

In the Matter of the Compensation of  
**THOMAS P. ROWBERG, Claimant**  
WCB Case No. 01-06652  
ORDER ON REVIEW  
Dennis O'Malley, Claimant Attorneys  
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that reduced his scheduled permanent disability award for loss of use or function of the left arm from 26 percent (42.92 degrees), as awarded by an Order on Reconsideration, to zero. In its respondent's brief, the self-insured employer challenges the ALJ's ruling that admitted Exhibit 27A (medical arbiter clarification) into evidence. On review, the issues are the propriety of the evidentiary ruling and extent of scheduled permanent disability. We affirm in part and reverse in part.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable injury to his left arm on March 2, 2000. (Ex. 1). The condition accepted was a "disabling biceps tendon strain, left arm." (Exs. 5; 12).

On January 29, 2001, Dr. Rask (attending physician at closure) found: (1) full range of left arm motion; and (2) 4/5 left arm strength. (Ex. 16). Dr. Rask declared claimant's condition medically stationary and opined that claimant had "some permanent disability" because of the weakness and pain in the left arm. (*Id.*)

On March 1, 2001, the employer referred claimant to Dr. Jones for evaluation. (Ex. 17). Dr. Jones diagnosed "probable partial or full biceps tendon rupture," and opined that, while claimant "may have a strength loss," any such loss could not be evaluated because of claimant's voluntary interference with the examination and functional overlay. (Ex. 17-5; 17-6). Dr. Jones indicated that if claimant did have a biceps tendon rupture, then weakness would be expected.

(Ex. 17-6). Dr. Jones recommended Cybex testing in order to accurately test loss of muscle strength. (*Id.*)

On March 12, 2001, Dr. Rask concurred with Dr. Jones' report. (Ex. 18). Subsequently, on March 20, 2001, Dr. Rask explained that, although he concurred with Dr. Jones' diagnosis of "partial distal biceps tendon rupture," he disagreed with the finding of "functional overlay." (Exs. 19; 20).

On March 21, 2001, the employer closed the claim without an award of permanent disability. (Ex. 21). Claimant requested reconsideration.

On July 2, 2001, Dr. Gill performed a medical arbiter evaluation in which he described the accepted condition as a "partial biceps tendon rupture." (Ex. 27-3). Dr. Gill found: (1) full range of left arm motion; and (2) 4/5 left arm strength. (Ex. 27-4). Dr. Gill noted that partial disruption of the biceps tendon would be expected to yield such a finding. (*Id.*) Additionally, Dr. Gill reported "intermittent cogwheel type giving way," suggesting a voluntary functional component to the loss of strength deficit. (Ex. 27-5). Dr. Gill noted, however, that such a finding may well be explained by claimant's fear of further injury. (*Id.*)

On July 24, 2001, the Appellate Review Unit (ARU) sought clarification from Dr. Gill regarding the percentage of the reduced-strength finding that was due to the accepted condition as opposed to claimant's "voluntary inhibition." (Ex. 27A). Dr. Gill responded: "On review of my records, it is most probable that his weakness is due entirely to the accepted biceps strain." (*Id.*) Based on Dr. Gill's clarification, ARU issued an Order on Reconsideration that awarded 26 percent scheduled permanent disability for loss of use or function of the left arm. (Ex. 28). The employer requested a hearing.

At hearing, claimant submitted Dr. Gill's clarification report for inclusion in the record. The ALJ admitted the report over the employer's objection. Turning to the merits of the permanent disability dispute, the ALJ determined that neither Dr. Rask's nor Dr. Gill's impairment findings were persuasive. Consequently, relying on *Atkins v. Allied Systems, Ltd.*, 175 Or App 487 (2001) (the Board is not bound by the attending physician's or medical arbiter's opinion and may "reject medical opinions that it finds to be unpersuasive"), the ALJ concluded that the record was insufficient for claimant to carry his burden of proving the "actual extent of disability." Accordingly, the ALJ reduced claimant's scheduled permanent disability award to zero.

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### Evidentiary Issue

ORS 656.283(7) provides that an ALJ is "not bound by common law or statutory rules of evidence \* \* \* and may conduct a hearing in any manner that will achieve substantial justice." The statute has been interpreted to give ALJ's broad discretion in admitting evidence. *See, e.g., Brown v. SAIF*, 51 Or App 389, 394 (1981). We review the ALJ's evidentiary ruling for abuse of discretion. *Rose M. LeMasters*, 46 Van Natta 1533 (1994), *aff'd mem LeMasters v. Tri-Met, Inc.*, 133 Or App 258 (1995).

In *Jason O. Olson*, 47 Van Natta 2192, 2193 (1995), we held, relying on ORS 656.268(6)(f), that a clarifying or supplemental report from a medical arbiter, prepared at the request of the Department, is admissible at hearing.<sup>1</sup> Here, the clarifying arbiter report was sought by the Department. Thus, it was admissible. *Compare Tinh Xuan Pahn Auto v. Bourgo*, 143 Or App 73 (1996) (post-reconsideration clarifying report from the medical arbiter not admissible if prepared at the request of the parties).

Moreover, ORS 656.283(7) provides in pertinent part: "[N]othing in this section shall be construed to prevent or limit the right of a worker, insurer or self-insured employer to present the reconsideration record at hearing \* \* \* ." Here, the clarifying report (Exhibit 27A) was included in the reconsideration record. Consequently, we find no abuse of discretion in the ALJ's evidentiary ruling.

### Extent of Disability

For the purpose of rating permanent disability, only the opinions of claimant's attending physician at the time of claim closure, other medical findings with which the attending physician concurred, and the findings of the medical arbiter may be considered. *See* ORS 656.245(2)(b)(B); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). Where a medical arbiter is used, impairment is established by the medical arbiter, unless a preponderance of medical opinion establishes a different level of impairment. OAR 436-035-0007(14). However, the Board is not compelled to rely on medical opinions it finds unpersuasive,

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<sup>1</sup> ORS 656.268(6)(f) provides: "Any medical arbiter report may be received at a hearing even if the report is not prepared in time for use in the reconsideration proceeding."

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whether those opinions are authored by the attending physician or a medical arbiter. *See James v. SAIF*, 176 Or App 337 (2001).

Here, Dr. Gill opined that claimant's impairment (loss of left arm strength) was entirely due to the accepted condition. In doing so, Dr. Gill considered, but ultimately rejected, the likelihood that there was a voluntary functional component to claimant's loss of strength.<sup>2</sup> We particularly note Dr. Gill's statement:

“Although there has been considerable discussion about the validity of these measurements, disruption of the musculotendinous unit, which is the case here at least on a partial basis, would be expected to yield *this degree of muscle strength deficit*.” (Ex. 27-4) (emphasis added).

Because Drs. Gill, Jones, and Rask all agree that claimant has a partial biceps tendon rupture of the left arm, and because they also agree that such a condition would result in a loss of strength consistent with the strength deficit measured by Dr. Gill, we find Dr. Gill's opinion persuasive. Consequently, we conclude that Dr. Gill's medical arbiter evaluation should be used to rate claimant's permanent disability. OAR 436-035-0007(14). Finally, because we agree with the ARU's evaluation of claimant's impairment based in that report, we reinstate the scheduled permanent disability award as awarded in the August 2, 2001 Order on Reconsideration.<sup>3</sup>

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 created by this order, not to exceed \$6,000. ORS 656.386(2); OAR 438-015-0055(2).

In addition, because claimant ultimately prevailed over the insurer's request for hearing regarding the Order on Reconsideration, he is also entitled to an attorney fee under ORS 656.382(2) for his counsel's services at the hearing level. *See Patricia L. McVay*, 48 Van Natta 317 (1996) (carrier-paid attorney fee

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<sup>2</sup> Such an opinion is consistent with Dr. Rask's.

<sup>3</sup> The employer asserts that ARU incorrectly rated impairment for a loss of strength in pronation. Based on our review of the Order on Reconsideration (Exhibit 28), we find that ARU expressly awarded impairment for loss of strength for flexion and supination, but not for loss of strength in pronation. (Ex. 28-2). Accordingly, we reject the employer's argument.

appropriate for services at hearings level where the carrier requested a hearing on an Order on Reconsideration, the ALJ reduced the permanent disability award granted by the Order on Reconsideration, but the Board ultimately affirmed the Order on Reconsideration); *Lorenzo K. Kimball*, 52 Van Natta 411, *on recon* 52 Van Natta 633 (2000) (same). After consideration of the factors in OAR 438-015-0010(4), we find that a reasonable attorney fee award for claimant's counsel's services at hearing in defense of the Order on Reconsideration's 26 percent scheduled permanent disability award is \$2,000, to be paid by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record), the complexity of the issue, the value of the interest involved, the nature of the proceedings, and the risk that claimant's counsel might go uncompensated.<sup>4</sup>

### ORDER

The ALJ's order dated November 23, 2001 is affirmed in part and reversed in part. The award of the August 2, 2001 Order on Reconsideration is reinstated and affirmed. For services at hearing, claimant is awarded an \$2,000 attorney fee, payable by the self-insured employer. For services on Board review, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order, not to exceed \$6,000, payable directly to claimant's attorney. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on October 8, 2002

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<sup>4</sup> The hearing record consisted of 31 exhibits. The hearing itself, which did not involve witness testimony, took about two hours.