

In the Matter of the Compensation of  
**JON M. SCHLEISS, Claimant**

WCB Case No. 09-05174

**ORDER ON REVIEW**

Hooton Wold & Okrent LLP, Claimant Attorneys  
James B Northrop, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that affirmed an Order on Reconsideration that awarded 5 percent whole person impairment and no work disability. On review, the issue is extent of permanent disability (impairment and work disability). We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," summarized as follows.

Claimant compensably injured his low back in November 2008. The SAIF Corporation accepted a lumbar strain. (Exs. 4, 10).

On November 26, 2008, claimant's attending physician, Dr. Gerry, ordered an MRI and authorized claimant "to try to go back to regular work." (Ex. 6). A December 12, 2008 MRI was interpreted as showing minor degenerative changes at L1-2 and L4-5. (Ex. 7).

On January 14, 2009, Dr. Gerry was provided with a description of claimant's regular job duties, and stated that, as of December 1, 2008, claimant could return to his regular work. (Ex. 8). On February 9, 2009, Dr. Gerry declared claimant's condition medically stationary and stated that claimant was released to regular work without restriction. (Ex. 9). Based on Dr. Gerry's closing examination findings, SAIF issued a March 3, 2009 Notice of Closure that did not award permanent disability. (Ex. 11).

Claimant requested reconsideration and appointment of a medical arbiter. (Ex. 13). On July 17, 2009, Dr. Thomas, the medical arbiter, examined claimant. (Ex. 16). He stated that claimant had "some limitation in his ability to use the spinal area," and classified that limitation as "moderate." (Ex. 16-2). He also found loss of lumbar range of motion (ROM). Dr. Thomas determined that the impairment findings were valid, but attributed the findings primarily to non-work

factors. (Ex. 16-2, -3). Specifically, he attributed 67 percent of the impairment findings to the degenerative changes evidenced on the MRI and claimant's long history of smoking. (*Id.*) The remaining 33 percent of the impairment findings were attributed to the on-the-job injury. (*Id.*)

Relying on the arbiter's impairment findings, an August 14, 2009 Order on Reconsideration awarded 5 percent whole person impairment and no work disability. (Ex. 17). In doing so, the order explained that: (1) claimant was not entitled to a "chronic condition" award because Dr. Thomas did not state that claimant was significantly limited in his ability to repetitively use the lumbar spine due to the accepted condition or direct medical sequela; (2) the loss of ROM findings were apportioned at 33 percent; and (3) claimant had been released to his at-injury job by his attending physician. (Ex. 17-3).

Claimant requested a hearing, contending that he was entitled to a "chronic condition" award based on Dr. Thomas's findings of "some" "moderate" limitation in the ability to use the lumbar spine. He also argued that apportionment was not appropriate because his claim did not involve a "combined condition." Finally, although conceding that Dr. Gerry released him to regular work, claimant argued that he was entitled to a work disability award because Dr. Thomas's report indicated that there were restrictions on his ability to return to regular work.

### CONCLUSIONS OF LAW AND OPINION

The ALJ affirmed the reconsideration order, finding that claimant's arguments were not consistent with existing case law and controlling statutes/administrative rules. On review, claimant renews the arguments made before the ALJ. We agree with the ALJ's order affirming the Order on Reconsideration, reasoning as follows.

Claimant is entitled to a 5 percent impairment value if a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, he is significantly limited in the repetitive use of his low back. OAR 436-035-0019(1)(h).<sup>1</sup> Citing *Webster's Third New Int'l Dictionary* 2116 (unabridged ed 2002), claimant contends that "significant"<sup>2</sup> means "having or

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<sup>1</sup> Because claimant's claim was closed by a March 3, 2009 Notice of Closure, the applicable standards are found in WCD Admin. Order 07-060 (eff. Jan. 1, 2008). OAR 436-035-0003(1).

<sup>2</sup> "Significantly" is defined as "in a significant manner." *Webster's* 2116.

likely to have influence or effect,” and that the term is synonymous with “important, weighty, [and] notable.” He then argues that Dr. Thomas’s report, which found “some” “moderate” limitation, represents such an “important, weighty, and notable” limitation in his repetitive use of the lumbar spine due to the accepted condition or medical sequela. Therefore, claimant concludes, he is entitled to a “chronic condition” award under OAR 436-035-0019(1)(h).

To determine the sufficiency of a medical opinion in establishing a “chronic condition” award, we consider the medical opinion as “a whole and evaluated in the context in which it was rendered.” *Maria C. Perales-Castaneda*, 54 Van Natta 634, 635 (2002). Although “magic words” are not required to establish a “chronic condition” limitation, and we may make reasonable inferences from the medical evidence, we are not free to reach our own medical conclusions in the absence of such evidence. *See Buss v. SAIF*, 182 Or App 590, 594-95 (2002); *Benz v. SAIF*, 170 Or App 22, 25 (2000); *Steven D. Clark*, 62 Van Natta 430, 437, 441 (2010).

Here, Dr. Thomas concluded that claimant had “some” “moderate limitation.” We agree with the Order on Reconsideration that such a description does not reach the level of a “significant” limitation required for a “chronic condition” award under OAR 436-035-0019(1)(h). In any event, in identifying claimant’s “moderate” limitation, Dr. Thomas did not state that the limitation was due to the accepted condition or direct medical sequela. *See* OAR 436-035-0007(1) (a claimant is entitled to an impairment value under the rules “only for those findings of impairment that are permanent and were caused by the accepted compensable condition and direct medical sequela”). *See also* ORS 656.214(1)(a).

Therefore, after reviewing Dr. Thomas’s report as a whole, we find that it does not establish that claimant is “significantly” limited in the repetitive use of his low back due to the accepted condition or direct medical sequela. Accordingly, claimant is not entitled to a “chronic condition” award.

We next address claimant’s contention that he is entitled to an award of “work disability,” rather than just “impairment.” 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.”<sup>3</sup> *See also* ORS 656.214(2)(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.”); 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.”). “Regular work” means “the job the worker held at injury.” ORS 656.214(1)(d); OAR 436-035-0005(15).

Claimant does not dispute that he was released to regular work by Dr. Gerry, his attending physician. (*See* Exs. 8, 9). Nevertheless, he contends that Dr. Thomas’s report is more persuasive concerning his ability to return to regular work. Under ORS 656.726(4)(f)(E), ORS 656.214, and OAR 436-035-0009(4), however, “the attending physician’s release to work (not the medical arbiter’s opinion) determines whether a claimant is entitled to work disability.” *Benjamin Peterson*, 59 Van Natta 909, 910 (2007); *see also Julia Escobedo*, 60 Van Natta 3289, 3291 (2008). Accordingly, claimant is not entitled to an award of work disability.<sup>4</sup>

Finally, claimant contends that the reconsideration order inappropriately apportioned his permanent impairment, despite Dr. Thomas’s conclusion that 67 percent of the impairment findings were not due to the accepted lumbar strain or direct medical sequela, but rather were due to unrelated or noncompensable impairment findings. *See* OAR 436-035-0007(1) (a worker is not entitled to an impairment value for unrelated or noncompensable impairment findings); *see also* ORS 656.214(1)(a) (“impairment” means the loss of use or function of a body part or system *due to* the compensable industrial injury or occupational disease determined in accordance with the standards provided under ORS 656.726) (emphasis added). Claimant acknowledges that, consistent with the reasoning expressed in *Vicente C. Ortiz*, 59 Van Natta 2193 (2007), his permanent disability award was properly apportioned. Nevertheless, he requests that we overrule *Ortiz*

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<sup>3</sup> 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.

<sup>4</sup> We also disagree with claimant’s assertion that Dr. Gerry’s release to regular work was made with insufficient information. Dr. Gerry was provided with a job description of claimant’s at-injury job (*see* Ex. 8), and claimant does not dispute the accuracy of that job description.

and find that he is entitled to an impairment value for impairment findings due to unrelated and noncompensable conditions. We adhere to the holding and reasoning set forth in *Ortiz*. Therefore, claimant's permanent impairment was properly apportioned.

In sum, for the foregoing reasons, we find that claimant has not established error in the reconsideration process, *i.e.*, we are not persuaded that the Order on Reconsideration's award was incorrect. *See, e.g., Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000) (the party challenging an Order on Reconsideration bears the burden of establishing error in the reconsideration process); *Peterson*, 59 Van Natta at 911 (same). Accordingly, we affirm.

### ORDER

The ALJ's order dated April 26, 2010 is affirmed.

Entered at Salem, Oregon on October 14, 2010