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In the Matter of the Compensation of  
**HEIDI GALLA, Claimant**  
WCB Case No. 08-03723  
ORDER ON REVIEW  
Gary Borden, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Lipton's order that reduced her work disability award for a lumbar strain condition from 30 percent, as granted by an Order on Reconsideration, to zero. On review, the issue is extent of permanent disability (work disability). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following supplementation.

After claimant sustained a compensable lumbar strain on May 3, 2006, her attending physician, Dr. Bohling, restricted her from returning to work. (Exs. 2, 5). Claimant was also diagnosed with degenerative disc disease and an annular tear, which were not accepted. (Ex. 8-4).

On February 26, 2007, Dr. Bohling opined that claimant's lumbar strain was not medically stationary and declined to release her to any type of modified work. (Ex. 18). On June 12, 2007, Dr. Bohling again opined that claimant's lumbar strain was not medically stationary, but released her to modified work. (Ex. 26-1-2). On July 10, 2007 and August 8, 2007, Dr. Bohling opined that the lumbar strain was medically stationary and reiterated his release to modified work. (Exs. 27-1-2, 28-1-2).

On November 21, 2007, Dr. Rosenbaum, an employer-arranged medical examiner, opined that claimant's lumbar strain had "resolved" and was medically stationary with "no impairment." (Ex. 33-5, -7). He acknowledged that claimant had impairment, but opined that the impairment was related to degenerative changes, including the annular tear. (Ex. 33-7).

On November 27, 2007, Dr. Bohling opined that the May 3, 2006 work incident was the major contributing cause of claimant's overall low back condition and need for treatment, including the strain, degeneration, SI joint instability, and the L4-5 annular tear. (Ex. 35-1). He also continued to restrict claimant from

returning to work, noting that her “continuing off work authorizations are due to the on-the-job incident of May 3, 2006.” (Ex. 35-2). On December 9, 2007, Dr. Bohling concurred with Dr. Rosenbaum’s report. (Ex. 36).

The employer closed the claim by Notice of Closure on December 26, 2007, with no award of permanent disability. (Ex. 38-1). Claimant requested reconsideration and the appointment of a medical arbiter.

On May 7, 2008, Dr. Adler performed a medical arbiter examination. (Ex. 40-1). He found impairment and opined that claimant could not return to regular work. (Ex. 40-2, -5). He attributed all of claimant’s impairment to the accepted lumbar strain. (Ex. 41).

On June 2, 2008, an Order on Reconsideration awarded 10 percent whole person impairment based on Dr. Adler’s examination. (Ex. 42-2). Additionally, finding that claimant had not been released, and had not returned, to regular work, the reconsideration order awarded 30 percent work disability. (Ex. 42-3). The employer requested a hearing.

We do not adopt the ALJ’s finding that the Appellate Review Unit (ARU) erred in awarding claimant work disability benefits.

### CONCLUSIONS OF LAW AND OPINION

The employer did not contest that portion of the Order on Reconsideration that awarded 10 percent whole person impairment based on Dr. Adler’s medical arbiter examination. However, contending that Dr. Bohling’s concurrence with Dr. Rosenbaum’s opinion released claimant to regular work regarding her lumbar strain, the employer disputed the Order on Reconsideration’s work disability award.

The ALJ agreed with the employer’s contention and modified the Order on Reconsideration to award no work disability. On review, claimant contends that Dr. Bohling’s concurrence with Dr. Rosenbaum’s opinion was not a release to regular work. We agree.

Claimant is only entitled to impairment, but not to work disability, if she “has been released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 or has returned to regular work at the job held at the time of injury.” ORS 656.214(2)(a);

ORS 656.726(4)(f)(E); OAR 436-035-0009(4).<sup>1</sup> Absent such a release or return to regular work, she is entitled to work disability as well as impairment. ORS 656.214(2)(b); OAR 436-035-0009(6).

As the party challenging the Order on Reconsideration, the employer bears the burden to establish that there was an error in the disability award. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000); *Benjamin Peterson*, 59 Van Natta 909, 911 (2007). The employer has not shown such error.

It is undisputed that claimant has not returned to regular work. Therefore, whether she is entitled to work disability depends on whether she “has been released to regular work by the attending physician,” Dr. Bohling, as a result of his concurrence with Dr. Rosenbaum’s opinion.<sup>2</sup> “Regular work” means “the job the worker held at injury.” ORS 656.214(1)(d); OAR 436-035-0005(15). As explained below, we do not find that Dr. Bohling released claimant to regular work.

A “physician’s release” must be “written notification \* \* \* releasing the worker to work and describing any limitations the worker has.” OAR 436-035-0005(12). Although Dr. Rosenbaum’s opinion described the accepted lumbar strain as “resolved” with “no impairment,” it did not specifically address whether claimant could return to her regular work. Further, in addition to concurring with Dr. Rosenbaum’s opinion, Dr. Bohling specifically opined that claimant could not return to work due to the May 3, 2006 work injury.

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<sup>1</sup> Because this claim was closed on December 26, 2007, the applicable standards are found in WCD Admin. Order 05-074 (eff. January 1, 2006). See OAR 436-035-0003(1).

<sup>2</sup> Claimant contends that even if Dr. Bohling released her to regular work, the release would be unpersuasive because the employer does not contest her impairment rating on review. Because Dr. Rosenbaum’s opinion, with which Dr. Bohling concurred, stated that claimant had no impairment due to the lumbar strain, claimant contends that it is contrary to the procedural posture of the case and, therefore, unpersuasive.

ORS 656.214(2)(a) and (b) and ORS 656.726(4)(f)(E) unequivocally make work disability dependent on whether the claimant returned to regular work or was released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245. Thus, regardless of whether Dr. Bohling’s opinion is consistent with claimant’s impairment award, the relevant question for “work disability” purposes is whether Dr. Bohling, as claimant’s attending physician, released claimant to her regular work. *Julia Escobedo*, 60 Van Natta 3289, 3291 (2006) (no work disability where the attending physician opined that the claimant had “no work restrictions, limitations, or disabilities,” but the medical arbiter panel stated that the claimant was “unable to perform the physical requirements of the job at injury” and the claimant received an impairment award).

Considering Dr. Bohling's explicit statement that claimant could not return to work due to the May 3, 2006 work injury, we decline to infer that Dr. Bohling's concurrence with Dr. Rosenbaum's opinion, which did not specifically address claimant's ability to work, released claimant to regular work.

Citing *Josefina Carrillo*, 56 Van Natta 1147 (2004) and *Stephanie A. Dys-Dodson*, 53 Van Natta 207 (2001), the employer contends that Dr. Rosenbaum's opinion that claimant had no impairment related to her lumbar strain adequately addresses claimant's ability to return to work. We disagree. Those cases addressed whether the carriers had sufficient information to determine extent of permanent disability and close the claims under ORS 656.268(1)(a), which provides that a carrier shall close the claim when the worker "has become medically stationary and there is sufficient information to determine permanent impairment." *Carrillo*, 56 Van Natta at 1152; *Dys-Dodson*, 53 Van Natta at 208. In both cases, we found that because the attending physicians had opined that the claimant's had no impairment, there was sufficient information to determine extent of permanent disability and close the claims.<sup>3</sup> *Carrillo*, 56 Van Natta at 1152, *Dys-Dodson*, 53 Van Natta at 208.

Our holdings in *Carrillo* and *Dys-Dodson* were consistent with the principle, now codified by OAR 436-030-0020(2)(a),<sup>4</sup> that an attending physician's written statement that there is "no permanent impairment, residuals, or limitations attributable to the accepted condition(s), and there is no reasonable expectation, based on evidence in the record, of loss of use or function, changes in the worker's physical abilities, or permanent impairment attributable to the accepted condition(s)" is "sufficient information" to determine the extent of disability.

*Carrillo* and *Dys-Dodson* are inapposite. Those cases evaluated whether unambiguous statements by the attending physicians provided the carriers with "sufficient information" to determine extent of permanent disability close the claims. As explained above, although Dr. Bohling concurred with Dr. Rosenbaum's "no impairment" opinion, he also opined that claimant could not return to work due to the May 3, 2006 work injury.

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<sup>3</sup> In *Dys-Dodson*, the attending physician had also released the claimant to regular work. 53 Van Natta at 208.

<sup>4</sup> Because the Order on Reconsideration issued on June 2, 2008, WCD Admin. Order 07-059 (eff. January 2, 2008) applies. See OAR 436-030-0003(1).

Further, whereas *Carrillo* and *Dys-Dodson* addressed whether there was “sufficient information” to determine the extent of permanent disability and close the claims, they did not address whether the claimants had been released to regular work. Because the attending physicians had found that the claimants had no impairment, their opinions were sufficient to determine the extent of permanent disability regardless of whether the claimants had returned to work. *See* OAR 436-035-0007(7) (no permanent partial disability award is available if there is no measurable impairment).

Here, in contrast to those cases, the question before us is not whether there was “sufficient information” to determine the extent of claimant’s permanent disability and close the claim. Rather, the issue is claimant’s entitlement to a work disability award. In other words, claimant is entitled to work disability, unless she was released, or returned, to regular work.

As explained above, Dr. Bohling restricted claimant from work due to the work injury, and his concurrence with Dr. Rosenbaum’s opinion did not explicitly release claimant to regular work. Moreover, Dr. Bohling did not withdraw his earlier opinion or explain his concurrence. Under such circumstances, we do not find that claimant was released to regular work. Accordingly, we reverse the ALJ’s order and reinstate the Order on Reconsideration’s work disability award.

Because our order results in increased compensation, for services on Board review, claimant’s counsel is awarded an “out-of-compensation” attorney fee equal to 25 percent of the increased compensation created by this order (*i.e.*, the difference between the ALJ’s award and our award), not to exceed \$6,000, payable by the employer directly to claimant’s counsel. ORS 656.386(4); OAR 438-015-0055(2).<sup>5</sup>

### ORDER

The ALJ’s order dated October 15, 2010 is reversed in part and affirmed in part. The June 2, 2008 Order on Reconsideration is reinstated and affirmed. For services on Board review, claimant’s attorney is awarded an “out-of-compensation” attorney fee equal to 25 percent of the increased compensation created by this order (*i.e.*, the difference between the ALJ’s award and our award), not to exceed \$6,000, payable directly to claimant’s counsel. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on July 25, 2011

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<sup>5</sup> We are not authorized to award a carrier-paid attorney fee for claimant’s counsel’s services at the hearing level. *SAIF v. DeLeon*, 241 Or App 614 (2011).