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In the Matter of the Compensation of  
**RORY L. SANDUSKY, Claimant**  
Own Motion No. 04-0157M  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE ON  
RECONSIDERATION  
Martin J McKeown, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

On December 20, 2004, we withdrew our December 3, 2004 Own Motion Order Reviewing Carrier Closure that modified a Notice of Closure to award claimant additional unscheduled permanent disability of 35 percent (112 degrees) and additional scheduled permanent disability of 4 percent (7.68 degrees) for new medical conditions (“partial tear, right rotator cuff, post debridement 9/27/95; partial tear, right shoulder labrum debrided 9/27/95; right rotator cuff tendinitis; right biceps tenosynovitis; and synovitis, right shoulder”). We took this action to consider the SAIF Corporation’s motion for reconsideration. Having received claimant’s response and SAIF’s reply, we now proceed with our reconsideration.

SAIF argues that claimant’s unscheduled permanent disability award should be reduced because his “social/vocational” factors should not be considered. Specifically, SAIF contends that claimant’s attending physician, Dr. Whitney, released him to regular work. Thus, SAIF argues that under ORS 656.726(4)(f)(D),<sup>1</sup> impairment is the only factor to be considered in the evaluation of claimant’s unscheduled permanent disability.

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<sup>1</sup> This statute provides, in relevant part:

“(D) Notwithstanding any other provision of this section, impairment is the only factor to be considered in evaluation of the worker's disability under ORS 656.214 (5) if:

(i) The worker returns to regular work *at the job held at the time of injury*;

(ii) The attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 releases the worker to regular work *at the job held at the time of injury* and the job is available but the worker fails or refuses to return to that job; or

(iii) The attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 releases the worker to regular work at the job held *at the time of injury* but the worker's employment is terminated for cause unrelated to the injury.” (Emphasis added).

Claimant responds that we correctly found that he is entitled to factoring for age, education, and adaptability. Specifically, claimant contends that: (1) factoring may be based on more than an attending physician's non-release to regular work; and (2) even if we were to assume that a non-release to regular work by an attending physician was the only way to trigger factoring, claimant's attending physician did not release him to his regular work at the time of claim closure.

We need not decide whether factoring may be based on evidence other than an attending physician's non-release to regular work, because we conclude that claimant's attending physician, Dr. Whitney, did not release him to "regular work at the job held at the time of injury." *See* ORS 656.726(4)(f)(D); OAR 436-035-0005(17)(c);<sup>2</sup> OAR 436-035-0270(3).<sup>3</sup> Our conclusion is based on the following reasoning.

Claimant's job at injury was "dock worker" (DOT# 922.687-062), which has a strength of "heavy." (Ex. 29-2). In January 1997, claimant began working as a motel maintenance person (DOT# 381.687-014), which also has a strength of "heavy."<sup>4</sup> (Ex. 40-1).

On March 8, 2000, claimant returned to Dr. Whitney for right shoulder treatment. At that time, Dr. Whitney gave claimant work restrictions of avoiding overhead work. (Ex. 34). On March 28, 2000, claimant's right shoulder was still painful. Dr. Whitney noted that claimant was "taking off doors" and "doing a lot of work with his shoulders." He stated, without further explanation, "[w]e will keep [claimant] in regular work right now." (Ex. 35). Dr. Whitney continued to

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<sup>2</sup> This rule provides:

"[r]egular work means the job the worker held at the time of injury."

<sup>3</sup> Pursuant to OAR 436-035-0270(3), only impairment shall be rated for workers who:

"(a) Return to and are working at their regular work on the date of issuance; or

"(b) The attending physician releases the worker to regular work and the work is available, but the worker fails or refuses to return to that job; or

"(c) The attending physician releases the worker to regular work, but the worker's employment is terminated for cause unrelated to the injury."

<sup>4</sup> Claimant described his motel maintenance job duties as "painting, maintaining the spa, dealing with the parking lot, and shampooing carpets." (Ex. 40-1).

treat claimant's right shoulder, but did not address claimant's work restrictions in his subsequent chart notes through June 7, 2000. (*See* Exs. 36; 38; 39).

On October 23, 2000, at SAIF's request, claimant was examined by Dr. Donahoo, an orthopedic surgeon. (Ex. 40). Dr. Donahoo noted that Dr. Whitney had specifically restricted claimant's work to avoid overhead lifting. (Ex. 40-3). Additionally, Dr. Donahoo stated: "[i]t worked out that [claimant] was able to do his regular job, *since he was not doing overhead painting*, and he continued working." (Ex. 40-3) (Emphasis added).

Dr. Donahoo was asked whether claimant was capable of performing his regular job without restrictions. He responded:

"[claimant] is doing his regular job with the restriction of no overhead activity, and he should continue to do that. \*\*\*" (Ex. 40-9).

Claimant's treating physician, Dr. Whitney, concurred with Dr. Donahoo's report. (Ex. 43).

Following Dr. Donahoo's October 2000, examination, there is no evidence that Dr. Whitney released claimant to his motel maintenance work without restrictions. Additionally, Dr. Whitney did not release claimant to his job-at-injury (dock worker). Because Dr. Whitney concurred with Dr. Donahoo's opinion that claimant should continue to work with the restriction of no overhead activity, we conclude that claimant was not released to his "regular work." OAR 436-035-0005(17)(c) (2003); OAR 436-035-0270(3) (2003); *see also* *Frederic J. Rickert*, 55 Van Natta 1017, 1019 (2003) (because the claimant did not return to his job-at-injury (or substantially similar work), and because he had not been released by his attending physician to return to such work, he was entitled to social/vocational values for age, education, and adaptability).<sup>5</sup>

Consequently, claimant is entitled to the social/vocational values for age, education, and adaptability.

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<sup>5</sup> In *Rickert*, we applied the Director's standards adopted in WCD Admin. Orders 98-055 (eff. July 1, 1998) and 99-056 (eff. April 26, 1999). *Id.* at 1019. Under the rules in effect at that time, "regular work" meant the job the worker held at the time of injury or *employment substantially similar in nature*. *See* OAR 436-035-0005(17)(c) (1999); *Rickert* at 1019. (Emphasis added). Here, the current version of OAR 436-035-0005(17)(c) has deleted the phrase "or employment substantially similar in nature." Therefore, under the current rule, claimant must be released by his attending physician to his job-at-injury; *i.e.*, dock worker, rather than to his motel maintenance job. *See also* ORS 656.726(4)(f)(D)(i).

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our December 3, 2004 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on February 9, 2005