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

Reviewing Panel: Members Langer and Weddell.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Myzak'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. On review, the issue is extent of permanent disability (work disability). We affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact and provide the following summary.

Claimant, a corrections officer, was compensably injured on June 14, 2006 when he suffered multiple injuries in a violent assault by an inmate. SAIF accepted left facial lacerations, fracture dislocation of the right ankle with diastasis, lumbar strain, thoracic strain, fractured fascial enamel tooth #21, periapical abscess tooth #6 secondary to contusion, and fractured lingual cusp tooth #14. (Exs. 2, 15).

Claimant's attending physician was Dr. Gifford. Dr. Carpenter, orthopedic surgeon, treated claimant's right ankle/foot conditions.

A September 25, 2007 Notice of Closure did not award permanent disability. (Ex. 16). Claimant requested reconsideration, and medical arbiter examinations were performed. A February 15, 2008 Order on Reconsideration awarded 15 percent whole person impairment and 21 percent work disability. (Ex. 23).

CONCLUSIONS OF LAW AND OPINION

The Appellate Review Unit (ARU) found that Dr. Gifford, claimant's attending physician, reported that claimant was precluded from returning to his regular job at injury as a corrections officer. The ARU awarded 21 percent work disability. (Ex. 23).

SAIF requested a hearing, challenging claimant's work disability award. SAIF argued that claimant was released to his regular work by his attending physician and that he returned to his regular work as a corrections officer. On the other hand, claimant contended that he was not released to his regular work and that he did not return to his regular work.

The ALJ found that claimant was released to modified work in the employer's mailroom in early August 2006. The ALJ explained that, on November 15, 2006, when claimant was performing modified work in the mail room, Dr. Gifford noted claimant's description that he was "working full duty" and he stated: "[c]ontinue full duty." (Ex. 5B). The ALJ further found that Dr. Gifford returned claimant to "full duty" with no limitations on December 19, 2008. (Ex. 9). On January 22, 2008, Dr. Gifford agreed that claimant was permanently precluded from returning to his regular job as a corrections officer. (Ex. 21). The ALJ concluded that, in context, Dr. Gifford's description of "full duty" was not "regular work" as a corrections officer, but was instead modified work in the mailroom. The ALJ was not persuaded that Dr. Gifford released claimant to regular work as a corrections officer.

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)[1] 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).[2] "Regular work" means "the job the worker held at the time of injury." ORS 656.214(1)(d) (2005); OAR 436-035-0005(15).

Thus, 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,[3] 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).

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[1] 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).

[2] 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."

[3] SAIF does not challenge 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 argues that it has established error in the reconsideration process because the ARU did not address the issue of whether claimant actually returned to his regular work. According to SAIF, 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. SAIF relies on a January 29, 2008 email from Mr. Lankford, the employer's safety manager, to SAIF's claim adjuster, which stated:

> "[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).

For the following reasons, we find that SAIF's reliance on the January 29, 2008 email is misplaced.

First, 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). Thus, 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.[4]

Moreover, we agree with claimant that 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 his regular work.

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," the record does not support the conclusion that claimant was performing his "regular work" at that time. We reason as follows.

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[4] We acknowledge that Dr. Carpenter signed a form indicating that claimant "may return to work/school without limitations" on December 5, 2006. (Ex. 7). However, the record does not establish that Dr. Carpenter was aware of the requirements of claimant's job at injury.

On August 9, 2006, Dr. Carpenter examined claimant after performing surgery to remove a diastasis screw. Dr. Carpenter 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). As noted above, Dr. Carpenter signed a form indicating that claimant "may return to work/school without limitations" on December 5, 2006. (Ex. 7).

Thus, 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. There is no evidence indicating that claimant was performing his "regular work" on November 15, 2006. Under these circumstances, we 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 complained of paresthesias along his left mandibular line to his neck, as well as the right thigh. Dr. Gifford 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).

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 conclude that Dr. Gifford's chart notes do not support the conclusion that he released claimant to "regular work" on December 19, 2006. *See Todd B. Lathrop*, 59 Van Natta 3010 (2007) (declining to infer that "regular job duties" referred to job-at-injury when record was unclear what job description or duties the physician was releasing the claimant to perform); *Rosalia B. Cordova*, 59 Van Natta 646, 648 (2007) (declining to infer that "regular job duties referred to job-at-injury when record was unclear what job description or duties the physician was releasing claimant to perform).

Furthermore, in a January 22, 2008 concurrence letter, Dr. Gifford agreed that 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). Based on this record, we agree with the ALJ that Dr. Gifford did not release claimant to his "regular work."

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").

As discussed above, SAIF relies on the January 29, 2008 email from the employer's safety manager, which stated that claimant was "released to full duty on December 5, 2006" and that "[f]rom 12/5/06 he worked and remained on full duty status until September 14, 2007[.]" (Ex. 22).

We agree with the ALJ 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. The ambiguity is compounded by the fact that the record does not support the conclusion that claimant was released to "full duty" on December 5, 2006 by Dr. Gifford, and because the record is confusing as to what Dr. Gifford meant by "full duty." Consequently, we agree with the ALJ that SAIF has not sustained its burden of establishing error in the reconsideration process. *See Marvin Wood Products v. Callow*, 171 Or App 175, 183-184 (2000).

Claimant's attorney is entitled to an assessed fee for services on review. 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 review is $2,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief, his counsel's fee request, and SAIF's objection), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated August 29, 2008 is affirmed. For services on review, claimant's attorney is awarded $2,500, payable by SAIF.

Entered at Salem, Oregon on January 16, 2009