

---

In the Matter of the Compensation of  
**WILLIAM L. JELLEY, Claimant**  
Own Motion No. 03-0144M  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE  
Cram Harder Wells & Baron, Claimant Attorneys  
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of the SAIF Corporation's February 12, 2003 "Notice of Closure: Own Motion Claim" that closed his "post-aggravation rights" new medical condition claim ("post-traumatic right elbow arthrosis") with no additional award of scheduled permanent disability for loss of use or function of his right arm. We modify the Own Motion Notice of Closure to award an additional 12 percent (23.04 degrees) scheduled permanent disability for the right arm, and 25 percent (1.5 degrees) scheduled permanent disability for the right little finger, for the "post-aggravation rights" new medical condition.<sup>1</sup>

#### FINDINGS OF FACT

On January 2, 1984, claimant sustained a compensable right elbow injury, which SAIF accepted as a disabling injury claim. An October 1984 Determination Order awarded claimant 45 percent (67.5 degrees) scheduled permanent disability for the right forearm. A July 1985 Opinion and Order increased claimant's award to 45 percent (86.4 degrees) scheduled permanent disability for the right arm. Claimant's aggravation rights expired on October 10, 1989.

On February 29, 2000, pursuant to our Own Motion authority under ORS 656.278(1), the claim was reopened because the compensable injury had worsened requiring surgery.

On March 2, 2000, Dr. Smith performed an open arthrotomy of the right elbow with extensive release and debridement. Claimant's condition was declared medically stationary on December 11, 2001. On July 10, 2002, SAIF accepted a "post-aggravation rights" new medical condition ("post-traumatic right elbow

---

<sup>1</sup> Claimant's total award to date for scheduled permanent disability is 57 percent of the right arm and 25 percent of the right little finger. The July 10, 2002 Notice of Closure awarded an additional 15 percent scheduled permanent disability of the right arm for a total award of 60 percent of the right arm. However, that award was vacated by our July 3, 2003 Own Motion Order Reviewing Carrier Closure.

arthrosis”), but did not voluntarily reopen the claim under Own Motion nor submit a recommendation to the Board as provided by rule. That same day, SAIF closed the claim, awarding, among other things, an additional 15 percent (28.8 degrees) scheduled permanent disability for loss of use or function of the right arm for a total award of 60 percent (115.2 degrees) of the right arm. Claimant requested Board review of that closure notice.

Following the July 2002 closure, SAIF voluntarily reopened claimant’s claim under Own Motion for the “post-aggravation rights” new medical condition (“post-traumatic right elbow arthrosis”) by filing a 3501 form. On February 12, 2003, SAIF closed the claim with an Own Motion Notice of Closure that did not grant permanent disability benefits for the “post-aggravation rights” new/omitted medical condition. Claimant requested Board review of the February 12, 2003 Notice of Closure and also requested a medical arbiter examination.

On July 3, 2003, we issued an “Own Motion Order Reviewing Carrier Closure,” modifying the July 10, 2002 “Notice of Closure: Own Motion Claim,” to eliminate the permanent disability award for the “worsened” right arm condition. *William L. Jelley, 55 Van Natta 2252 (2003).*

On that same date, we issued an “Order Postponing Action on Own Motion Request for Review of Carrier Closure,” regarding the February 12, 2003 “Notice of Closure: Own Motion Claim,” and referred the claim to the Director to appoint a medical arbiter. *William L. Jelley, 55 Van Natta 2254 (2003).*

A medical arbiter examination was performed on September 29, 2003 by Dr. Whitney, an orthopedic surgeon. Dr. Whitney found: (1) decreased sensation (9 mm) of claimant’s right little finger; (2) right wrist ranges of motion of dorsiflexion, 35 degrees, palmar flexion, 45 degrees, radial deviation, 15 degrees, and ulnar deviation, 25 degrees; (3) elbow ranges of motion (right/left) of flexion, 95 degrees/150 degrees, extension, 50 degrees/0 degrees, pronation, 17 degrees/80 degrees, supination, 25 degrees/80 degrees; (4) decreased strength in the intrinsic muscles (4-/5) of the right hand, the flexor carpi ulnaris (4/5), the sublimis muscles of the 4<sup>th</sup> and 5<sup>th</sup> fingers (4/5), and the profundus muscles of the 4<sup>th</sup> (4/5) and 5<sup>th</sup> (4-/5) fingers; and (5) a significant limitation in repetitive use of the right elbow and arm.

Dr. Whitney did not provide a measurement of claimant’s arm length discrepancy but opined that it was not “significant.” However, the attending physician, Dr. Baker, noted in his June 26, 2003 report that claimant had a right

arm length discrepancy of approximately 1 inch due to claimant's "serial surgeries."

### CONCLUSIONS OF LAW AND OPINION

Claimant contends that he is entitled to additional scheduled permanent partial disability (PPD) related to his "post-aggravation rights" new medical condition of "post-traumatic right elbow arthrosis" of the right arm. We agree.

Because the aggravation rights on claimant's January 2, 1984 injury claim expired on October 10, 1989, the claim is within our Own Motion jurisdiction. *Miltenberger v. Howard's Plumbing*, 93 Or App 475 (1988). The claim was reopened for the processing of a "post-aggravation rights" new medical condition. Such claims may qualify for payment of permanent disability compensation. ORS 656.278(1)(b) (2001); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recon* 54 Van Natta 1552 (2002).

In *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003), we interpreted the permanent partial disability limitation set forth in ORS 656.278(2)(d) (2001) and determined that it applies where there is (1) "additional impairment" to (2) "an injured body part" that has (3) "previously been the basis of a permanent partial disability award."<sup>2</sup> We found that the first step is to determine whether the conditions that require application of the ORS 656.278(2)(d) (2001) limitation are satisfied. If those conditions are satisfied, we found that the Director's standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate "post-aggravation rights" new or omitted medical condition claims. For claims closed on or after February 1, 2003, such as claimant's claim, that rule is found at OAR 436-035-0007(10) (2003).

Here, all three factors are satisfied. Dr. Whitney's September 2003 medical arbiter examination revealed decreased right wrist and right elbow ranges of

---

<sup>2</sup> ORS 656.278(2)(d) (2001) provides:

“(2) Benefits provided under subsection (1) of this section:

“ \* \* \* \* \*

“(d) May include permanent disability benefits for additional impairment to an injured body part that has previously been the basis of a permanent partial disability award, but only to the extent that the permanent partial disability rating exceeds the permanent partial disability rated by the prior award or awards.”

motion, which qualify for an impairment rating. Additionally, claimant has decreased strength in the right hand, decreased sensation in the right little finger, a 1 inch arm length discrepancy, and a chronic condition of the right arm, which qualify for an impairment rating. Moreover, claimant's "post-aggravation rights" new medical condition ("post-traumatic right elbow arthrosis") involves the same "injured body part" that was the basis of his previous 45 percent scheduled permanent disability award for his initially accepted "laceration, right forearm, severance and avulsion of ulnar nerve at right elbow, loss of medial condyle of humerus" conditions.

Under such circumstances, the medical evidence establishes that there is additional impairment to an injured body part (right arm) that was previously the basis of a PPD award. Therefore, the limitation in ORS 656.278(2)(d) (2001) applies to claimant's scheduled PPD. However, before application of the statutory limitation, we redetermine claimant's scheduled PPD pursuant to the Director's standards. See OAR 436-035-0007(10) (2003); *Nielsen*, 55 Van Natta at 3207.

Claimant has received a prior award for the right arm (elbow) of 45 percent scheduled PPD. As addressed above, the limitation in ORS 656.278(2)(d) (2001) applies. Therefore, claimant is entitled to additional permanent disability only to the extent that the PPD rating exceeds that rated by the prior award. ORS 656.278(2)(d) (2001); *Nielsen*, 55 Van Natta at 3208. We now proceed with that rating.

Here, the Own Motion Notice of Closure issued on February 12, 2003. Thus, the applicable standards are found in WCD Admin. Order 03-050 (eff. February 1, 2003).

### Right Little Finger

Dr. Whitney found decreased sensation (9 mm) of claimant's little finger. All other fingers had sensory findings of 6 mm or less (normal). The 9 mm decreased sensation is graded as "less than normal." OAR 436-035-0110(1)(a). This receives a value of 25 percent of the whole little finger. OAR 436-035-0110(1)(c). The value for sensory loss of the little finger is not converted to a hand value because only one finger is affected. OAR 436-035-0070(1). Therefore, claimant receives a value of 25 percent of the little finger.

## Right Wrist and Elbow Ranges of Motion

Dr. Whitney made the following right wrist findings: dorsiflexion, 35 degrees; palmar flexion, 45 degrees; radial deviation, 15 degrees; and ulnar deviation, 25 degrees. Under the standards, claimant receives a value of 4 percent for 35 degrees of dorsiflexion; 4 percent for 45 degrees of palmar flexion; 1 percent for 15 degrees of radial deviation; and 1 percent for 25 degrees of ulnar deviation. OAR 436-035-0080(1), (3), (5), and (7). These values are added for a total of 10 percent impairment of the right forearm. OAR 436-035-0007(16)(a). 10 percent of the right forearm is then converted to 8 percent of the right arm. OAR 436-035-0007(18); OAR 436-035-0090.

Claimant contends that he should receive an increased elbow range of motion value. He relies on the December 2001 report of Dr. Baker, his attending physician. Dr. Baker reports that claimant's right elbow was ankylosed at 15 degrees of flexion and 15 degrees of pronation. Claimant asserts that ankylosis of 15 degrees of flexion receives a value of 63 percent and ankylosis of 15 degrees of pronation has a value of 71 percent under OAR 436-035-0100(3) and (5) respectively. Claimant further argues that under OAR 436-035-0007(17), he should receive the largest value; *i.e.*, 71 percent, in lieu of all the other range of motion findings. Claimant also requests the promulgation of a temporary rule to address his elbow impairment.

SAIF contends that, by the July 2002 claim closure, claimant's range of motion had improved; and, therefore, Dr. Baker's December 2001 statement was not persuasive for the purpose of rating claimant's elbow impairment. SAIF also argues that a temporary rule is not necessary because the standards address claimant's impairment.

We have the authority to remand a claim to the Director for promulgation of a temporary rule when a disability is not addressed by the existing standards. *See Gallino v. Courtesy Pontiac-Buick-GMC*, 124 Or App 538, 541-42 (1993); *Gevers v. Roadrunner Construction*, 156 Or App 168 (1998). Thus, the threshold issue in determining whether to remand to the Director for promulgation of a temporary rule is a determination that a disability is not addressed by the existing standards.

Claimant has the burden of proving that his disability is not addressed by the standards. *See Katie J. Opdenweyer*, 52 Van Natta 92 (2000); *Terry Hockett*, 48 Van Natta 1297 (1996), *Susan D. Wells*, 46 Van Natta 1127 (1994) (no remand

to the Director for temporary rules where the claimant failed to meet her burden of proving that her disability was not addressed by the standards); *compare Peter Gevers*, 51 Van Natta 32 (1999) (where the claimant's disability was not ratable under the standards, claim remanded to the Director for promulgation of a temporary rule, even though the claimant had not requested such relief).

We conclude that promulgation of a temporary rule is not necessary because the standards address claimant's alleged ankylosis impairment. *See* OAR 436-035-0100(3) and (5). In any event, based on the following reasoning, we are not persuaded that claimant has sustained ankylosis impairment.

The Director's rules provide that when a medical arbiter is used on reconsideration, impairment is determined by the medical arbiter, unless a preponderance of medical opinion establishes a different level of impairment. OAR 436-035-0007(14). Impairment findings made by a consulting physician may be used only if the attending physician concurs with those findings. OAR 436-035-0007(13). Otherwise, only the attending physician at the time of claim closure may make impairment findings. ORS 656.245(3)(b)(B); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). We do not automatically rely on a medical arbiter's opinion in evaluating claimant's impairment but, rather, rely on the most thorough, complete, and well-reasoned evaluation of impairment. *See Kenneth W. Matlack*, 46 Van Natta 1631 (1994).

Here, the medical arbiter, Dr. Whitney, performed a thorough and complete examination that included range of motion findings. Therefore, we rely on Dr. Whitney's report to rate claimant's scheduled permanent disability. Based on Dr. Whitney's report, we conclude that there is no "ankylosis" disability.<sup>3</sup>

---

<sup>3</sup> Dr. Whitney's report described claimant's condition as "almost ankylosis" prior to the March 2000 surgery. *Stedman's Electronic Medical Dictionary*, v.4.0 (1998) defines "ankylosis" as "[s]tiffening or fixation of a joint as the result of a disease process, with fibrous or bony union across the joint." The March 2000 surgery report reveals that claimant's surgery, in part, consisted of an "interpositional arthroplasty," which *Stedman's* defines as "[s]urgical correction of ankylosis by separation of the immobile part of a joint from the mobilized part and interposition of a substance (e.g., fascia, cartilage, metal, or plastic) between them." Dr. Whitney did not make any finding of "ankylosis" at the time of his September 2003 medical arbiter examination. Under such circumstances, we are not persuaded that claimant is entitled to an impairment value for "ankylosis."

Dr. Whitney made the following active elbow range of motion findings (right/left): flexion, 95 degrees/150 degrees; extension, 50 degrees/0 degrees; pronation, 17 degrees/80 degrees; supination, 25 degrees/80 degrees. All of the left elbow ranges of motion are normal; therefore, the values under the Standards are used to establish the right elbow impairment as follows: 95 degrees of flexion equals 14.5 percent; 50 degrees of extension equals 10 percent; 17 degrees of pronation equals 10.3 percent; and 25 degrees of supination equals 9 percent. OAR 436-035-0007(24)(a); OAR 436-035-0100(1), (2), and (4). These are added for a value of 43.8 percent. OAR 436-035-0007(23)(a). This figure is then rounded to a total value of 44 percent of the right arm for claimant's decreased right elbow ranges of motion. OAR 436-035-0007(16).

We combine 44 percent (ROM of the right elbow) with 8 percent (converted right wrist ROM) for a final value of 48 percent of the right arm for decreased range of motion.

### Strength Findings

Per Dr. Whitney, claimant has decreased strength in the intrinsic muscles (4-/5) of the right hand, the flexor carpi ulnaris (4/5), the sublimis muscles of the 4<sup>th</sup> and 5<sup>th</sup> fingers (4/5), and the profundus muscles of the 4<sup>th</sup> (4/5) and 5<sup>th</sup> fingers (4-/5). The intrinsic muscles of the hand are the interossei and lumbricals. *Stedman's Electronic Medical Dictionary*, v.4.0 (1998). They are innervated by the ulnar nerve. *Gray's Anatomy* (1995) p. 896; OAR 436-035-0007(20)(b). The flexor carpi ulnaris muscle of the hand is also innervated by the ulnar nerve. *Id.*

Claimant receives no value for the decreased strength in his 4<sup>th</sup> and 5<sup>th</sup> fingers because loss of strength in a finger or thumb receives a value of zero. *See* OAR 436-035-0110(9)(a).

4-/5 strength of the interossei and lumbrical muscles receives a value of 30 percent. OAR 436-035-0007(20). 4/5 strength of the flexor carpi ulnaris muscle receives a value of 20 percent. Claimant's initially accepted condition included "laceration, right forearm; severance and avulsion of ulnar nerve at right elbow; loss of medial condyle of humerus." Because claimant's injury to the ulnar nerve was above the forearm, we use a value of 44 percent as a multiplier. OAR 436-035-0110(9). Therefore, 30 percent multiplied by 44 percent equals 13.2 percent for the decreased strength of the interossei and lumbrical muscles. 20 percent multiplied by 44 percent equals 8.8 percent for the decreased strength of the flexor carpi ulnaris muscle. These values are added (13.2 + 8.8) for a total of

22 percent of the wrist/forearm. This value is then divided by 2 for an average of 11 percent, which represents the final impairment value for the ulnar nerve. OAR 436-035-0007(21). Therefore, claimant receives a value of 11 percent of the right forearm for loss of strength.

There are no other ratable strength findings. 11 percent of the forearm is converted to 9 percent of the arm. OAR 436-035-0090. Therefore, claimant receives a value of 9 percent of the arm for decreased strength.

### Chronic Condition

Per Dr. Whitney, claimant is significantly limited in repetitive use of his right elbow and arm. Therefore, claimant receives a value of 5 percent of the arm for chronic condition. OAR 436-035-0010(5)(d).

### Arm Length Discrepancy

Dr. Whitney did not provide a measurement of claimant's arm length discrepancy. He opined that it was not "significant." However, OAR 436-035-0110(2) allows a value of 5 percent of the arm when surgery or an injury results in an arm length discrepancy of "1 inch or more, but less than 2 inches." On June 26, 2002, the attending physician, Dr. Baker, stated that the "[s]erial surgeries have resulted in [approximately] 1 [inch] shortening."

Inasmuch as Dr. Baker's report is the only medical opinion that addresses the "arm length discrepancy" finding, we rely on this impairment finding.<sup>4</sup> Accordingly, claimant receives a value of 5 percent of the right arm for the 1 inch arm length discrepancy.

### Surgery

Claimant argues that his March 27, 2000 surgery involved a "radial head resection," and, therefore, he is entitled to receive 15 percent of the arm pursuant to OAR 436-035-0110(5)(c). According to the March 2000 surgery report by Dr. Smith, claimant's surgery involved an open arthrotomy (of the right elbow),

---

<sup>4</sup> We note that the medical arbiter, Dr. Whitney, does not conclude that claimant's arm length discrepancy is not present, or is less than 1 inch. Instead, Dr. Whitney states that the arm length discrepancy is not "significant." In light of such circumstances, we find Dr. Baker's findings on this impairment value more persuasive.

with extensive release and debridement (of osteophytes from the radial head and olecranon), and interposition arthroplasty, using allograft, Achilles tendon. Claimant argues that the removal of the osteophytes from the radial head constitutes a “radial head resection.”

We conclude that no physician’s opinion supports a conclusion that claimant’s surgery constituted a “radial head resection.” Therefore, claimant receives no value for his surgery. *See* OAR 436-035-0007(27)(a).

The impairment values are combined as follows: 48 percent (ROM) combined with 9 percent (loss of strength) equals 53 percent; 53 percent combined with 5 percent (arm length discrepancy) equals 55 percent; 55 percent combined with 5 percent (chronic condition) equals 57 percent. Accordingly, claimant is entitled to a total award of 57 percent of the right arm.

Applying the limitation prescribed by ORS 656.278(2)(d) (2001) results in an increase in claimant’s right arm permanent disability award of 12 percent (23.04 degrees) (current award of 57 percent minus the prior award of 45 percent). Therefore, we modify the February 12, 2003 Notice of Closure to award 25 percent (1.5 degrees) of the right little finger and an additional 12 percent of the right arm for a total award to date of 57 percent scheduled permanent disability for the right arm.<sup>5</sup>

Because our decision 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 (the 12 percent scheduled permanent disability award for the right arm and the 25 percent scheduled permanent disability award for the right little finger), not to exceed \$4,600, payable directly to claimant’s counsel. ORS 656.386(2); OAR 438-015-0080(3); OAR 438-015-0040(1).

IT IS SO ORDERED.

Entered at Salem, Oregon on January 20, 2004

---

<sup>5</sup> The July 10, 2002 Notice of Closure’s award of an additional 15 percent (28.8 degrees) scheduled permanent disability of the right arm, for a total award of 60 percent (115.2 degrees) scheduled permanent disability of the right arm, was eliminated by our July 3, 2003 “Own Motion Order Reviewing Carrier Closure.” SAIF is allowed to offset any previous payment of permanent disability made pursuant to its July 2002 Notice of Closure against the permanent disability award granted by this order.