
In the Matter of the Compensation of
SUSAN L. BORACCI, Claimant
WCB Case No. 08-07994
ORDER ON REVIEW
Black Chapman et al, Claimant Attorneys
Julene M Quinn SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell, Biehl, and Herman. Member Biehl dissents.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that affirmed an Order on Reconsideration that did not award additional unscheduled permanent disability for her low back condition. On review, the issue is extent of unscheduled permanent disability.

We adopt and affirm the ALJ's order with the following changes and supplementation. On pages 3 and 4, we change the name of the medical arbiter to "Dr. Daven." We provide the following summary.

Claimant was compensably injured in July 2001 and the SAIF Corporation accepted an L2-3 disc herniation, as well as L3-4 and L4-5 degenerative disc disease. (Ex. 1). The claim was initially closed in 2004, and claimant was ultimately awarded 13 percent unscheduled permanent disability for her low back condition. (Exs. 4, 5).

In April 2008, SAIF reopened the claim based on a worsening of claimant's accepted conditions. (Ex. 12). On May 14, 2008, claimant underwent a work capacity evaluation (WCE). (Ex. 14). Claimant's attending physician, Dr. Bert, did not agree with the sitting and lifting recommendations in the WCE, but he did agree that claimant's lumbar range of motion and strength measurements were invalid for purposes of rating impairment. (Exs. 16, 17).

A July 17, 2008 Notice of Closure awarded temporary disability benefits, but did not award additional unscheduled permanent disability. (Ex. 19). Claimant requested reconsideration. Dr. Daven performed a medical arbiter examination on November 6, 2008. (Ex. 23).

A December 5, 2008 Order on Reconsideration affirmed the Notice of Closure. The Appellate Review Unit (ARU) relied on the opinion of Dr. Daven to determine claimant's permanent impairment. The ARU explained that it had

contacted Dr. Daven regarding the validity of the examination findings, but no response had been received. (Ex. 24-1). The ARU noted that Dr. Daven found that the findings were due to the accepted conditions, and he noted that the ranges of motion were limited due to pain complaints. The ARU reasoned that, because the record on reconsideration revealed pain complaints, inconsistencies on testing, self-limitation and “better observed than tested findings,” claimant did not have valid ratable findings. The ARU concluded that claimant was not entitled to any additional unscheduled permanent disability. (Ex. 24-2). Claimant requested a hearing.

The ALJ explained that Dr. Daven concluded that claimant’s lumbar range of motion (ROM) testing was not valid for rating purposes because she was not able to give full effort due to pain complaints. The ALJ also noted that Dr. Daven determined that claimant’s straight leg raising validity check was not valid. The ALJ found that Dr. Daven’s findings regarding the invalid findings were supported by the WCE findings and Dr. Bert’s opinion. The ALJ concluded that the ARU did not err by finding that claimant was not entitled to additional unscheduled permanent disability.

On review, claimant argues that, based on Dr. Daven’s findings and OAR 436-035-0007(8) (WCD Admin. Order 07-060, eff. January 2, 2008), she has measurable lumbar ROM impairment. She contends that Dr. Daven’s ROM findings (except for lumbar flexion) must be rated because he did not provide a written opinion, based on sound medical principles, explaining why the findings were invalid, pursuant to OAR 436-035-0007(12).

SAIF responds that claimant has not established that the impairment findings were objective or valid. SAIF contends that Dr. Daven provided an ample explanation that claimant’s lumbar ROM findings were not valid.

Claimant has the burden of proving the nature and extent of her disability. ORS 656.266(1). As the party seeking relief on review from the reconsideration order, she must also establish error in that prior resolution. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000).

On reconsideration, where a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician are more accurate and should be used. OAR 436-035-0007(5). Absent persuasive evidence to the contrary, we are not free to disregard a medical

arbiter's impairment findings when the arbiter unambiguously attributes the claimant's permanent impairment to the compensable condition. *Hicks v. SAIF*, 194 Or App 655, 659-60, *recons*, 196 Or App 146 (2004).

This case also involves consideration of OAR 436-035-0007(8) and OAR 436-035-0007(12). OAR 436-035-0007(8) provides:

“Pain is considered in the impairment values in these rules to the extent that it results in measurable impairment. If there is no measurable impairment, no award of permanent disability is allowed for pain. To the extent that pain results in disability greater than that evidenced by the measurable impairment, including the disability due to expected waxing and waning of the worker's condition, this loss of earning capacity is considered and valued under OAR 436-035-0012 and is included in the adaptability factor.”

Because the validity of Dr. Daven's impairment findings is at issue, we consider OAR 436-035-0007(12), which provides:

“Validity is established for findings of impairment according to the criteria noted in the *AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev., 1990*, unless the validity criteria for a particular finding is not addressed in this reference, is not pertinent to these rules, or is determined by physician opinion to be medically inappropriate for a particular worker. Upon examination, findings of impairment which are determined to be ratable under these rules are rated unless the physician determines the findings are invalid and provides a written opinion, based on sound medical principles, explaining why the findings are invalid. When findings are determined invalid, the findings receive a value of zero. If the validity criteria are not met but the physician determines the findings are valid, the physician must provide a written rationale, based on sound medical principles, explaining why the findings are valid. For purposes of this rule, the straight leg raising validity test (SLR) is not the sole criterion used to invalidate lumbar range of motion findings.”

After the ALJ's order issued, the court decided *O'Connor v. Liberty Northwest Ins. Corp.*, 232 Or App 419 (2009), which interpreted OAR 436-035-0007(5), (6), and (12). In our order in *William O'Connor*, 59 Van Natta 2410 (2007), we applied the standards in WCD Admin. Order No. 05-074 (eff. January 1, 2006). Here, although we apply the standards in WCD Admin. Order 07-060 (eff. January 2, 2008) instead, we note that there have been no changes to OAR 436-035-0007(5), (6), and (12).

In *O'Connor*, the primary issue was whether the medical arbiter had determined that the claimant's ROM findings were invalid. Citing OAR 436-035-0007(5), (6), and (12), the court explained:

“Read together, those parts of OAR 436-035-0007 require that, on reconsideration, the impairment must be based on the medical arbiter's objective findings. There are two exceptions: (1) where the medical arbiter states that those findings are invalid; or (2) where a preponderance of the evidence demonstrates that different findings are more accurate. If a preponderance of the medical evidence shows that the attending physician's findings are more accurate, then the impairment is rated based on those findings or on closure findings made by a consulting physician if the attending physician concurs in those findings.” 232 Or App at 426 (footnote omitted).

The court explained further: “We emphasize that OAR 436-035-0007(12) does not require a finding by the medical arbiter that the findings are *valid*. The findings are to be rated unless the medical arbiter determines that they are invalid or the evidence indicates otherwise.” *Id.* at n 1 (emphasis in original).

The court concluded that the medical arbiter's statements indicated that the arbiter “did not and could not determine whether the findings were valid,” not that the arbiter had, in fact, made a determination that the findings were invalid. The court rejected our interpretation that, viewing the arbiter's opinion as a whole, it established that the arbiter considered the wrist ROM findings invalid. The court acknowledged that “magic words” are not required, but explained that, “even without the use of statutory verbiage, there must be some express text in a report that demonstrates compliance with statutory or rule requirements.” *Id.* at 427. The court further acknowledged that it may be possible for a medical arbiter report as a whole to constitute a determination of invalidity under OAR 436-035-0007(12) even if the doctor does not explicitly state that the findings are “invalid.” *Id.*

The court explained that, under OAR 436-035-0007(12), validity “is established * * * according to the criteria noted in the *AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev., 1990*, unless the validity criteria for a particular finding is not addressed in this reference, is not pertinent to these rules, or is determined by physician opinion to be medically inappropriate for a particular worker.” The court noted that the same standards apply to a determination of invalidity and explained that a medical examiner’s opinion “explaining why the findings are invalid” necessarily must consider those standards. 232 Or App at 428-29.

Here, unlike *O’Connor*, Dr. Daven clearly stated that claimant’s “range of motion testing was not valid for rating purposes[.]” (Ex. 23-2). The issue here is whether the arbiter adequately explained his finding as required by OAR 436-035-0007(12). As the court explained in *O’Connor*, a medical examiner’s opinion “explaining why the findings are invalid” necessarily must consider the standards in OAR 436-035-0007(12). 232 Or App at 429. The medical opinion must determine validity or invalidity *and* evaluate the relevant criteria. *Id.*

Here, consistent with OAR 436-035-0007(12), the ARU provided instructions to Dr. Daven, which included the following:

“Please state whether the findings are valid **and** due to the accepted condition. If the worker fails the straight leg raising (SLR) validity test for lumbar flexion, please comment on whether the worker gave full effort and whether the lumbar flexion findings are otherwise valid. If any findings are considered invalid, provide rationale and detailed reasoning in accordance with Bulletin 239 and the *AMA Guides*; include anatomic findings if applicable.” (Ex. 22-2; bold in original).

Dr. Daven accurately described the accepted conditions. He cautioned claimant during the evaluation that she should not perform activities that caused excessive pain, and indicated that the examination could be stopped at any time if the maneuvers were “discomforting.” (Ex. 23-1). Dr. Daven reported claimant’s lumbar ROM findings and explained:

“The range-of-motion testing was voluntarily limited by pain complaints. With right and left lateral bending her complaints were primarily in the neck and thoracic region. Maximum

straight leg raising was 60 degrees on the right and 60 degrees on the left. These maneuvers caused pain in the backs of her legs and numbness in her toes. When sitting and distracted, straight leg raising was 85 degrees bilaterally. The straight leg validity test was considered invalid.” (Ex. 23-2).

Dr. Daven concluded that claimant’s ROM “testing was not valid for rating purposes as she was not able to give full effort due to pain complaints. Straight leg raising validity check was also considered not valid.” (*Id.*) He determined that the findings were due to the accepted conditions. (Ex. 23-3). Dr. Daven also explained:

“Even though the findings are due to the accepted condition, the worker did fail the straight leg raising validity test for lumbar flexion. It was felt that the worker was not able to give full effort due to pain complaints.” (Ex. 23-3).

As noted earlier, the ARU contacted Dr. Daven to clarify the validity of the examination findings, but did not receive a response. (Ex. 24-1, -2).

Claimant contends that she is entitled to impairment for reduced lumbar extension, right lateral bending and left lateral bending. She does not seek impairment for reduced lumbar flexion. Claimant argues that Dr. Daven’s impairment findings are ratable because they were based on pain. She contends that, under OAR 436-035-0007(8), her pain resulted in measurable impairment that is to be considered in the impairment values.

In contrast, SAIF contends that Dr. Daven’s report does not support the conclusion that the limited ROM was due to “pain.” Rather, SAIF argues that his report shows that it was a *volitional* limitation of motion due to “pain complaints.”

Dr. Daven explained that claimant’s “range-of-motion testing was voluntarily limited by pain complaints” and that her ROM “testing was not valid for rating purposes as she was not able to give full effort due to pain complaints.” (Ex. 23-2). Dr. Daven also said that “[i]t was felt that the worker was not able to give full effort due to pain complaints.” (Ex. 23-3).

Thus, Dr. Daven indicated that claimant “voluntarily limited” her ROM testing and that she was “not able to give full effort due to pain complaints.” We find that Dr. Daven’s opinion is ambiguous as to whether claimant’s reduced ROM was purely “volitional” as SAIF contends, or whether, because of pain, she was not *able* to give full effort.

The distinction is important for at least two reasons. The ARU specifically asked Dr. Daven to comment on whether claimant gave “full effort.” (Ex. 22-2). Based on his ambiguous statements noted above, it is not clear whether claimant gave “full effort.” See *Cheryl A. Blanchard*, 58 Van Natta 434 (2006) (physician found that the claimant’s impairment findings were invalid due to pain behavior, functional overlay, and suboptimal effort). Furthermore, to the extent the lack of full effort was because of pain, OAR 436-035-0007(8) provides that “[p]ain is considered in the impairment values in these rules to the extent that it results in measurable impairment.”

Based on Dr. Daven’s ambiguous statements, we are unable to determine whether claimant’s pain resulted in “measurable impairment,” pursuant to OAR 436-035-0007(8). See *Guadalupe B. Rosas*, 60 Van Natta 2297 (2008) (because the medical opinion did not provide any findings of measurable impairment resulting from pain, no permanent disability was allowed for pain under OAR 436-035-0007(8)). Dr. Daven’s comments are more confusing in light of his statement that claimant was cautioned during his evaluation that she “should not perform any activities that caused excessive pain and that the examination could be stopped at any time if the maneuvers were discomforting.” (Ex. 23-1).

We acknowledge that OAR 436-035-0007(12) provides that “findings of impairment which are determined to be ratable under these rules are rated unless the physician determines the findings are invalid and provides a written opinion, based on sound medical principles, explaining why the findings are invalid.” According to claimant, we must accept Dr. Daven’s impairment findings because he did not provide a “written opinion, based on sound medical principles, explaining why the findings are invalid.” But, even assuming that Dr. Daven did not provide the necessary explanation of why the lumbar ROM findings were invalid, OAR 436-035-0007(12) requires “findings of impairment which are determined to be ratable.” Based on the aforementioned problems with Dr. Daven’s opinion, claimant’s lumbar ROM findings of impairment were not “determined to be ratable” pursuant to OAR 436-035-0007(12).

Instead, we find that a preponderance of the medical evidence demonstrates that different findings by Dr. Bert, claimant’s attending physician, are more accurate and should be used. In April 2008, Dr. Bert concluded that claimant’s condition after the aggravation was back to baseline and that her condition was medically stationary by July 2005. He recommended a physical capacities evaluation for the closing examination. (Ex. 13). On May 14, 2008, claimant underwent a WCE. (Ex. 14). Dr. Bert did not agree with the sitting and lifting

recommendations in the WCE, but he did agree that claimant's lumbar ROM and strength measurements were invalid for purposes of rating impairment. (Exs. 16, 17). The evaluator had reported that claimant was inconsistent in her written and verbal descriptions of her symptoms. (Ex. 14-2). Claimant's consecutive ROM measurements were not considered valid and the evaluator also said that the strength measurements were not valid due to cogwheel release, lack of palpable muscle contraction, and giveaway weakness. (Ex. 14-3). Furthermore, the evaluator explained that the tests of maximum voluntary effort indicated that claimant was making less than full effort and he noted that inconsistencies were observed in her presentation and performance and that she appeared to be self-limiting in the strength and ROM testing. (Ex. 14-8, -9).

Based on the WCE report, as ratified by Dr. Bert, we agree with the ALJ and the ARU that claimant is not entitled to additional unscheduled permanent disability for her low back condition. We conclude that claimant has not sustained her burden of establishing error in the reconsideration process. *See Callow*, 171 Or App at 183-184. We therefore affirm the ALJ's order.

ORDER

The ALJ's order dated June 9, 2009 is affirmed.

Entered at Salem, Oregon on January 20, 2010

Member Biehl dissenting.

The majority determines that the impairment findings of Dr. Bert, claimant's attending physician, are more accurate than those of Dr. Daven, the medical arbiter. Because I disagree with the majority's analysis of the medical evidence, I respectfully dissent.

In *O'Connor v. Liberty Northwest Ins. Corp.*, 232 Or App 419, 429 (2009), the court explained that a medical examiner's opinion "explaining why the findings are invalid" necessarily must consider the standards in OAR 436-035-0007(12). The medical opinion must determine validity or invalidity *and* evaluate the relevant criteria. *Id.*

Here, Dr. Daven found "measurable impairment" in claimant's lumbar range of motion (ROM) measurements for extension, right lateral bending, and left lateral bending, and his explanation of the invalidity of those findings did not comply with OAR 436-035-0007(12). For the following reasons, I would find that the aforementioned ROM measurements must be rated.

Dr. Daven explained that claimant was cautioned not to perform any activities that caused excessive pain and was informed that the examination could be stopped at any time if the maneuvers were discomforting. (Ex. 23-1). During the examination, he found that claimant's lumbar ROM was 20 degrees flexion, 5 degrees extension, 10 degrees right lateral bending, and 10 degrees left lateral bending. (Ex. 23-2). Dr. Daven's lumbar ROM worksheet indicated that he performed three measurements for each lumbar ROM. (Ex. 23-5). He noted that her "range-of-motion testing was voluntarily limited by pain complaints." Dr. Daven concluded that the straight leg validity test was considered invalid. (*Id.*) Later in the report, he said that there was no evidence of any muscle wasting or neuromuscular weakness, nor were there any objective signs of loss of sensation. Dr. Daven reported that claimant's "range-of-motion testing was not valid for rating purposes as she was not able to give full effort due to pain complaints." He concluded that the findings were due to the accepted conditions, but he noted that claimant failed the straight leg raising validity test for lumbar flexion. He reiterated that claimant "was not able to give full effort due to pain complaints." (Ex. 23-3).

OAR 436-035-0007(8) (WCD Admin. Order 07-060, eff. January 2, 2008) provides:

"Pain is considered in the impairment values in these rules to the extent that it results in measurable impairment. If there is no measurable impairment, no award of permanent disability is allowed for pain. To the extent that pain results in disability greater than that evidenced by the measurable impairment, including the disability due to expected waxing and waning of the worker's condition, this loss of earning capacity is considered and valued under OAR 436-035-0012 and is included in the adaptability factor."

Based on Dr. Daven's findings, claimant had "measurable impairment" based on repeated testing in the form of reduced lumbar ROM, including extension and right/left lateral bending, which he determined was related to the accepted conditions. (Ex. 23). Claimant is not seeking impairment for lumbar flexion.

Nevertheless, Dr. Daven explained that claimant's "range-of-motion testing was voluntarily limited by pain complaints" and that her "range-of-motion testing was not valid for rating purposes as she was not able to give full effort due to pain

complaints.” (Ex. 23-2, -3). Earlier in the report, however, Dr. Daven explained that claimant was cautioned not to perform any activities that caused excessive pain. (Ex. 23-1).

OAR 436-035-0007(12) provides:

“Validity is established for findings of impairment according to the criteria noted in the *AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev., 1990*, unless the validity criteria for a particular finding is not addressed in this reference, is not pertinent to these rules, or is determined by physician opinion to be medically inappropriate for a particular worker. *Upon examination, findings of impairment which are determined to be ratable under these rules are rated unless the physician determines the findings are invalid and provides a written opinion, based on sound medical principles, explaining why the findings are invalid.* When findings are determined invalid, the findings receive a value of zero. If the validity criteria are not met but the physician determines the findings are valid, the physician must provide a written rationale, based on sound medical principles, explaining why the findings are valid. For purposes of this rule, the straight leg raising validity test (SLR) is not the sole criterion used to invalidate lumbar range of motion findings.” (Emphasis added).

Thus, under OAR 436-035-0007(12), Dr. Daven’s findings of impairment “are rated unless the physician determines the findings are invalid and provides a written opinion, based on sound medical principles, explaining why the findings are invalid.” Although Dr. Daven concluded that the lumbar ROM findings were invalid, he explained only that the ROM testing was not valid because claimant was “not able” to give full effort due to pain complaints.

The ARU’s medical arbiter instructions to Dr. Daven asked him to state whether the findings were valid and due to the accepted condition. The instructions explained, in part:

“If the worker fails the straight leg raising (SLR) validity test for lumbar flexion, please comment on whether the worker gave full effort and whether the lumbar flexion findings are otherwise valid. If any findings are considered invalid, provide rationale

and detailed reasoning in accordance with Bulletin 239 and the AMA Guides; include anatomic findings if applicable.” (Ex. 22-2).

Notwithstanding those instructions and the requirements of OAR 436-035-0007(12), Dr. Daven did not provide “detailed reasoning in accordance with Bulletin 239 and the AMA Guides” explaining why the findings for extension and right/left lateral bending were considered invalid. WCD Bulletin 239, section V, subsection C, which pertains to range of motion and angle of fusion, provides:

“Measure the active movement of a joint while the worker is exerting full effort (unassisted by the examiner) and report the maximum degrees of retained motion. The degrees of motion should be related to the neutral zero position as specified in the Guides. For a fused joint, the angle of fusion should be reported in degrees with reference to the same neutral zero position.

“The Guides state, ‘Pain, fear of injury, or neuromuscular inhibition may limit mobility by diminishing effort. Such limitations provide inaccurately low and inconsistent measurements leading to improperly inflated impairment estimates. Reproducibility of joint motion is currently the only known criterion for validating optimum effort.’ When measuring spinal range of motion, the Department requires the examiner to take three consecutive measurements of mobility. These must fall within $\pm 10\%$ or 5 degrees (whichever is greater) of each other to be considered valid. The measurements may be repeated up to six times. If there continue to be inconsistencies, the measurements are considered invalid.

“When measuring spinal range of motion with an inclinometer, an additional validity criterion (the straight leg raising validity test of lumbar flexion) shall be applied to the measurement of the angles of flexion and extension of the lumbar spine at midsacrum. This criterion is described in the Guides on pages 96 and 97 and in APPENDIX C, Page 30.

“If either of these criteria are not met or other findings are noted in the course of an examination which are inconsistent, the physician may reexamine the worker at another time, or consider the findings invalid; **OR**

“If the validity criteria are not met but the physician determines the findings are valid, the physician must provide a written rationale, based on sound medical principles, explaining why the findings are valid.” (Emphasis in original).

As previously noted, Dr. Daven’s worksheet for claimant’s lumbar ROM measurements indicated that he performed three measurements for each type of movement. (Ex. 23-5). His measurements for claimant’s lumbar extension and right/left lateral flexion were consistent and reproducible. WCD Bulletin 239 provides that “[r]eproducibility of joint motion is currently the only known criterion for validating optimum effort.” *Compare Lourdes Brown*, 60 Van Natta 2065 (2008) (the medical arbiter’s explanation that the claimant’s ROM findings were invalid because he could not obtain consistent and reliable measurements was based on “sound medical principles”). Dr. Daven’s explanation that claimant’s ROM measurements for extension, right lateral bending, and left lateral bending were invalid because she was “not able” to give full effort due to pain complaints lacks adequate explanation in light of OAR 436-035-0007(12), the medical arbiter instructions, and Bulletin 239. *See Stephen W. Dinger*, 61 Van Natta 668 (2009) (where the medical arbiter described only “pain complaints,” but did not identify the alleged inconsistencies or describe the instances or observations of the claimant’s lack of full effort during the ROM testing, the explanation of invalidity was not based on “sound medical principles”).

In reaching this conclusion, I acknowledge SAIF’s argument that Dr. Daven provided an ample explanation that the findings were not valid because he noted that the straight leg validity test was considered invalid and stated that claimant had somewhat inconsistent sensory testing in her thighs. SAIF notes that Dr. Daven said that claimant had been unable to work since July 2001, and that the severity of her pain had waxed and waned with no significant improvement over many years. SAIF contends that Dr. Daven noted that there was no evidence of any muscle wasting or neuromuscular weakness or any objective signs of sensation.

Claimant’s straight leg raising validity test pertains to her lumbar flexion, but she is not seeking impairment for flexion. (*See Ex. 23-5*). In any event, OAR 436-035-0007(12) provides that the straight leg raising validity test is not the sole criterion used to invalidate lumbar range of motion findings. Dr. Daven did not explain whether or not claimant’s sensory testing in her thighs or the lack of muscle wasting or neuromuscular weakness had any bearing on her lumbar ROM and I do not have the necessary medical expertise to make that

determination. *See SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge). Dr. Daven's comments about the persistence of claimant's pain since the work injury appear to support the fact that her pain was consistent and reproducible. I do not agree with SAIF that Dr. Daven provided "ample" information to explain why he determined that the ROM measurements for extension, right lateral bending, and left lateral bending were invalid.

Although the ALJ relied on *Sherry M. Bouris*, 59 Van Natta 297 (2007), that case is inapposite. In *Bouris*, the claimant argued that the medical arbiter's opinion explaining why he found the ROM findings invalid was not based on sound medical principles as required by OAR 436-035-0007(12) (2005). *Id.* at 299. The arbiter had explained that he considered the cervical ranges of motion invalid because they were considerably less than that measured by the attending physician and he "would expect ROM to get better with time, not worse." We found no medical evidence rebutting the arbiter's explanation that the ROM measurements were invalid because of the expectation that they would improve over time rather than get worse. We concluded that, in the absence of contrary medical opinion, the arbiter's explanation regarding the invalidity of the claimant's ROM findings was "based on sound medical principles." *Id.* at 299-300.

In *Bouris*, no issue was raised regarding the claimant's pain complaints or the application of OAR 436-035-0007(8), which provides that pain resulting in measurable impairment is considered in the impairment values. In *Bouris*, we accepted the medical arbiter's explanation of invalidity because there was no medical evidence rebutting that explanation. Here, Dr. Daven's finding of invalidity, without further explanation, is inconsistent with OAR 436-035-0007(8).

Because Dr. Daven found "measurable impairment" in the lumbar ROM measurements for extension, right lateral bending, and left lateral bending and his explanation of the invalidity of those findings did not comply with OAR 436-035-0007(12), I find that the aforementioned ROM measurements must be rated. *See* OAR 436-035-0007(8) (pain is considered in the impairment values in these rules to the extent that it results in measurable impairment). Moreover, Dr. Daven concluded that claimant's impairment findings were related to the accepted conditions. Thus, Dr. Daven's arbiter report is unambiguous regarding the cause of claimant's impairment. *See Hicks v. SAIF*, 194 Or App 655, 660, *recons*, 196 Or App 146 (2004) (absent persuasive evidence to the contrary, we are not free to disregard a medical arbiter's impairment findings when the arbiter

unambiguously attributes the claimant's permanent impairment to the compensable condition). I am not persuaded that a preponderance of medical opinion establishes that different findings by the attending physician were more accurate and should be used.

Based on the aforementioned reasoning, I would determine claimant's impairment based on Dr. Daven's lumbar ROM measurements. Because the majority relies on Dr. Bert's opinion instead, I respectfully dissent.