

In the Matter of the Compensation of  
**LOREN K. MILLER, Claimant**  
Own Motion No. 09-0004M  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE ON  
RECONSIDERATION

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Reviewing Panel: Members Weddell and Lowell.

On June 26, 2009, we withdrew our May 29, 2009 order that awarded 20 percent unscheduled permanent partial disability (PPD) for claimant's "post-aggravation rights" new/omitted medical conditions claim for his right shoulder ("right shoulder tendonitis and right shoulder subacromial and subdeltoid bursitis"). We took this action to consider the SAIF Corporation's contention that claimant was not entitled to additional PPD for his new/omitted medical conditions. Having received claimant's response, we proceed with our reconsideration.

Prior to our May 29, 2009 order, claimant had received a 25 percent (80 degrees) unscheduled PPD award for his *left* shoulder resulting from his 1999 compensable injury. That award was calculated by adding 5 percent unscheduled chronic condition impairment to a social/vocational value of 20 percent. (Ex. 7-4).

In our May 29, 2009 order, we addressed the unscheduled PPD for claimant's *right* shoulder new/omitted medical conditions claim resulting from the same 1999 compensable injury. Because the right shoulder had not previously been the basis of a PPD award, we determined that the limitation in ORS 656.278(2)(d) did not apply, and that the PPD for the newly accepted right shoulder conditions was to be rated under the Director's standards without a "redetermination" of disability. *See Loren K. Miller*, 61 Van Natta 1481 (2009); *Sandra L. Sanchez*, 60 Van Natta 1597, 1599 (2008).

After finding 14 percent ratable impairment, we added a social/vocational value of 6, for a total unscheduled PPD award of 20 percent (64 degrees) for the right shoulder. Therefore, claimant was awarded an additional 20 percent unscheduled PPD.

On reconsideration, SAIF asserts that this method of calculation results in “double compensation” in a manner inconsistent with *Leroy J. Moser, DCD*, 60 Van Natta 890, *recons*, 60 Van Natta 1113 (2008), *recons*, 61 Van Natta 296 (2009).<sup>1</sup> Based on the following reasoning, we affirm our prior decision.

The relevant statutes regarding this “post-aggravation rights” new/omitted medical condition are found at ORS 656.278(1)(b), (2)(d), and (6). Although permanent disability benefits are available for “post-aggravation rights” new/omitted medical conditions under ORS 656.278(1)(b), ORS 656.278(2)(d) provides a specific limitation on that availability.<sup>2</sup>

The statutory limitation on PPD 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.” *Miller*, 61 Van Natta at 1482; *Cory L. Nielsen*, 55 Van Natta 3199, 3206-07 (2003).

Conversely, in *Nielsen*, we also explained that, if a “post-aggravation rights” new/omitted medical condition does not involve an injured body part that was previously the basis of a PPD award, ORS 656.278(2)(d) does not apply to reduce the PPD award. 55 Van Natta at 3203 n 2. Thus, the *Nielsen* rationale holds that where it is determined that the limitation in ORS 656.278(2)(d) does not apply,

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<sup>1</sup> In *Antonio L. Martinez*, 61 Van Natta 1892, 1902-03 (2009), we disavowed that portion of the *Moser* decision that declined to award the claimant’s attorney an assessed fee under ORS 656.382(2) for defending our Own Motion unscheduled PPD award following the carrier’s reconsideration request of the initial Own Motion order. Although the remainder of the *Moser* decision remains good law, its rationale is distinguishable.

<sup>2</sup> ORS 656.278(1)(b) provides, in relevant part:

“[t]he payment of permanent disability benefits may be provided after application of the standards for the evaluation and determination of disability as may be adopted by the Director of the Department of Consumer and Business Services pursuant to ORS 656.726[.]”

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.”

the permanent disability for the “post-aggravation rights” new/omitted medical condition is rated under the Director’s standards without “redetermination” of disability. *Nielsen*, 55 Van Natta at 3203 n 2, 3207.

Thus, there is interplay between our statutory mandate to apply the Director’s standards to determine PPD benefits available under ORS 656.278(1)(b) and the statutory mandate under ORS 656.278(2)(d), which provides for a limitation on such benefits. As explained above, we addressed that interplay and explained those principles in *Nielsen*.

In *Moser*, we applied our *Nielsen* reasoning.<sup>3</sup> Specifically, because the decedent’s previous PPD award was for a low back condition and the “post-aggravation rights” new/omitted medical condition being rated was a mental condition (depressive episode), we reasoned that the ORS 656.278(2)(d) “limitation” did not apply; *i.e.*, these were not the same body parts and the decedent had not been previously granted a PPD award for a mental condition resulting from his work injury. Therefore, we rated the unscheduled PPD for the “post-aggravation rights” new/omitted medical condition (depressive episode) under the Director’s standards *without* “redetermination” of disability. *Moser*, 61 Van Natta at 299.

In *Moser*, because the Own Motion Notice of Closure issued on November 9, 2004; we applied the standards found in WCD Admin. Order 03-050 (eff. February 1, 2003). OAR 436-035-0003(1) (2003). Those standards contained *former* OAR 436-035-0320(4), which provided that, when calculating unscheduled disability:

“If the impairment results from injury to more than one body part or system listed in these rules, the values shall be combined (not added) to arrive at a final impairment value.”

Based on the decedent’s currently rated depressive episode impairment finding (23 percent impairment), in conjunction with his previous low back impairment finding (11 percent impairment), we found that he had impairment that resulted from injury to more than one body part or system listed in the Director’s disability standards. Therefore, applying *former* OAR 436-035-0320(4), we combined the values for the low back and depressive episode to arrive at a final impairment value of 31 percent. *Moser*, 61 Van Natta at 299.

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<sup>3</sup> During the pendency of the matter in *Moser*, the worker passed away and his wife pursued the matter. For purposes of that case, “claimant” referred to the deceased worker’s surviving spouse.

Moreover, in *Moser*, the decedent's "social/vocational" factors included an adaptability factor that was based on this combined 31 percent impairment value. OAR 436-035-0310(8), (9) (2003); *Id.* at 302-03. Adding the decedent's "social/vocational" value (8) to his impairment value (31), we reached a total of 39 percent unscheduled PPD. *Id.* at 303. However, we noted that the deceased worker had already been awarded 15 percent unscheduled PPD due to his compensable low back injury.<sup>4</sup> Because the decedent was not entitled to double compensation for permanent impairment and "social/vocational" factors that had previously been granted, we took those values into consideration when calculating his current unscheduled PPD award. Consequently, we concluded that the deceased worker's additional unscheduled PPD award was 24 percent (39 percent minus 15 percent). *Id.*

Here, like *Moser*, our analysis in *Nielsen* applies. Under that analysis, because claimant's right shoulder had not previously been the basis of a PPD award, the limitation in ORS 656.278(2)(d) does not apply, and the PPD for the newly accepted right shoulder conditions are rated under the Director's standards *without* a "redetermination" of disability. *Miller*, 61 Van Natta at 1482.

However, here, different standards apply to this closure than applied to the closure in *Moser*. Specifically, because the Own Motion Notice of Closure issued on November 10, 2008, the applicable standards are found in WCD Admin. Order 07-060 (eff. January 1, 2008). *See* OAR 436-035-0003(1) (2008). As addressed in our prior order, application of those standards results in 14 percent impairment for the right shoulder. Yet, in contrast to *Moser*, the current applicable standards provide no rule similar to *former* OAR 436-035-0320(4) for combining impairment resulting from injury to multiple body parts or systems where, as here, the date of injury is before January 1, 2005.<sup>5</sup> In fact, *former* OAR 436-035-0320(4) was among those rules repealed by WCD Admin. Order 04-063 (eff. January 1, 2005).

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<sup>4</sup> Specifically, the deceased worker had previously received an unscheduled PPD award of 15 percent for his compensable low back injury. That award was composed of 11 percent impairment and 4 percent for "social/vocational" factors. *Moser*, 61 Van Natta at 299.

<sup>5</sup> OAR 436-035-0009(2) (2008) provides that "[i]f the impairment results from injury to more than one extremity, area, or system, the whole person values for each are combined (not added) to arrive at a final impairment value." That provision, however, only applies to calculating disability benefits for dates of injury on or after January 1, 2005. OAR 436-035-0008 (2008), which governs calculating disability benefits for dates of injury prior to January 1, 2005, contains no similar provision.

Moreover, no similar rule was subsequently enacted regarding calculating unscheduled PPD for dates of injury before January 1, 2005.<sup>6</sup> See OAR 436-035-0008 (2008).

Therefore, under the standards relevant to this claim closure, the previous left shoulder impairment is not combined with the current right shoulder impairment. As a result, neither the adaptability factor nor the “social/vocational” factor is affected by the previous left shoulder impairment. Thus, unlike the situation in *Moser*, there is no “combining” that would result in double payment. Consequently, we do not consider the prior unscheduled PPD award for the *left* shoulder when calculating claimant’s current unscheduled PPD award for the *right* shoulder.

Finally, claimant is entitled to a carrier-paid attorney fee for his counsel’s services on reconsideration. ORS 656.382(2); *Antonio L. Martinez*, 61 Van Natta 1892, 1903-04 (2009). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on reconsideration is \$2,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case on reconsideration (as represented by claimant’s response), the complexity of the issues, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our May 29, 2009 order effective this date. The parties’ rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 29, 2009

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<sup>6</sup> The general rule directing that “[e]xcept as otherwise noted in these rules, impairment values to a given body part, area, or system are combined” remains unchanged, although renumbered. See OAR 436-035-0011(6) (2008); OAR 436-035-0007(19) (2003). Furthermore, we applied OAR 436-035-0011(6) (2008) in determining that claimant’s right shoulder impairment totaled 14 percent. Specifically, we combined the following right shoulder impairment values: 5 percent (surgery) combined with 5 percent (chronic condition) for 10 percent, combined with 4 percent (ranges of motion), for a total of 14 percent impairment in the right shoulder. See *Miller*, 61 Van Natta at 1484. Nevertheless, unlike *former* OAR 436-035-0320(4), OAR 436-035-0011(6) (2008) does not involve combining impairment values related to more than one body part or system.