate in the vocational
20 process or to provide requested information necessary for these evaluations.

² The ALJ stated, "I believe it probable that claimant was out of town and did not actually receive the April 18, 2008 warning letter until April 28, 2008."

1 Therefore, under Workers' Compensation Division rules (*former* OAR)
2 436-120-0350(9)), you are no longer eligible for vocational assistance."

3 Claimant appealed that determination to the Employment Services Team
4 (EST) of DCBS, and the EST issued an order affirming SAIF's eligibility decision. The
5 EST determined:

6 "[Claimant] was made aware of the warning letter during the return-to-work
7 plan conference on April 21, 2008 that was held between the dates that he
8 states that he was away from his residence. * * * [He] was also made aware
9 of the [warning] letter by his attorney Mr. Wells upon return from his
10 vacation, and had time to respond to his vocational counselor prior to his
11 end of eligibility on May 5, 2008."

12 The EST order did not identify the date on which claimant received the warning letter,
13 other than to indicate that it did "not give weight to [claimant's] contention that his time
14 away from his residence did not allow him to receive the warning letter in time to review
15 it and respond."

16 Claimant appealed the EST's order to the ALJ, who issued a proposed final
17 order affirming the EST. The ALJ acknowledged that the EST had made factual errors in
18 its order, but concluded:

19 "[T]he ultimate holding of that decision was that claimant was on notice of
20 the warning letter as early as April 21, 2008 when he was advised that [the
21 warning letter] had issued and was in effect, that his counsel at the time had
22 received the [warning] letter and was in contact with the carrier and the
23 vocational services provider and that the regular mail copy of the [warning]
24 letter was not returned as undeliverable.

25 "* * * Claimant's own actions in not monitoring his mail, when he was
26 actually aware of the issuance and effect of the warning letter, is not
27 justification for an extension of the 10 day period noted in [the warning]
28 letter."

29 Nonetheless, as with the EST order, the ALJ's order did not identify the date on which

1 claimant received the warning letter for purposes of beginning the 10-day period in which
2 claimant was required to respond.

3 In her final order, the director resolved the issue of "whether claimant
4 timely responded to SAIF's warning letter" by adopting, without additional analysis, the
5 ALJ's proposed order. Claimant timely sought judicial review of the director's order in
6 this court.

7 A final order must be supported by substantial reason, which requires that
8 the order articulate "the *reasoning* that leads the agency from the *facts* that it has found
9 to the *conclusions* that it draws from those facts." [TTC - The Trading Co., Inc. v. DCBS](#),
10 235 Or App 606, 612, 234 P3d 1056 (2010) (quoting *Drew v. PSRB*, 322 Or 491, 500,
11 909 P2d 1211 (1996)) (emphasis in *Drew*). We therefore assess whether the director's
12 final order stated the reasoning that led from the director's findings of fact to her
13 conclusion that "claimant's eligibility for vocational services was properly terminated."

14 The warning letter required claimant to select an occupation within 10 days
15 of receiving the letter, otherwise he might lose his eligibility for vocational assistance
16 through application of *former* OAR 436-120-0350. *Former* OAR 436-120-0350
17 provided, as pertinent:

18 "A worker is ineligible or the worker's eligibility ends when any of
19 the following conditions apply:

20 * * * * *

21 "(9) The worker has failed, after written warning, to participate in
22 the vocational assistance process, or to provide relevant information."

1 *Former* OAR 436-120-0004(10) (12/1/07)³ further required that

2 "[w]arnings to the worker must state what the worker must do within a
3 specified time to avoid ineligibility or the ending of eligibility or training."

4 The only action that the warning letter required claimant to take to avoid termination of
5 his vocational eligibility was to respond with an occupation selection within 10 days of
6 receiving the warning letter. Thus, determining whether claimant's May 5, 2008,
7 selection of an occupation was timely depends on when claimant received the warning
8 letter for purposes of beginning the 10-day period.

9 The director determined that claimant actually received the warning letter
10 on April 28, 2008. If claimant's receipt of the warning letter began the 10-day period,
11 then claimant's May 5 selection of an occupation occurred within the 10-day period. In
12 rejecting that conclusion and upholding SAIF's termination of claimant's vocational
13 eligibility, the director did not identify the act or event that occurred before claimant
14 received the warning letter that constituted receipt of the letter for purposes of beginning
15 the 10-day period. Although the director highlighted the facts that (1) the April 21
16 conference placed claimant "on notice" of the warning letter; (2) claimant's counsel had
17 received the warning letter; and (3) the regular mail copy of the warning letter was not
18 returned as undeliverable, the director did not explain whether any of those
19 circumstances, alone or combined, constituted receipt of the warning letter by claimant,
20 much less *why* they did.

³ *Former* OAR 436-120-0004(4) (12/1/07) was renumbered and amended on November 15, 2010.

1 The latter point is particularly significant. *Former* OAR 436-120-0350
2 required the warning to be written, and the warning letter stated that the 10-day period for
3 claimant to select an occupation began to run from receipt of the warning letter, not from
4 receipt of the notice or information embodied in the warning letter. In order for the
5 director's final order to satisfy the substantial reason requirement, it must identify when
6 and how claimant received the warning letter and how that receipt meets the requirement
7 in *former* OAR 436-120-0350 that the warning be written.

8 Reversed and remanded for reconsideration.