

In the Matter of the Compensation of
LEROY J. MOSER, DCD, Claimant
Own Motion No. 04-0433M
OWN MOTION ORDER ON RECONSIDERATION REVIEWING CARRIER
CLOSURE

Scott M McNutt Jr, AAL, Claimant Attorneys
Andersen & Nyburg, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

On April 11, 2008, we awarded 23 percent (73.6 degrees) unscheduled permanent disability (PPD) for claimant's "post-aggravation rights" new or omitted medical condition claim (depressive episode).¹ Noting that the deceased worker previously received a 15 percent (48 degree) unscheduled PPD award for his low back condition, the insurer contends that the "current award should be combined with the previous award." Based on the following reasoning, we disagree with the insurer's contention.

As we explained in our prior order, the PPD limitation set forth in ORS 656.278(2)(d) applies where there is (1) "additional impairment" to (2) "an injured body part" that has (3) "previously been the basis of a [PPD] award."² *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003). When the previous PPD award has been granted for a body part different than the body part for which impairment is currently being rated, the limitation under ORS 656.278(2)(d) is not applicable. *See, e.g., Dale M. Ackler*, 56 Van Natta 2809 (2004) (ORS 656.278(2)(d) not applicable because "post-aggravation rights" new / omitted medical condition, bilateral carpal – metacarpal arthritis (hand), was a different body part than a previously accepted / rated bilateral arm condition); *Alan T. Kucera*, 56 Van Natta 1596 (2004) (ORS 656.278(2)(d) not applicable because "post-aggravation

¹ During the pendency of this matter, the worker passed away. The decedent's wife is pursuing this matter. For the purposes of this case, "claimant" refers to the deceased worker's surviving spouse.

² ORS 656.278(2)(d) 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."

rights” new / omitted medical condition, arthritis of fifth CMC joint (hand), was a different body part than a previously accepted / rated arm condition); *Terry J. Rasmussen*, 56 Van Natta 1136 (2004) (ORS 656.278(2)(d) not applicable because “post-aggravation rights” new / omitted medical condition, left foot / ankle, was a different body part than a previously accepted / rated left knee condition); *compare Edward A. Hansen*, 56 Van Natta 243, 245-47 (2004) (record established that “post-aggravation rights” new medical condition (“subcapital fracture left hip”) involved the same “injured body part” (left knee) that was the basis of his previous scheduled permanent disability award, therefore, limitation in ORS 656.278(2)(d) (2001) applied).

Here, the decedent’s previous PPD award was for a low back condition. In contrast, the new or omitted medical condition which is being rated in this proceeding is a mental condition (depressive episode). The medical record does not establish that the decedent’s low back and mental conditions are the same “body part.” Furthermore, the decedent was not previously granted a PPD award for a mental condition resulting from his 1989 injury.

In light of such circumstances, the ORS 656.278(2)(d) limitation is not applicable. Consequently, as set forth in our prior award, claimant is awarded 23 percent (73.6 degrees) unscheduled PPD for the decedent’s “post-aggravation rights” new or omitted medical condition (depressive episode). Likewise, the insurer is responsible for payment of the entire award, without combining or other consideration of the decedent’s previous low back award. Finally, we reiterate that claimant’s counsel is awarded an “out-of-compensation” attorney fee equal to 25 percent of the increased permanent disability compensation created by this order (the 23 percent (73.6 degrees) unscheduled PPD award granted by this order), not to exceed \$4,600, payable directly to claimant’s counsel. ORS 656.386(2); OAR 438-015-0040(1); OAR 438-015-0080(3).

Accordingly, we withdraw our April 11th order. On reconsideration, as supplemented, we republish our April 11th order. The parties’ rights of reconsideration and appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 7, 2008