

In the Matter of the Compensation of  
**TIMOTHY P. KERR, Claimant**  
WCB Case No. 12-03385  
**ORDER ON RECONSIDERATION**  
Welch Bruun & Green, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

On July 30, 2013, we reversed that portion of an Administrative Law Judge's (ALJ's) order that awarded 27 percent work disability and reinstated an Order on Reconsideration's award of 19 percent whole person impairment and no work disability. Contending that Dr. Black, claimant's attending physician, did not release him to return to his job at injury, claimant requests reconsideration of that portion of our decision and reinstatement of the ALJ's work disability award. For the following reasons, we adhere to our previous order.

In reversing the ALJ's work disability award, we reasoned that although Dr. Black had previously imposed work restrictions, his ultimate opinions releasing claimant to regular work were unequivocal. On reconsideration, claimant contends that Dr. Black's ultimate opinions regarding his work release restricted him to "medium-heavy" work. Because claimant's job at injury as a Journeyman Wireman was "very heavy," claimant argues that Dr. Black ultimately did not release him to regular work. We disagree with claimant's contention.

Under ORS 656.726(4)(f)(E) (Or Laws 2005, ch 653, §§ 1, 5), impairment is the only factor to be considered in evaluating a worker's disability under ORS 656.214 (Or Laws 2005, ch 653, §§ 3, 5) if "the worker has been released to regular work by the attending physician[.]" "Regular work" means "the job the worker held at injury," and includes tasks that are performed on a steady or customary basis. ORS 656.214(1)(d); OAR 436-035-0005(15); *Thrifty Payless, Inc. v. Cole*, 247 Or App 232, 239 (2011). Because we evaluate claimant's disability as of the date of the Order on Reconsideration, his entitlement to work disability depends on whether Dr. Black released him to regular work as of the June 28, 2012 Order on Reconsideration. ORS 656.283(7); *Joshua A. Dorr*, 64 Van Natta 1934, 1937 (2012).

Dr. Black opined that claimant was "released to his regular work" on May 7, 2012, and again on June 27, 2012. (Exs. 103-1, 106-1). Nevertheless, claimant contends that Dr. Black's June 27, 2012 opinion described claimant's

regular work (*i.e.*, his job at injury as a journeyman wireman) as “medium-heavy” work. Thus, claimant contends that Dr. Black’s ultimate opinion incorporated the “medium-heavy” work restriction and, therefore, did not release claimant to regular work. *See Luther Rolle*, 65 Van Natta 416 (2013) (statement that the claimant had “no restrictions” was inconsistent with the remainder of the attending physician’s report, which included work restrictions); *Brian E. Pier*, 63 Van Natta 1902 (2011) (the claimant was awarded work disability where the release to regular work did not consider the full range of his regular work’s tasks). We disagree with claimant’s interpretation of Dr. Black’s June 27, 2012 opinion.

Dr. Black’s June 27, 2012 opinion was offered in response to an inquiry from the Appellate Review Unit (ARU). The ARU’s letter noted that a November 6, 2007 physical capacity evaluation (PCE) had “concluded [claimant] is capable of medium-heavy range of physical demand with the restriction of occasional overhead reaching with the left arm,” which was “consistent with [Dr. Black’s] November 26, 2011” opinion. (Ex. 106-1).

Nevertheless, the ARU’s letter did not state that claimant’s regular work as a journeyman wireman was “medium heavy.” Instead, it asked:

“Regarding the newly accepted condition of rotator cuff tear, left shoulder and recurrent rotator cuff tear, left shoulder, for the record, is the worker released to his regular work at the time of injury as a Journeyman Wireman? Please review the Job Analysis provided.” (Ex. 106-1, emphasis in original)

The Job Analysis for the “Journeyman Wireman” position describes the job as in the “very heavy” category of physical demands. (Ex. A-1). Therefore, although the ARU’s letter had noted that claimant had previously been restricted to “medium heavy” work, Dr. Black’s release to regular work addressed an accurate description of claimant’s job at injury as “very heavy” work.

Further, Dr. Black was invited to indicate any restrictions in claimant’s lifting/carrying capacity, regarding both the weight that claimant could lift/carry and the frequency of such lifting/carrying, and to indicate whether claimant was permanently precluded from frequently stooping, climbing, crouching, balancing, crawling, reaching, kneeling, twisting, and/or pushing/pulling. (Ex. 106-2). Thus, even if Dr. Black had misunderstood claimant’s “regular work” to incorporate his previous work restrictions, he was given an opportunity to reiterate such restrictions in conjunction with his work release. He declined to indicate any such restrictions. (*Id.*).

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Under such circumstances, we continue to conclude that Dr. Black's ultimate opinion unequivocally released claimant to regular work.<sup>1</sup> Therefore, we adhere to our decision that claimant is not entitled to work disability.

Accordingly, we withdraw our July 30, 2013 order. On reconsideration, as supplemented herein, we adhere to and republish our July 30, 2013 order. The parties' 30-day statutory appeal rights shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on August 29, 2013

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<sup>1</sup> Alternatively, claimant contends that Dr. Black's ultimate release of claimant to regular work was an unexplained change in opinion, and claimant should therefore receive work disability based on Dr. Black's earlier work restrictions. *See David A. Marquardt*, 64 Van Natta 515 (2012) (entitlement to work disability not determined by attending physician's ultimate opinion where the attending physician had changed opinion without reasonable explanation); *Benjamin M. Peterson*, 59 Van Natta 909 (2007) (same); *but see Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (change in opinion persuasive where it was reasonably explained by the record).

Dr. Black considered his prior work restrictions, reviewed a job analysis for claimant's job at injury, and opined that claimant could return to regular work without restrictions in lifting/carrying or reaching. We find that his change in opinion was reasonably explained.