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In the Matter of the Vocational Assistance Dispute of

**Campbell, Teddy, Claimant**

Contested Case No: HH02-003

**PROPOSED & FINAL ORDER**

April 19, 2002

GENERAL INSURANCE CO., Petitioner

TEDDY CAMPBELL, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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Administrative Law Judge Paul Vincent conducted a telephone hearing in this matter on March 20, 2002. Petitioner General Insurance Co. (insurer) appeared through attorney Robb Schoetthoefter. Respondent Teddy Campbell (claimant) appeared through attorney Scott McNutt Sr.. The Workers' Compensation Division (WCD) waived appearance. The petitioner appeals an administrative order by the Workers' Compensation Division, Rehabilitation Review Unit (the director or RRU) finding claimant ineligible for vocational assistance. Testimony was taken from Bruce McLean.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

**ISSUE**

The issue is whether claimant is ineligible for vocational assistance because he misrepresented a matter material to evaluating eligibility or providing vocational assistance under ORS chapter 656 and OAR chapter 436.

**EVIDENTIARY RULINGS**

WCD Exhibits 1-23 were admitted into the record without objection. Petitioner's Exhibits P1-P6 were admitted into the record without objection. The record closed at the hearing's conclusion.

**FINDINGS OF FACT**

I adopt the findings of the Administrative Order issued by RRU in this matter on November 23, 2001. (Ex. 21). A 35-minute surveillance videotape was taken of claimant on the premises of Ken's Auto Repair and other locations. The tape contains "date stamping" that indicates the events depicted took place on August 7-8, 2001. The claimant shows that claimant performed occasional light tasks with both hands. (Ex. P2).

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**FINDINGS OF ULTIMATE FACT**

Claimant has not been shown to have misrepresented a matter material to evaluating

eligibility or providing vocational assistance under ORS chapter 656 and OAR chapter 436.

## OPINION AND CONCLUSIONS OF LAW

### Standard of Review

I may modify the director's order only if it: violates a statute or rule; exceeds the statutory authority of the agency; was made upon unlawful procedure; or was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). In determining whether one of those criteria exists, I may admit evidence, which was not before RRU, and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); see also *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proof rests on the proponent of that fact or position. ORS 183.450(2).

Insurer asserts that RRU erred by failing to find that claimant has materially misrepresented his work history and physical capabilities. Pursuant to ORS 656.340(1)(a), an insurer is obligated to provide vocational assistance to injured workers who are eligible. However, insurer points out that OAR 436-120-0350 also provides that workers can become ineligible under various circumstances, including where “(12) the worker has misrepresented a matter material to evaluating eligibility or providing vocational assistance.” A claimant’s current wage earning ability is a matter material to evaluating eligibility or providing vocational assistance. *See Ascencion Madera*, 4 WCSR 224 (1999)(Claimant falsely denied current employment; claimant’s wage earning ability is a matter material to evaluating eligibility or providing vocational assistance and claimant was therefore ineligible for vocational assistance pursuant to OAR 436-120-0350(12)).

I disagree with insurer’s conclusion that the facts in this case are analogous to *Madera*. The insurer argues that the videotape provided in evidence demonstrates that claimant was employed at Ken’s Auto Repair after previously denying employment. Having viewed the videotape in its entirety, I find claimant’s characterization of his activities as “hanging out” at Ken’s to be more appropriate. The videotape appears to be an edited “highlights” tape that was not continuously filmed, but instead starts and stops to depict various activities at various times. Despite the fact that only “highlights” appear to have been selected, the claimant is primarily seen to be standing around various automobiles that are under repair and chatting with what appear to be uniformed Ken’s workers. While the Ken’s workers appear to be quite active, claimant mainly appears to have been standing in a nonchalant fashion while smoking cigarettes. On several occasions he appears to rearrange items on a work bench for no particular purpose. On several occasions he does appear to be leaning into a car that another uniformed individual is working on. It appears that claimant was in some manner consulting with the uniformed individual but not in any directed manner. The only movement that is clearly depicted on the tape that could be characterized as “work” is claimant’s activities at the steering wheel of several cars. Claimant appears to have been momentarily assisting the mechanics on duty at Ken’s. Of particular note was claimant’s extremely awkward behavior in “guarding” the wrist that bore a “wrap” during this particular activity. Claimant appears to be very gingerly keeping the steering wheel in place with the wrapped hand while he awkwardly reaches over with the other hand to continuing turning the wheel with the unwrapped hand only. In short, claimant’s activities did

not appear consistent with the activities of an individual who could reasonably expect recompense for his activity. In the absence of any supporting testimony by either the individual who made the surveillance tape or medical testimony that the claimant's activities were inconsistent with his work restrictions, I agree with claimant that insurer is asking for purely speculative conclusions and has not met its burden of proof.

Similarly, the insurer cites the short scene where claimant is depicted apparently casting a lure with a fishing rod. The scene is short and shows only brief clips of claimant casting with the rod. It is unclear how much force is necessary to cast with the rod or the duration in which claimant engaged in the activity. No medical evidence is presented to demonstrate that the activity as depicted is inconsistent with claimant's physical restrictions. This evidence, standing by itself, simply does not support the conclusions that insurer asks me to draw from it without speculation. Accordingly, I agree with claimant and affirm the underlying order.

### **ORDER**

IT IS HEREBY ORDERED that the RRU's order in this matter, dated November 23, 2001, is affirmed.

DATED this 19th day of April, 2002.

By: \_\_\_\_\_  
Paul Vincent, Hearing Officer  
Hearing Officer Panel