

In the Matter of the Compensation of
BRIAN E. PIER, Claimant

WCB Case No. 10-06246

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The self-insured employer requests review of Administrative Law Judge (ALJ) Sencer's order that awarded 9 percent work disability for claimant's right arm injury. On review, the issue is extent of permanent disability (work disability). We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

In awarding work disability, the ALJ determined that claimant was not released to his regular work. *See* ORS 656.214(2)(b). On review, the employer contends that the medical evidence establishes that claimant was released to regular work without restrictions and therefore was not entitled to work disability. For the following reasons, we conclude that the ALJ properly awarded work disability, although our reasoning differs from the ALJ's.

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). However, as the party challenging the Order on Reconsideration, the employer has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods, v. Callow*, 171 Or App 175, 183-84 (2000).

Under ORS 656.726(4)(f)(E) (Or Laws 2007, ch 274, §§ 2, 8), impairment is the only factor to be considered in evaluation of a worker's disability under ORS 656.214 (Or Laws 2007, ch 274, §§ 1, 8) if "the worker 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."¹ "Regular work" means "the job the worker held at injury." ORS 656.214(1)(d); OAR 436-035-0005(15).²

¹ Because claimant's injury occurred on November 27, 2008, the 2007 amended versions of ORS 656.214(2) and ORS 656.726(4)(f)(E) apply. *Jon M. Schleiss*, 62 Van Natta 2567, 2570 n 3 (2010).

² Because claimant's claim was closed by a June 29, 2010 Notice of Closure, the applicable standards are found in WCD Admin. Order 10-051 (eff. June 1, 2010). OAR 436-035-0003(1).

Here, the employer contends that Dr. Sotta was claimant's attending physician at claim closure and that he concurred with the medical opinion of an examining physician, Dr. Tesar, who released claimant to his regular work as an equipment operator. (Exs. 68-6, 70).³ However, claimant's job at injury was not limited to equipment operator, but rather he was also cross-trained and regularly performed work as a laborer. (Ex. 80A).

Therefore, while claimant was injured while hired as an equipment operator, his regular work consisted of both the equipment operator and laborer positions. Accordingly, Dr. Sotta's concurrence with Dr. Tesar's report in which he released claimant to return to work as an equipment operator does not constitute a release to claimant's job at injury, which was equipment operator/laborer. *See Shannon Ludahl*, 60 Van Natta 63, 633 (2008) (the claimant was not released to return to his "regular work" where the attending physician only reviewed a "parts administrator" position when releasing the claimant to "regular work," but the claimant also frequently worked as a mechanic at the time of injury).

Dr. Tesar subsequently reviewed claimant's affidavit in which he stated that he operated heavy equipment, but also performed the tasks of a laborer. Dr. Tesar again opined that claimant could be released to regular work. (Exs. 80A, 82). However, no "attending physician," including Dr. Sotta, concurred with Dr. Tesar's final report.

Under these circumstances, we conclude that this record does not contain a release to regular work. Thus, the ALJ correctly determined that claimant was entitled to a work disability award. Accordingly, we affirm.

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 the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated March 21, 2011 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,500, payable by the employer.

Entered at Salem, Oregon on September 28, 2011

³ The ALJ determined that Dr. Fleiss was claimant's attending physician. However, even assuming that the employer is correct that the attending physician was Dr. Sotta, we would still find that claimant was not released to his regular work.