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In the Matter of the Compensation of  
**JASON MONAGHAN, Claimant**  
WCB Case No. 08-01671  
ORDER ON RECONSIDERATION  
Malagon Moore et al, Claimant Attorneys  
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman. Member Langer dissents.

On February 6, 2009, we withdrew our January 16, 2009 order that affirmed an Administrative Law Judge's (ALJ's) order that affirmed an Order on Reconsideration's award of 21 percent work disability for claimant's right foot/ankle and facial/teeth conditions. We took this action to consider the SAIF Corporation's contention that claimant is not entitled to an award for "work disability." Having received claimant's response, we proceed with our reconsideration. Based on the following reasoning, we adhere to our previous decision.

SAIF argues that claimant has to prove that he is entitled to a "work disability" award. According to SAIF, claimant must prove that his attending physician did not release him to regular work, and also must prove that he did not return to his regular work at the job held at the time of injury.

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). However, because SAIF requested a hearing regarding the Order on Reconsideration, it has the burden of establishing error in the reconsideration process. *Marvin Wood Products v. Callow*, 171 Or App 175, 183-184 (2000); *Robert A. Voss*, 60 Van Natta 3208, 3210, *recons*, 60 Van Natta 3492 (2008); *Albert T. Jones*, 60 Van Natta 1158, 1159 (2008).

SAIF argues that claimant is not entitled to an award of "work disability" because all the evidence indicates that he returned to his regular work as a corrections officer and then left his at-injury job for personal reasons unrelated to his work injury.

Claimant responds that Dr. Gifford, his attending physician, did not release him to regular work duty and later affirmed that claimant's work injury precluded his return to work as a corrections officer. Claimant further contends that the evidence does not establish that he returned to regular work.

Under ORS 656.726(4)(f)(E) (2005), impairment is the only factor to be considered in evaluation of a worker's disability under ORS 656.214(2) (2005)<sup>1</sup> if "the worker has been released to regular work by the attending physician or nurse practitioner authorized to provide medical services under ORS 656.245 or has returned to regular work at the job held at the time of injury." *See also* OAR 436-035-0009(4) (WCD Admin. Order No. 05-074; effective January 1, 2006).<sup>2</sup> "Regular work" means "the job the worker held at the time of injury." ORS 656.214(1)(d) (2005); OAR 436-035-0005(15).

In our previous order, we explained that if claimant returned to his regular work at the job held at the time of injury, or was released to such work by his attending physician, Dr. Gifford, his permanent disability would be limited to impairment and he would not be entitled to a "work disability" award. ORS 656.726(4)(f)(E) (2005). We concluded that the record did not establish either requirement.

Again on reconsideration, SAIF relies on a January 29, 2008 email from Mr. Lankford, the employer's safety manager, to establish that claimant returned to his regular work as a corrections officer, performed his regular work for over nine months, and then left his regular employment for reasons unrelated to his work injury. Mr. Lankford's January 29, 2008 email to SAIF's claim adjuster stated, in part:

"[Claimant] was released to full duty on December 5, 2006. From 12/5/06 he worked and remained on full duty status until September 14, 2007, at which time he resigned. His reason for his resignation was to move closer to his children and to go back to school." (Ex. 22).

On reconsideration, SAIF contends that Mr. Lankford's email is not ambiguous as to what "full duty" meant and whether claimant had returned to his regular work as a corrections officer. According to SAIF, any confusion is caused by the fact that claimant had two treating physicians. We disagree.

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<sup>1</sup> For injuries, as here, occurring on or after January 1, 2006, ORS 656.214(2) (2005) and ORS 656.726(4)(f)(E) (2005) apply. *See* Or Laws 2005, ch 653, § 5; *Kandace K. Kraft*, 59 Van Natta 2524, 2525 n 3 (2007).

<sup>2</sup> OAR 436-035-0009(4) provides: "Only permanent impairment is rated for those workers with a date of injury on or after January 1, 2006, and who have been released or returned to regular work by the attending physician or authorized nurse practitioner."

In our prior order, we explained that SAIF had not challenged the ALJ's finding that Dr. Gifford was claimant's attending physician. *See* ORS 656.005(12)(b) (a worker's "attending physician" is the doctor or physician "primarily responsible for the treatment of a worker's compensable injury"). SAIF now asserts that claimant had two treating physicians, but it acknowledges that Dr. Gifford was apparently acting as the attending physician for claimant's overall injuries, whereas Dr. Carpenter was treating claimant's foot condition.

We continue to find that Dr. Gifford was claimant's attending physician. Based on the statutory scheme, we must determine whether claimant was released to return to regular work by Dr. Gifford, or whether claimant returned to his regular work at the job held at the time of injury. In either case, claimant's permanent disability would be limited to impairment and he would not be entitled to a "work disability" award. ORS 656.726(4)(f)(E) (2005).

On reconsideration, we adhere to our conclusion Dr. Gifford did not release claimant to return to regular work. The record does not establish that Dr. Gifford's "full duty" release was the same as a release to "regular work" or that it was based on an accurate understanding of claimant's regular work. We reason as follows.

On November 15, 2006, Dr. Gifford reported that claimant "returns working full duty and he is not symptom free but is having no pain." Claimant had paresthesias along the trigeminal nerve and numbness along the lateral aspect of his upper right thigh where the inmate had kicked him. Dr. Gifford recommended different medication and stated "[c]ontinue full duty." (Ex. 5B).

Although Dr. Gifford's November 15, 2006 chart note said that claimant was "working full duty," we explained in our prior order that the record does not support the conclusion that claimant was performing his "regular work" at that time. On August 9, 2006, Dr. Carpenter examined claimant after performing surgery, and he stated that he had "returned [claimant] to light duty in the mailroom." (Ex. 3). On the following day, Dr. Carpenter approved a modified job in the mailroom, which included sorting or reading mail, filing documents, inventorying property, and other similar duties. (Ex. 3A).

Claimant's cast was removed on September 7, 2006, and Dr. Carpenter anticipated a return to "full duty" in one month. (Ex. 4). However, claimant was still having discomfort in the ankle on October 4, 2006, so Dr. Carpenter postponed the closing examination for two to three months. (Ex. 5). Dr. Carpenter signed a form indicating that claimant "may return to work/school without limitations" on December 5, 2006.<sup>3</sup> (Ex. 7).

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<sup>3</sup> We note that Dr. Carpenter was not the attending physician and in any event, the record does not establish that Dr. Carpenter was aware of the requirements of claimant's regular job at injury.

The record indicates that, at the time of Dr. Gifford's November 15, 2006 chart note, claimant was still performing his modified job in the mailroom. The evidence does not establish that claimant was performing his "regular work" on November 15, 2006. We continue to find that the record does not support the conclusion that Dr. Gifford's November 15, 2006 reference to claimant "working full duty" meant that he was performing his "regular work" at that time or that he was released to perform regular work.

When claimant returned to Dr. Gifford on December 19, 2006, he noted that claimant was having foot pain, which Dr. Carpenter would be reassessing the next week. Dr. Gifford's chart note indicated that claimant should "recheck" in one month, and he noted: "Return to full duty with no limitations." (Ex. 9).

However, as previously explained, Dr. Gifford's December 19, 2006 chart note did not explain what he meant by "full duty" or whether his reference to "full duty" in that chart note meant something different than his reference to "full duty" in the November 15, 2006 chart note. The record does not include information indicating that, by December 19, 2006, Dr. Gifford was informed about the nature of claimant's regular work duties. We continue to find that Dr. Gifford's reports do not support the conclusion that he released claimant to "regular work" on December 19, 2006. Our conclusion is further supported by Dr. Gifford's January 22, 2008 concurrence letter, which said it was medically probable as a consequence of his industrial injury that claimant was permanently precluded from returning to his regular job as a corrections officer. (Ex. 21-2).

We turn to SAIF's argument that claimant is not entitled to an award of work disability because he actually returned to his regular work. *See* ORS 656.726(4)(f)(E) (2005) (impairment is the only factor to be considered in evaluation of a worker's disability under ORS 656.214(2) (2005) if the "worker has \* \* \* returned to regular work at the job held at the time of injury").

On review, SAIF relied on the January 29, 2008 email from Mr. Lankford to establish that claimant had returned to regular work. On reconsideration, SAIF relies on additional documents to establish that claimant returned to regular work, including Dr. Carpenter's December 5, 2006 note. On that date, Dr. Carpenter signed a form and checked a box indicating that claimant "may return to work/school without limitations" on December 5, 2006. (Ex. 7). However, we find that Dr. Carpenter's chart note does not establish that claimant actually returned to regular work as a corrections officer because the record did not indicate that he was aware of the requirements of claimant's job at injury. *See Keith Weyerts*, 60 Van Natta 2770, 2773 (2008), *recons*, 61 Van Natta 697 (because the

record did not establish that the attending physician had an adequate understanding of the claimant's job duties as a truck driver, his opinion did not constitute a release to "regular work"), *abated*, 61 Van Natta 962 (2009).

SAIF also relies on Dr. Turnbull's December 5, 2006 chart note that said "Back to full duty tomorrow." (Ex. 8). The record includes only one chart note from Dr. Turnbull, chiropractor. There is no indication what Dr. Turnbull meant by "full duty" or whether he was aware of the requirements of claimant's job at injury. We find that Dr. Turnbull's chart note is not sufficient to establish that claimant actually returned to his regular work at the job at injury.

Based on Dr. Gifford's December 19, 2006 chart note that said "Return to full duty with no limitations" and his February 21, 2007 chart note that said claimant "continues to do his job without restrictions[,] SAIF argues that claimant returned to regular work. (Exs. 9, 11). However, the context of Dr. Gifford's chart notes does not assist us in determining what he meant by "full duty" or whether "full duty" meant claimant's "regular work" at injury. As claimant points out, Dr. Gifford noted that claimant could "[c]ontinue on full duty" on November 15, 2006 (Ex. 5B), but SAIF argues that claimant did not return to regular work until December 5, 2006. Moreover, the record does not indicate whether Dr. Gifford understood the nature of claimant's regular work duties. We are not persuaded that Dr. Gifford's chart notes establish that claimant actually returned to his regular work at the job at injury.

SAIF relies on Dr. Cancado's March 26, 2007 statement that claimant "works as a correctional officer[,] arguing that his statement is in the present tense, which means that as of March 26, 2007, claimant was working as a corrections officer. (Ex. 13). Claimant responds that Dr. Cancado's comment is unexplained and unpersuasive.

Dr. Cancado, neurologist, examined claimant on one occasion, on referral from Dr. Gifford to evaluate claimant's paresthesias and determine whether he had any nerve damage. (Exs. 11, 13). In the section of Dr. Cancado's report regarding "social history," he stated that claimant "works as a correctional officer." Dr. Cancado reported that claimant complained of paresthesias in the left neck, in the right hip and also in the right toes. Claimant also had some paresthesias in the right lateral lower extremity. Dr. Candado noted that claimant had tried medication, but it was not helpful. He reported that "[w]alking or standing for any prolonged period of time can aggravate the symptoms in the foot." (Ex. 13-1). Dr. Cancado diagnosed right foot numbness and paresthesias associated with a

right Tinel's sign at the medial ankle, with a differential diagnoses to include a right tarsal tunnel syndrome, as well as left upper anterior neck numbness and/or paresthesias. Dr. Cancado recommended an EMG/NCS of the right lower extremity.

In light of claimant's previous release to work in the mail room, we find that Dr. Cancado's comment that claimant "works as a correctional officer" is insufficient to establish that claimant returned to his "at-injury" job. In addition, Dr. Cancado's report of claimant's remaining symptoms, particularly that walking or standing for any prolonged period of time aggravated his foot symptoms, appears to be inconsistent with finding that claimant had actually returned to his regular work at injury as a correctional officer.

SAIF also relies on comments from the medical arbiters to support the conclusion that claimant returned to his regular work. Dr. Myall reported on January 22, 2008 that claimant "tells me he has no real concerns now and that he is wanting to leave this area and go to New York." (Ex. 19-2). On the same date, Drs. Griffin and Harris reported that claimant "is currently working in the tire department at Wal-Mart in New York State." (Ex. 20-1). They said that claimant lived "out of state" and "is not seeing a physician for this injury" and he was observed "walk[ing] comfortably from the waiting area to the exam room." (Ex. 20-2, -3).

We acknowledge that the arbiters reported that claimant was working in another state as of January 2008. Nevertheless, their reports do not establish that claimant had actually returned to his regular work as a corrections officer before he moved to New York. Dr. Myall evaluated claimant's facial injuries, and his comment that claimant "tells me he has no real concerns now" was followed by his report that claimant is "able to eat whatever he wishes and also has no difficulty swallowing." (Ex. 19-2). Dr. Myall's report does not establish that claimant returned to his regular work.

The comment from Drs. Griffin and Harris that "walk[ing] comfortably from the waiting area to the exam room" does not assist us in deciding whether claimant returned to regular work, particularly when they also reported that claimant "continues to have frequent and near constant stiffness in the right ankle and foot." (Ex. 20-1). Similarly, their comment that claimant was working in the tire department does not explain the nature of those duties. In any event, claimant's work as of January 2008 does not establish that he actually returned to his regular work as a corrections officer.

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As discussed in our prior order, SAIF refers to the January 29, 2008 email from Mr. Lankford stating that claimant was released to full duty on December 5, 2006, and remained on full duty status for nine months (Ex. 22), and argues that establishes that claimant returned to regular work.

We continue to find that SAIF's reliance on the January 29, 2008 email is misplaced. Mr. Lankford's statement that claimant was released to "full duty" on December 5, 2006 is inconsistent with Dr. Gifford's December 19, 2006 chart note, which stated: "Return to full duty with no limitations." (Ex. 9). The record indicates that Dr. Gifford did not release claimant to "full duty" until December 19, 2006, rather than December 5, 2006, as SAIF argues. Moreover, we continue to find that the January 29, 2008 email is ambiguous as to what "full duty" meant and whether claimant returned to his "regular work" as a corrections officer.

After considering the parties' arguments on reconsideration, as well as the dissenting opinion, we continue to conclude that, based on our prior reasoning and the discussion above, SAIF has not sustained its burden of establishing error in the reconsideration process. *See Callow*, 171 Or App at 183-184.

Finally, claimant's counsel is entitled to an assessed fee for services on reconsideration. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on reconsideration is \$2,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's response to SAIF's reconsideration motion), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated. This award is in addition to the attorney fee award granted in our previous order.

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our January 16, 2009 order in its entirety. For services on reconsideration, claimant's attorney is awarded \$2,000, payable by SAIF. This fee is in addition to the award granted by our January 16, 2009 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 May 15, 2009

Member Langer dissenting.

After considering SAIF's arguments and reviewing the record again, I agree with SAIF that the evidence establishes that claimant returned to his regular work as a corrections officer and that he is not entitled to a "work disability" award. For the following reasons, I respectfully dissent.

The record establishes that claimant was not awarded any temporary disability payments after November 15, 2006. The September 25, 2007 Notice of Closure awarded temporary total disability (TTD) from June 14, 2006 through August 9, 2006, and temporary partial disability (TPD) from August 10, 2006 through November 15, 2006. (Ex. 16). The August 10, 2006 beginning date of TPD is consistent with Dr. Carpenter's August 9, 2006 release to light duty in the mailroom. (Ex. 3). Claimant's TPD payments ended on November 15, 2006, which is consistent with Dr. Gifford's November 15, 2006 chart note that said claimant was "working full duty." (Ex. 5B).

The February 15, 2008 Order on Reconsideration affirmed the award of temporary disability benefits. (Ex. 23). Neither party challenged the temporary disability benefits at hearing. Because claimant was eligible for TPD from August 9, 2006, to November 15, 2006, he either worked reduced hours or at a reduced rate of pay in the mailroom. The record further indicates that claimant either returned to "regular work" as a corrections officer as of November 15, 2006, or he continued modified duty in the mailroom while receiving his at-injury wages. In either situation, claimant's TPD would be zero.

Based on the following uncontested evidence, however, I would find that, more likely than not, claimant returned to regular work without restrictions in December 2006. Dr. Carpenter reported that claimant "may return to work/school without limitations" on December 5, 2006. (Ex. 7). Similarly, Dr. Turnbull's December 5, 2006 chart note said "Back to full duty tomorrow." (Ex. 8). Dr. Gifford's December 19, 2006 chart note said "[r]eturn to full duty with no limitations" and his February 21, 2007 chart note said that claimant "continues to do his job without restrictions." (Exs. 9, 11).

In addition, and consistent with these medical reports, Mr. Lankford's January 29, 2008 email states that claimant "was released to full duty on December 5, 2006" and "[f]rom 12/5/06 he worked and remained on full duty status until September 14, 2007, at which time he resigned." (Ex. 22).<sup>4</sup>

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<sup>4</sup> The evidence of claimant's December 5, 2006 release and return to "full duty" without restrictions reasonably supports an inference that Dr. Gifford's November 15, 2006 chart note stating "[c]ontinue full duty" (Ex. 5B) actually refers to claimant's modified, albeit "full duty," work in the mailroom. If claimant had been released and returned to "regular" work already on November 15, 2006,

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The majority relies on Dr. Gifford's January 22, 2008 concurrence letter, which said it was medically probable that claimant was "precluded" from returning to his regular job as a corrections officer. (Ex. 21-2). However, that report is irrelevant, because it does not rebut the evidence that claimant did actually return to his regular work. Likewise, the majority's assertion that the record does not show that claimant's physicians were aware of the requirements of claimant's at-injury job is irrelevant. The parties do not dispute the regular work requirements. Moreover, there is no affidavit from claimant stating that he did *not* return to his regular work as a corrections officer.

Based on this record, even if Dr. Gifford did not release claimant to regular work, SAIF is correct that claimant is not entitled to a work disability award because he actually *returned* to his regular work at the time of injury. *See* ORS 656.726(4)(f)(E) (2005) (impairment is the only factor to be considered in evaluation of a worker's disability under ORS 656.214(2) (2005) if the "worker has \* \* \* returned to regular work at the job held at the time of injury"). The evidence persuasively establishes that claimant returned to his regular work and, therefore, he is not entitled to an award for "work disability." I respectfully dissent.