
In the Matter of the Compensation of
TERRY J. ROSE, Claimant
WCB Case No. 01-07660
ORDER ON REVIEW
Fontana & Takaro, Claimant Attorneys
Reinisch Mackenzie et al, Defense Attorneys

Reviewing Panel: Members Langer, Bock, and Phillips Polich. Member Phillips Polich dissents.

The insurer requests review of Administrative Law Judge (ALJ) Kekauoha's order that affirmed an Order on Reconsideration that awarded an additional 6 percent (19.2 degrees) unscheduled permanent disability for claimant's low back condition. On review, the issue is extent of unscheduled permanent disability.¹ We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

We begin with a summary of the pertinent facts.

Claimant compensably injured his low back on May 18, 1999. The insurer accepted claimant's injury claim for "disabling lumbar radiculopathy."

An April 2000 Notice of Closure awarded temporary disability and 14 percent unscheduled permanent disability for claimant's low back. A September 2000 Order on Reconsideration awarded 5 percent scheduled permanent disability for claimant's right foot and otherwise affirmed the closure notice.

Meanwhile, in July 2000, the insurer modified its acceptance to include claimant's L4-5 disc herniation and reopened the claim. A January 12, 2001 Notice of Closure awarded no additional temporary or permanent disability. An April 6, 2001 Order on Reconsideration set aside the closure as premature.

¹ We acknowledge claimant's motion to dismiss the insurer's request for review and refer the parties to our May 20, 2002 order denying the motion.

On April 16, 2001, claimant was rear-ended in a motor vehicle accident (MVA). His driver's seat back broke and he sustained direct trauma to his lower thoracic-upper lumbar area. (*See* Ex. 46-3).

An April 18, 2001 Notice of Closure closed the claim without additional temporary or permanent disability. Claimant requested reconsideration and a panel of medical arbiters examined him. Based on the medical arbiters' report, a September 5, 2001 Order on Reconsideration awarded an additional 6 percent unscheduled permanent disability for a total of 20 percent for claimant's low back. The insurer requested a hearing, contending that claimant was not entitled to additional permanent disability. The ALJ affirmed the reconsideration order's award. We disagree, based on the following.

Evaluation of permanent disability must be "as of the date of issuance of the reconsideration order." ORS 656.283(7). For purpose of rating permanent disability, only the opinions of claimant's attending physician at the time of claim closure, or any findings with which he or she concurred, and the medical arbiter's findings, if any, may be considered. *See* ORS 656.245(2)(b)(B), ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994).

In this case, Dr. Flemming, treating physician, opined that claimant had no impairment in addition to that reported in March 2000. (Ex. 40). The arbiters, on the other hand, recorded claimant's lumbar range of motion as: "true lumbar flexion 45 degrees; extension 15 degrees; lateral flexion right 20 degrees and left 24 degrees[.]" noting that claimant's measurements were the same or better than on prior examinations. (Ex. 46-4-5). The arbiters acknowledged that claimant's lumbar flexion did not meet the straight leg raising (SLR) check, but they opined that this was due to pain and tenderness from the injuries sustained in the MVA. (*Id.* at 5). *See* Director's Bulletin No. 239 (rev. July 15, 1998) at 36 (providing that "measurements of true lumbar flexion are invalid if the tightest straight leg raising (SLR) angle is not equal to or within 10 degrees of the sum of the lumbar extension and flexion measured at midsacrum.").

The arbiters concluded that claimant's "lumbar range of motion findings were valid" because they were comparable to prior measurements. (*Id.*) Despite acknowledging claimant's current failed SLR test, the arbiters did not acknowledge that claimant's prior measurements also included invalid SLR results, *before* the off work MVA. There is no explanation why claimant's current lumbar flexion could be valid based on its similarity with prior measurements, when all three sets

of measurements included failed SLR results. *See* Director's Bulletin No. 239 at 36. Because the arbiters' "validity conclusions" do not follow from the evidence they relied on, we find their conclusions unpersuasive. Moreover, we cannot say that the arbiters provided a written opinion based on sound medical principles explaining why claimant's otherwise invalid lumbar flexion findings are valid. *See* OAR 436-035-0007(28).

The arbiters also estimated that claimant's range of motion impairment was 90 percent due to his accepted injury and 10 percent due to the MVA, again noting the current measurements' similarity with prior ("pre-MVA") measurements and claimant's reporting that his symptoms had improved before the MVA. (Ex. 46-5). In addition, the arbiters reported claimant's statement that his current range of motion limitations "were more from the pain and tenderness in the lower thoracic-upper lumbar area than the lower back, right buttock and right lower extremity symptoms." (*Id.* at 4). The arbiters also opined that the MVA "clearly" limited claimant's range of motion testing, observing that claimant "restricted himself due to discomfort in [the lumbar] area after less than 10 degrees of range of motion in all directions." (*Id.* at 5).

Thus, the arbiters apparently accepted claimant's statement that his symptoms were due more to the off-work MVA, than due to the work injury, noting that these symptoms "clearly" restricted claimant's range of motion. We are unable to reconcile the arbiters' various pronouncements to conclude that claimant's "MVA-symptom restricted" range of motion impairment is primarily (90 percent) injury-related. Because the arbiters also found that claimant self-restricted his range of motion "after less than 10 degrees in all directions," we are not persuaded that the arbiters' "apportionment conclusions" follow from their findings. In sum, the record lacks a persuasive explanation how claimant's range of motion impairment could be 90 percent due to the work injury, when he self-restricted all range of motion because of "MVA-related" pain. Under these circumstances, we find the arbiters' opinion as a whole unpersuasive. Consequently, we find the evidence insufficient to establish valid injury-related impairment and we conclude that claimant is not entitled to additional permanent disability benefits.

ORDER

The ALJ's order dated February 21, 2002 is reversed. The Order on Reconsideration is reversed. The Notice of Closure is reinstated and affirmed. The ALJ's attorney fee award is reversed.

Entered at Salem, Oregon on October 1, 2002

Board Member Phillips Polich dissenting.

I agree with the ALJ's opinion and analysis. And I would adopt his order finding claimant entitled to 6 percent unscheduled permanent disability in addition to that awarded on reconsideration. Consequently, I must respectfully dissent from the majority's contrary opinion.