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In the Matter of the Vocational Assistance Dispute of

**Autry, Mitchell, Claimant**

Contested Case No: HH02-030

**PROPOSED & FINAL ORDER**

June 14, 2002

MITCHELL AUTRY , Petitioner

INSURANCE CO. OF THE WEST , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Administrative Law Judge Paul Vincent conducted a telephone hearing in this matter on April 18, 2002. Petitioner Mitchell Autry (claimant) appeared on his own behalf. Respondent Insurance Co. of the West (insurer) appeared through attorney Leah Sideras. 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 Mitchell Autry. The record was left open for four weeks for the receipt of documentary evidence.

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 under ORS chapter 656 and OAR chapter 436.

**EVIDENTIARY RULINGS**

WCD Exhibits 1-23 were admitted into the record without objection. Respondent's Supplemental Exhibits 24-32 were admitted into the record without objection.

**FINDINGS OF FACT**

I adopt the findings of the Administrative Order issued by RRU in this matter on January 22, 2002. (Ex. 20). I make the following additional findings of fact:

Claimant's condition of Mild Overuse Syndrome, both hands, was accepted by insurer as a non-disabling claim on April 11, 2000 with a February 1, 2000 date of injury 1. On May 10, 2000, Dr. Puziss opined that the overuse syndrome was medically stationary, and that claimant "should not do any heavy repetitive use of his hands." (Ex. 26).

Claimant's attorney requested reclassification of the claim from non-disabling to disabling on July 23, 2001. (Ex. 28).

On August 28, 2001, insurer denied the reclassification of the overuse syndrome claim. (Ex. 29). Claimant appealed the insurer's denial of his request to reclassify the overuse syndrome claim from non-disabling to disabling to the Workers' Compensation Division. The director found the claim disabling. (Ex. 30). On February 8, 2002, an Opinion and Order of the Workers' Compensation Board, Hearings Division set aside the Director's Review and Classification Order. The Order found that the request for reclassification had not been submitted to the insurer within one year of the Notice of Acceptance and therefore the Workers' Compensation Division was without jurisdiction to review the claim. The matter was dismissed for failure to file an aggravation claim under ORS 656.273. (Ex. 31).

### **FINDINGS OF ULTIMATE FACT**

Claimant is ineligible for 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).

Claimant asserts that RRU erred by failing to find that he was substantially handicapped to employment, but raises no new argument and simply reasserts the argument he made prior to the Director's Review and Order. I find that the evidence supports the director's finding that claimant is not substantially handicapped to employment.

First, the director found that claimant's suitable wage was 80 percent of the average weekly wage of \$175.95 per week, which is \$140.76 or \$6.50 per hour working approximately 22 hours

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**1 THE DIRECTOR'S REVIEW AND ORDER ERRONEOUSLY FOUND THE DATE OF INJURY FOR THIS CLAIM TO BE FEBRUARY 1, 2001.**

per week (claimant was only employed part time). The claimant did not directly challenge these findings, and I find that the record supports them.

Second, RRU found that claimant had returned to suitable employment, pursuant to 436-120-0005(9), for a period of more than 60 days and was therefore ineligible for vocational assistance

under OAR 436-120-0350. RRU correctly noted that that claimant returned to work at St. Vincent's for sixteen weeks after his medically stationary date of February 20, 2001. His average weekly wage was \$309 per week, which is more than he was earning at the time of injury.

Finally, claimant finds error in RRU's failure to consider his overuse syndrome claim when determining that he had no substantial handicap to employment. RRU found that claimant had no substantial handicap to employment pursuant to OAR 436-120-0005(8), which defines "substantial handicap" as meaning that the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. Here, the claimant repeatedly argued that the limitations placed on the repetitive use of his hands, when combined with the limitations from the accepted disabling injury, prevent him from finding employment. However, the definition at OAR 436-120-0005(8) requires claimants lack of physical capacity, knowledge, skills or abilities to be due to the accepted disabling injury. Here, the limitations being raised by claimant as the most significant hindrance to employment, the inability to use his hands repetitively, is attributable to his non-disabling overuse syndrome claim. Inasmuch as the claim is classified as disabling, RRU appropriately found that there was no substantial handicap to employment pursuant to OAR 436-120-0005(8). Accordingly, I affirm the administrative order.

### **ORDER**

IT IS HEREBY ORDERED that the RRU's order in this matter, dated January 22, 2002, is affirmed.

DATED this \_\_\_\_ day of June 2002.

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