
In the Matter of the Compensation of
JUDY A. COLE, Claimant
WCB Case No. 09-01416
ORDER ON REVIEW
Peter O Hansen, Claimant Attorneys
Garrett Hemann et al, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman.

Claimant requests review of Administrative Law Judge (ALJ) Wren's order that affirmed an Order on Reconsideration that awarded no work disability for a low back injury. On review, the issue is extent of permanent disability (work disability). We modify.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," but not the "Ultimate Findings of Fact." We summarize and supplement those findings as follows.

On April 18, 2008, claimant compensably injured her low back. Before then, claimant worked as an order puller making an hourly wage of \$19.00. (Ex. 11-2). The record demonstrates that claimant's average work week before her injury was 43 hours. (Ex. 16-2).

On September 19, 2008, Dr. Janzen, her attending physician, reported that claimant's condition was medically stationary. (Ex. 65). According to Dr. Janzen, as of September 2, 2008, claimant had been released to regular work, but was "not to do any overtime." (Ex. 66-1). He considered this limitation to be permanent. (*Id.*) He did not report any permanent impairment findings.

An October 27, 2008 Notice of Closure awarded 2 percent whole person impairment for the low back, but no work disability. (Ex. 75). Claimant requested reconsideration and a medical arbiter examination. Dr. Bradley, the medical arbiter, found slightly reduced lumbar range of motion. He also reported that claimant was working as a "warehouse worker, full time in a similar capacity as worked at the time of injury." (Ex. 120-2).

A February 13, 2009 Order on Reconsideration affirmed the Notice of Closure's 2 percent whole person impairment award and declined to award "work disability" because claimant had been released to her "regular work" at the job at injury. (Ex. 127-3). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

In affirming the Order on Reconsideration, the ALJ agreed that claimant was not entitled to a work disability award because she had been released to her “regular work.” In so finding, the ALJ reasoned that claimant’s work did not “entail any obligation or right to work” longer than 40 hours a week. Therefore, he was not persuaded that claimant’s “regular work” involved overtime.

On review, claimant argues that because she performed overtime work as a regular part of her job at injury, Dr. Janzen did not release her to “regular work.” For the following reasons, we are persuaded that claimant is entitled to a work disability award.

Claimant has the burden of proving the nature and extent of her disability. ORS 656.266(1). Because claimant requested a hearing regarding the Order on Reconsideration, she has the burden of establishing error in the reconsideration process. *Marvin Wood Products v. Callow*, 171 Or App 175, 183-184 (2000); *Robert A. Voss*, 60 Van Natta 3208, 3210, *recons*, 60 Van Natta 3492 (2008).

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)¹ if “the worker has been released

¹ ORS 656.214 (2007) provides:

“(2) When permanent partial disability results from a compensable injury or occupational disease, benefits shall be awarded as follows:

“(a) 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, the award shall be for impairment only. Impairment shall be determined in accordance with the standards provided by the director of the department of consumer and business services pursuant to ORS 656.726(4). Impairment benefits are determined by multiplying the impairment value times 100 times the average weekly wage as defined by ORS 656.005.

“(b) If the worker has not been released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 or has not returned to regular work at the job held at the time of injury, the award shall be for impairment and work disability. Work disability shall be determined in accordance with the standards provided by the director pursuant to ORS 656.726(4). Impairment shall be determined as provided in paragraph (a) of this

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.”² See also OAR 436-035-0009(4) (“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 “Regular work” means “the job the worker held at injury.” ORS 656.214(1)(d) (2007); OAR 436-035-0005(15).

To determine whether claimant was released or returned to regular work, we must first decide whether claimant’s “regular work” involved overtime. For the following reasons, we conclude that it did.

Claimant’s job description is silent as to the number of hours required for her job as an “order puller.” (Ex. 10). Therefore, the job description is of no probative value in this particular case. Nor does the record contain an affidavit or written statement/report from claimant or the employer describing the job held at injury and/or clarifying the required hours. However, the record does contain claimant’s wage and hour information through the date of injury. These records demonstrate that claimant worked overtime, on a consistent basis before her injury, and that her average work week was greater than 40 hours.⁴ Based on this particular record, we are persuaded that claimant performed overtime work as part of her “regular work.”

The employer argues that overtime was not a part of claimant’s regular work as her job description does not include an “entitlement or obligation” to work

subsection. Work disability benefits shall be determined by multiplying the impairment value, as modified by the factors of age, education and adaptability to perform a given job, times 150 times the worker's weekly wage for the job at injury as calculated under ORS 656.210(2). The factor for the worker’s weekly wage used for the determination of the work disability may be no more than 133 percent or no less than 50 percent of the average weekly wage as defined in ORS 656.005.”

² Because claimant’s injury occurred after January 1, 2008, the 2007 amended versions of ORS 656.214(2) and ORS 656.726(4)(f)(E) apply.

³ Because the Notice of Closure issued on October 27, 2008, the applicable disability rating standards are found in WCD Admin. Order 07-060 (eff. January 1, 2008). OAR 436-035-0003(1).

⁴ Claimant worked 17 weeks of overtime within the six months preceding the injury, 10 within the preceding three months, and five within a month. (Ex. 16-1).

overtime. However, as noted above, the job description is silent as to the number of required hours. Further, while the employer characterizes claimant's overtime as "occasional," the record supports a finding that she worked overtime on a regular basis. (Ex. 16). Thus, we disagree with the employer's contention.

Dr. Janzen unambiguously restricted claimant from overtime work on a permanent basis. (Ex. 66-1). Because we have determined that overtime was part of her regular work at the time of injury and Dr. Janzen's restriction qualified as a modification of her "at-injury" job duties due to the compensable injury, we conclude that claimant was not released to her "regular work." See *Jeri L. Hansen*, 50 Van Natta 1047 (1998) (the claimant was entitled to a social/vocational value where she was restricted in the number of hours she could "repetitious[ly] use" her right upper extremity, thus restricting the number of hours she could mop following the work injury; such restriction qualified as a modification of the claimant's job duties); cf. *Diane C. Leonetti*, 50 Van Natta 2060 (1998) (although the claimant had certain identified physical restrictions, the record did not demonstrate that the restrictions required a modification of her job duties).

Next, in determining whether a worker returned to regular work, we compare the particular job duties at the time of injury with those performed at the time of evaluation. See *Rodney L. Femrite*, 61 Van Natta 1123, 1127 (2009); *Steven F. Knight*, 57 Van Natta 2603, 2607 (2005). We consider a physician's release to regular work as a factor in determining whether the worker returned to regular work without it being an absolute requirement. *James I. Dorman*, 50 Van Natta 1649, 1650, *recons*, 50 Van Natta 1773 (1998), *aff'd without opinion*, 164 Or App 175 (1999). Thus, whether the attending physician releases the worker to regular work is only one factor to be considered in determining whether a worker returned to regular work. *Id.* at 1650 n 2.

Here, the record does not establish that claimant returned to her "regular work." We acknowledge that claimant reported on several instances that she had returned to her "full duty" or "full time" work.⁵ First, during her October 21, 2008 chiropractor visit, claimant stated that she "had to return to full duty by 90 days post injury." (Ex. 71-1). Likewise, Dr. Bradley's January 21, 2009 arbiter report stated that claimant was working as a "warehouse worker, full time in a similar capacity as worked at the time of injury." (Ex. 120-2). Finally, claimant's request

⁵ The parties do not dispute that claimant's "job" at injury as an "order puller," was the same position to which she returned. (See Exs. 9, 10).

for vocational assistance was denied because she reported that she “returned to [her] regular position” with her employer. (Ex. 125-3).

However, as discussed above, the record establishes that claimant’s “regular work” involved overtime. Nevertheless, claimant’s 801 form, and the employer’s accident report, state that claimant’s work schedule was Monday through Friday, 8 hours a day.⁶ (Exs. 8, 9, 11). Given these circumstances, without more explanation for what was meant by “full time,” “similar capacity,” or “full duty” when authored, we do not find these references particularly helpful on the issue of whether claimant returned to her “regular work.” Thus, without more in the record to indicate that claimant worked more than 40 hours a week after she returned to work, we are unable to conclude that she returned to her regular “job at the time of injury.”

In sum, the record establishes that claimant’s “regular work” involved overtime, and that she is now permanently precluded from performing such work. Because the “return or release to regular work” criteria in ORS 656.214(2)(a) (2007) and ORS 656.726(4)(f)(E) (2007) have not been satisfied, claimant is entitled to work disability, in addition to the previously awarded impairment value. OAR 436-035-0009(6).⁷ We now compile those factors.

Claimant is over 50, which results in a value of 1. OAR 436-035-012(2)(a). Her education value is zero.⁸ OAR 436-035-0012(4)(b). Claimant’s job at injury was DOT 922.687-058 (order picker), which has a Specific Vocational Preparation (SVP) value of 2. (Ex. 11). An SVP of 2 receives a value of 4. OAR 436-035-0012(5). Claimant’s age/education values are added for a total of 5. OAR 436-035-0012(15).

⁶ Although the employer’s report states that claimant worked “5” hours per day, this is most likely a typographical error. Rather, we find it more likely that the employer meant to report that claimant worked “8” hours per day, which would coincide with its earlier description of claimant’s work as “full time,” and its 801 form. (Exs. 8-1, 11-1, -2).

⁷ Because a determination of whether claimant was *released* to regular work depends on her attending physician’s opinion, not the medical arbiter’s, statements by Dr. Bradley have no bearing on whether a “release” actually occurred. ORS 656.726(4)(f)(E) (2007); OAR 436-035-0009(4).

⁸ Claimant’s representation at the hearing level that her education value was zero is not contested.

The adaptability factor is determined by a comparison of claimant's Base Functional Capacity (BFC) with the maximum Residual Functional Capacity (RFC). OAR 436-035-0012(7). DOT 922.687-058 shows strength as "medium." Thus, claimant's BFC is "medium."

Pursuant to OAR 436-035-0012(10)(a), a worker's RFC is evidenced by the attending physician's release unless a preponderance of medical opinion describes a different RFC. Dr. Janzen released claimant to perform "medium" duties. (Ex. 65). Thus, claimant's RFC is "medium." OAR 436-035-0012(8)(h).

Claimant's "medium" BFC and "medium" RFC result in an adaptability value of zero. However, under the adaptability scale, claimant is entitled to an adaptability value of 1. OAR 436-035-0012(11), (13). The product of claimant's age/education value (5) multiplied by the adaptability factor (1) equals 5. OAR 436-035-0012(15)(e). Claimant's social-vocational value (5) is added to her impairment value (2) for a total of 7 percent "work disability." OAR 436-035-0009(6)(b). The Order on Reconsideration and the ALJ's order are modified accordingly.

Because our order results in increased compensation, claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation awarded by the order (the 7 percent "work disability" award), not to exceed \$6,000, payable by the employer directly to claimant's counsel. ORS 656.386(4) (Or Laws 2009, ch 526, §§ 5, 6); OAR 438-015-0055(2).

ORDER

The ALJ's order dated July 14, 2009 is modified. In addition to the Order on Reconsideration's and ALJ's awards, claimant is awarded 7 percent work disability. Claimant's counsel is awarded an "out-of-compensation" attorney fee award equal to 25 percent of the increased compensation created by this order (*i.e.*, the 7 percent "work disability" award), not to exceed \$6,000, payable by the employer directly to claimant's counsel.

Entered at Salem, Oregon on July 7, 2010