
In the Matter of the Compensation of
WILLIAM P. NELSON, Claimant
Own Motion No. 08-0091M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Philip H Garrow, Claimant Attorneys
John M Pitcher, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of the May 27, 2008 Notice of Closure that awarded 7 percent (22.4 degrees) unscheduled permanent disability (PPD) for his “post-aggravation rights” new/omitted medical conditions (left pelvic fracture, left trochanteric bursitis, traumatic osteoarthritis of the left hip, rotary scoliosis and left hip labral tear). Claimant contends that he is entitled to an increased PPD award.¹ Based on the following reasoning, we modify the Notice of Closure to award an additional 23 percent (73.6 degrees) unscheduled PPD.

FINDINGS OF FACT

On May 18, 1977, claimant, a choker setter, sustained a compensable injury (pelvic and lumber fractures) when struck by a log. The claim was initially closed by Determination Order of June 25, 1979, with an award of 20 percent unscheduled permanent disability. (Ex. 6). Claimant’s unscheduled permanent disability award was increased to 35 percent by a November 1979 stipulation. (Ex. 8).

In August 2007, the employer agreed to accept as an omitted condition a left pelvic fracture and the following as additional/consequential conditions: left trochanteric bursitis, traumatic osteoarthritis of the left hip, rotary scoliosis and left hip labral tear. (Ex. 43). An Administrative Law Judge (ALJ) approved the settlement on August 29, 2007. That same day, the employer voluntarily reopened the Own Motion claim for processing of the new or omitted medical conditions. (Ex. 44).

¹ Claimant’s May 18, 1977 claim was accepted as a disabling claim and was first closed on June 25, 1979. Thus, claimant’s aggravation rights expired on June 25, 1984. Therefore, when the self-insured employer voluntarily reopened the claim in August 2007, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On May 27, 2008, the employer issued its Notice of Closure.

Dr. Hill, claimant's attending physician, performed a closing examination on April 23, 2008. Dr. Hill reported the following impairment findings: 34 degrees lumbar flexion, 12 degrees lumbar extension and 12 degrees for right and left side bending; 130 degrees right hip flexion, 120 left hip flexion, 0 degrees left and right hip extension, 45 degrees right hip external rotation, 35 degrees left hip external rotation, 25 degrees right hip internal rotation and 15 degrees left hip internal rotation. (Ex. 46-1, 2). Dr. Hill restricted claimant to no lifting of more than 25 pounds and only occasional lifting in excess of 10 pounds. Recommending that claimant avoid repetitive bending/twisting/stooping, Dr. Hill concluded that claimant not go back to regular work.

On May 27, 2008, the employer issued a Notice of Closure that awarded an additional 7 percent unscheduled permanent disability based on Dr. Hill's left hip impairment findings. (Ex. 49-2). Claimant requested review of the closure notice, arguing that his lumbar impairment should be recalculated and that social/vocational factors be considered in determining unscheduled permanent disability.

CONCLUSIONS OF LAW AND OPINION

Because the aggravation rights on claimant's May 18, 1977 injury claim expired on June 25, 1984, 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 "post-aggravation rights" new medical conditions (left pelvic fracture, left trochanteric bursitis, traumatic osteoarthritis of the left hip, rotary scoliosis and left hip labral tear). Such claims may qualify for payment of permanent disability compensation. ORS 656.278(1)(b) (2001); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recon* 54 Van Natta 1552 (2002), *aff'd Dougan v. SAIF*, 193 Or App 767 (2004), *rev allowed* 337 Or 58 (2004).

The PPD limitation set forth in ORS 656.278(2)(d) (2001) applies where there is (1) "additional impairment" to (2) "an injured body part" that has (3) "previously been the basis of a [PPD] award." *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003).

Here, all three factors are satisfied. Dr. Hill's closing examination revealed decreased left hip and low back ROM that qualifies for an impairment rating. Moreover, claimant's new medical conditions involve the same "injured body part" that was the basis of his previous 35 percent unscheduled PPD award for his accepted left hip and low back conditions.

Under such circumstances, the medical evidence establishes that there is additional impairment to injured body parts (left hip and low back) that were previously the basis of PPD awards. Therefore, the limitation in ORS 656.278(2)(d) (2001) applies to claimant's unscheduled PPD. However, before application of the statutory limitation, we redetermine claimant's unscheduled PPD pursuant to the Director's standards. *See* OAR 436-035-0007(3) (2005); *Nielsen*, 55 Van Natta at 3207.

An Own Motion Notice of Closure dated May 27, 2008 closed claimant's claim. Thus, the applicable standards are found in WCD Admin. Order 04-063 (eff. January 1, 2005). *See* OAR 436-035-0003(1) (2005).

In the absence of a medical arbiter's findings, only the treating physician's impairment findings, or the findings of another physician with which the treating physician concurs, can be used to rate claimant's impairment for the "post-aggravation rights" new medical conditions. *See* ORS 656.245(2)(b)(B); OAR 436-035-0007(6) (2005); n8 *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994); *Geoffrey R. Pickett*, 56 Van Natta 3104, 3107 (2004).

Here, there is no dispute that Dr. Hill's impairment findings may be used to rate claimant's impairment. Under such circumstances, we conclude that Dr. Hill's April 23, 2008 closing examination addresses claimant's permanent impairment due to the "post-aggravation rights" new or omitted medical conditions. Thus, we proceed with our evaluation of claimant's unscheduled PPD.

Dr. Hill provided bilateral hip ROM findings as follows, right/left: flexion, 130 degrees/120 degrees; extension, 0 degrees/0 degrees; internal rotation, 25 degrees/15 degrees; and external rotation, 45 degrees/35 degrees. (Ex. 94). Claimant does not have a history of injury or disease involving his right hip. Therefore, a contralateral comparison is appropriate. *See* OAR 436-035-0011(3) (2005).

Because claimant's bilateral hip ROM findings for flexion and extension are either equal to or exceed the value under the rules, they receive values of 0 percent. OAR 436-035-0011(3)(a) (2005). Claimant receives a value of 2.1 percent for his left hip external rotation of 35 degrees. OAR 436-035-0340(12). Claimant also receives a value of 2.6 percent for 15 degrees internal rotation of the left hip. OAR 436-035-0011(10). The total impairment of 4.7 percent is rounded to five percent. Dr. Hill's report also supports a 5 percent award for a chronic condition

limiting repetitive use of the left hip. (OAR 436-035-0019). Combining that impairment value with 5 percent for reduced range of hip motion, the result is 10 percent total hip impairment.

With regard to lumbar impairment, 34 degrees flexion equals 4 percent impairment (OAR 436-035-0360(8)); 12 degrees extension equals 4.2 percent impairment (OAR 436-035-0360(9)); 12 degrees right bending equals 2.6 percent impairment (OAR 436-035-0360(10)), and 12 left side bending equals 2.6 percent (OAR 436-035-0360(10)). Total impairment for lost range of motion is 13.4 rounded to 13 percent.

Claimant also receives a total of 12 percent impairment for compression fractures at L3 and L4. (OAR 436-035-0350(1)(a)). For transverse fractures at L3 and L4, claimant would receive 10 percent impairment under OAR 436-035-0350(1)(b). Dr. Hill's report also supports a "chronic condition" award for 5 percent impairment. Claimant's total lumbar impairment after combining 13 percent, 12 percent, 10 percent and 5 percent is 34 percent. Claimant's combined hip and lumbar impairment equals 41 percent after 34 percent for lumbar impairment is combined with 10 percent for hip impairment.

Pursuant to ORS 656.726(4)(f)(D), impairment is the only factor to be considered in evaluation of the worker's disability under ORS 656.214(5) if:

“(i) The worker returns to regular work at the job held at the time of injury;

“(ii) The attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 releases the worker to regular work at the job held at the time of injury and the job is available but the worker fails or refuses to return to that job; or

“(iii) The attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 releases the worker to regular work [*1888] at the job held at the time of injury but the worker's employment is terminated for cause unrelated to the injury.”

“Regular work” means the job the worker held at the time of injury. OAR 436-035-0005(15) (2005). Here, the record establishes that claimant has not been released by the attending physician to return to his job-at-injury (choker setter). Furthermore, claimant had not returned to regular work at the time of claim closure. Consequently, he is entitled to the social/vocational factors. Therefore, we now assemble those values under OAR 436-035-0012 (2005).

Claimant was 51 years old at the time of closure, which receives a value of 1. OAR 436-035-0012(2)(a) (2005). He has a high school diploma, which receives a value of 0. OAR 436-035-0012(4)(a) (2005). At the time of the May 27, 2008 Notice of Closure, claimant’s highest SVP in the previous 5 years was an SVP of 3 for his job as a “groundskeeper” (DOT # 406.684-014). OAR 436-035-0012(5). An SVP of 3 receives a value of 3. OAR 436-035-0012(5). The age/education values are added for a total of 4. OAR 436-035-0012(15)(c) (2005).

We now determine claimant’s adaptability factor. “Base Functional Capacity” (BFC) means an individual’s demonstrated physical capacity before the injury or disease. OAR 436-035-0012(8)(a) (2005). Claimant’s BFC is “heavy.” OAR 436-035-0012(9)(a) (2005).

Per Dr. Hill, claimant is capable of no lifting over 25 pounds and only occasional lifting to 10 pounds. He also has repetitive use limitations in bending, twisting and stooping, resulting in an RFC of sedentary. OAR 436-035-0012(8)(h) (2005). “Heavy” (BFC) to “sedentary” (RFC) receives an adaptability value of 6. OAR 436-035-0012(11) (2005).

Therefore, claimant’s age/educational value of 4 times the adaptability value of 6 equals 24. OAR 436-035-0012(15)(e) (2005). Adding the impairment value of 41 percent to the social/vocational factor of 24 results in a total unscheduled PPD of 65 percent (208 degrees) for the left hip and low back. OAR 436-035-0008(2)(b)(C) (2005).

As discussed above, claimant has previously been awarded 35 percent unscheduled permanent disability. Thus, applying the limitation in ORS 656.278(2)(d) (2001), claimant’s additional award equals 30 percent unscheduled PPD. The May 2008 Notice of Closure awarded claimant 7 percent unscheduled PPD. Accordingly, the May 2008 Notice of Closure is modified to award claimant an additional 23 percent (73.6 degrees) unscheduled permanent disability for his “post-aggravation rights” new medical conditions.

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 23 percent increased award granted by this order), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(2); OAR 438-015-0080(2).²

IT IS SO ORDERED.

Entered at Salem, Oregon on September 8, 2008

² Claimant requests an attorney fee, asserting that his attorney was instrumental in obtaining acceptance of the omitted medical conditions. Yet, our Own Motion authority does not extend to the acceptance or denial of new/omitted medical condition claims. ORS 656.267(2). Rather, our Own Motion authority is initiated once such a claim has been determined to be compensable. ORS 656.267(3). As such, we are authorized to consider whether claimant's attorney was instrumental in obtaining the voluntary reopening of the Own Motion claim. If such a finding was rendered, claimant's counsel would be entitled to an "out-of-compensation" attorney fee from temporary disability. OAR 438-015-0080. However, no temporary disability was granted by the Notice of Closure. Finally, the request is denied to the extent that claimant's attorney is requesting an "employer-paid" fee, because we have no authority to award such fee under our Own Motion authority.