

In the Matter of the Compensation of
DAVID S. LUND, Claimant

WCB Case No. 08-01725

ORDER ON REVIEW

Jon C Correll, Claimant Attorneys

Hornecker Cowling et al, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Naugle's order that affirmed an Order on Reconsideration that awarded 12 percent (38.4 degrees) unscheduled permanent disability for his right shoulder conditions. In its respondent's brief, the self-insured employer contests that portion of the ALJ's order that admitted prior litigation orders. On review, the issues are extent of unscheduled permanent disability and evidence. We modify in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following supplementation.

Claimant, a wood products production laborer, compensably injured his right shoulder pulling veneer off the green-chain. (Ex. 4-10, -11). In November 2003, the employer accepted a nondisabling right shoulder strain. (Ex. 4-35). Later, following litigation of its denial of a new/omitted medical condition claim, the employer issued a Modified Notice of Acceptance to include a nondisabling right rotator cuff tear. (Ex. 4-70). The claim was eventually reclassified as disabling. (Ex. 4-79, -119).

In October 2006, Dr. Bynum, attending physician, stated that claimant was able to perform "his current work as a heavy equipment operator." (Ex. 4-71). In December 2006, Dr. Bynum repaired claimant's right shoulder rotator cuff, resecting his acromion and clavicle. (Ex. 4-75 through 78).

On May 16, 2007, Dr. Bynum released claimant to a "trial of regular work." (Ex. 4-117). In doing so, Dr. Bynum stated, "[claimant] is not anticipating the need to do any work other than heavy equipment operating and is not likely to have to do any strenuous work with the shoulder at or above the shoulder level." (*Id.*)

On August 15, 2007, Dr. Bynum performed a closing examination and reported claimant's shoulder range of motion (ROM) findings to be equal bilaterally, except that the internal rotation was 45 degrees on the right and 60 degrees on the left. He recommended claim closure, adding that claimant could "continue regular work." (Ex. 4-118).

On October 8, 2007, a Notice of Closure awarded 12 percent unscheduled permanent partial disability (PPD) based on claimant's decreased ROM and surgery. (Ex. 4-121). The Notice of Closure Summary indicated that claimant returned to "Job at injury (same employer)" and that he was released to his "Job at injury without restrictions." (Ex. 4-122). Claimant requested reconsideration and a medical arbiter examination.

On January 11, 2008, Dr. Nagel, the medical arbiter, listed claimant's accepted conditions as a right shoulder strain and rotator cuff tear. (Ex. 5-1). Dr. Nagel reported decreased shoulder ROM findings.¹ (Ex. 5-4, -5). Dr. Nagel apportioned 40 percent of the impairment findings, which he considered to be valid, to claimant's accepted conditions and 60 percent to "other unrelated conditions." (Ex. 5-6, -7). He concluded that claimant was capable of occasionally lifting/carrying up to 50 pounds. (Ex. 5-6).

Relying on Dr. Nagel's medical arbiter report, the Appellate Review Unit (ARU) found claimant's right shoulder ROM impairment value to be 5 percent, and apportioned 40 percent of that value to his accepted conditions, which equaled 2 percent shoulder ROM impairment. (Ex. 6-2, -3). Combining the ROM impairment value to the full impairment values for surgery (5 percent for acromion resection and 5 percent for clavicle resection), the February 21, 2008 Order on Reconsideration awarded 12 percent unscheduled PPD for claimant's right shoulder conditions. (Ex. 6-3). Finding that claimant "returned to regular work and then took other employment elsewhere[,]" the ARU concluded that he was not entitled to social-vocational factors. (*Id.*) Claimant requested a hearing.

¹ Dr. Nagel noted that claimant had no previous history of injury or disease in his contralateral shoulder joint, no strength loss, and no "chronic condition" impairment due to his accepted conditions. (Ex. 5-5).

CONCLUSIONS OF LAW AND OPINION

Evidence

In his written closing argument, claimant submitted a prior ALJ's order and Board's order (Exhibits A and B) for admission. The employer objected, arguing that it was unclear whether the disputed exhibits had been submitted to the ARU for inclusion in the reconsideration proceeding. In doing so, the employer requested that the ALJ determine admissibility of the disputed exhibits. Claimant responded that he was correcting the employer's error under OAR 436-030-0135(3).²

Thereafter, the ALJ reopened the hearing record in order to obtain a copy of the reconsideration record. After receiving a certified copy of the reconsideration record used by the ARU, the ALJ found that the disputed exhibits were contained in the reconsideration record. Consequently, the ALJ admitted the disputed exhibits.

We review the ALJ's evidentiary ruling for abuse of discretion. *Charlotte A. Landers*, 60 Van Natta 1432, 1434 (2008); *Barrett Behurst*, 58 Van Natta 453, 454 (2006). The record for the reconsideration proceeding includes all documents and other material relied upon in issuing the Order on Reconsideration as well as any additional material submitted by the parties, but not considered in the reconsideration proceeding. OAR 436-030-0155(1). The record consists of all documents and material received and date stamped by the Director before issuance of the Order on Reconsideration. OAR 436-030-0155(1)(a).

Here, the reconsideration record shows that the disputed exhibits were date stamped, "+06-29-06 WCD" and "10-5-05 WCD." (Exs. A, B, 7-11 through 23). The Order on Reconsideration issued on February 21, 2008. (Ex. 6). Furthermore, in submitting the documents, the ARU (on behalf of WCD and the Director) certified that they were part of the reconsideration record. (Ex. 7-2). As such, we find no abuse of discretion in the ALJ's evidentiary ruling.

² Because of claimant's November 28, 2007 request for reconsideration, the applicable rules are found in WCD Admin. Order 05-073 (eff. January 1, 2006). OAR 436-030-0003(1).

Unscheduled PPD

In affirming the Order on Reconsideration, the ALJ found that claimant did not meet his burden of establishing error. In doing so, the ALJ determined that the employer accepted a “combined condition” consisting of a right shoulder rotator cuff tear combined with preexisting osteoarthritis. Because the employer did not issue a major contributing cause denial, the ALJ found that claimant was entitled to have impairment rated for his total combined condition. Nevertheless, based on Dr. Nagel’s medical arbiter report, the ALJ concluded that claimant’s right shoulder ROM findings should be apportioned. The ALJ also found that claimant was not entitled to social-vocational factors because he previously returned to his “at-injury” job.

On review, the employer argues that it did not accept a “combined condition” because claimant did not request acceptance of a “combined condition” and it was not ordered to accept a “combined condition.” Instead, the employer contends that it accepted only a “right shoulder rotator cuff tear.” (Ex. 4-70). As such, the employer argues that claimant is not entitled to have impairment rated for his total “combined condition,” *i.e.*, his right shoulder rotator cuff tear and preexisting osteoarthritis. For the following reasons, we disagree.

When an order finds a particular condition to be compensable, that unappealed finding controls over a subsequent Notice of Acceptance. *Patrick J. Kehoe*, 57 Van Natta 2063, 2065-66 (2005); *William H. Bradford*, 57 Van Natta 1156, 1159 (2005); *Timothy L. Wolf*, 56 Van Natta 3480, 3482-83 (2004). In *Kehoe*, a prior unappealed litigation order found the claimant’s cervical disc condition to be compensable under a “combined condition” analysis, *i.e.*, his cervical disc condition combined with preexisting degenerative changes at that level, and ordered the insurer to process the claim according to law. *See Patrick J. Kehoe*, 56 Van Natta 1813 (2004). We held that, in light of the prior unappealed litigation order, the claimant had a compensable combined condition regardless of the insurer’s subsequent acceptance of only a cervical disc herniation. *Kehoe*, 57 Van Natta at 2065.

Here, the facts are similar to *Kehoe*. Claimant requested a hearing regarding the employer’s denial of his request to accept a new medical condition claim for a right shoulder rotator cuff tear. (Ex. 4-52, -60, -61). In an October 4, 2005 Opinion and Order, a prior ALJ listed the issue as “New Medical Condition-Combined Condition[.]” (Ex. A-1). The prior ALJ found that “claimant’s preexisting osteoarthritis in his right shoulder contributed to his right-shoulder

rotator cuff tear. This is a combined condition claim.” (Ex. A-4). The prior ALJ ultimately concluded that claimant established that his right shoulder rotator cuff tear was an “otherwise compensable injury” and that the employer did not meet its burden of proving that the “otherwise compensable injury” was not the major contributing cause of his claimed condition. (Ex. A-4 through 8). In doing so, the prior ALJ ordered the employer “to add claimant’s new or omitted medical condition, a right-shoulder rotator cuff tear, to claimant’s accepted claim and further process the claimant’s claim according to law.” (Ex. A-8).

In a June 28, 2006 Order on Review, we agreed with the prior ALJ’s determination that the claim involved a “combined condition” and affirmed the prior ALJ’s order. (Ex. B-2). Our order was not appealed.

We acknowledge that, unlike *Kehoe* (where the prior litigation order stated that the insurer’s denial was set aside and “the claim” was remanded to the insurer for processing according to law), the “Order” section of the prior ALJ’s order in the present case specifically directed the employer to accept only “a right-shoulder rotator cuff tear.” (Ex. A-8). However, the prior ALJ expressly identified the disputed condition as a “combined condition” and applied a “combined condition” analysis in determining the compensability of claimant’s right shoulder rotator cuff tear. (Ex. A). In affirming the prior ALJ’s order, we agreed with the prior ALJ’s determination that the claim involved a “combined condition.” (Ex. B-2). Moreover, our prior order did not indicate that the employer contested that determination. (Ex. B-1). Instead, the employer contended that it had proven that the “otherwise compensable injury” (the rotator cuff tear) was not the major contributing cause of claimant’s “combined condition” (the tear combined with his preexisting osteoarthritis). (*Id.*)

Accordingly, regardless of the employer’s subsequent acceptance of only a “right shoulder rotator cuff tear,” claimant had a compensable combined condition consisting of a right shoulder rotator cuff tear combined with preexisting osteoarthritis. *Kehoe*, 57 Van Natta at 2065; *Wolf*, 56 Van Natta at 3482. Because the employer did not issue a major contributing cause denial before claim closure, claimant is entitled to impairment values for those findings of impairment caused by his entire combined condition, *i.e.*, his right shoulder rotator cuff tear combined with preexisting osteoarthritis. OAR 436-035-0007(1);³ OAR 436-035-0014(1)(c); *see SAIF v. Belden*, 155 Or App 568, 575-76 (1998), *rev den*, 328 Or 330 (1999).

³ Because of claimant’s October 8, 2007 Notice of Closure, the applicable standards are found in WCD Admin. Order 05-074 (eff. January 1, 2006). OAR 436-035-0003(1).

However, while claimant's combined condition is ratable in its entirety, he is not entitled to impairment values for findings of impairment due to unaccepted conditions. See ORS 656.214(5) (Or Laws 1999, ch 876, § 2); OAR 436-035-0007(1). Thus, we determine what permanent impairment is due to the accepted conditions, as opposed to unaccepted conditions.

On reconsideration, where a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician are more accurate and should be used. OAR 436-035-0007(5). Absent persuasive reasons to the contrary, we are not free to disregard the medical arbiter's impairment findings when he or she unambiguously attributes the claimant's permanent impairment to the compensable condition. *Hicks v. SAIF*, 194 Or App 655, 659, *modified on recons*, 196 Or App 146 (2004); *Antonio L. Martinez*, 57 Van Natta 1812, 1814 (2005).

Dr. Nagel, the medical arbiter, listed claimant's accepted conditions as "[r]ight shoulder strain and right rotator cuff tear." (Ex. 5-1). Dr. Nagel reported decreased right shoulder ROM findings, with no history of previous injury or disease in claimant's contralateral shoulder. (Ex. 5-5). He also found no right shoulder strength loss or "chronic condition" impairment. (*Id.*) Dr. Nagel considered the impairment findings to be valid and apportioned 40 percent of the findings to claimant's accepted conditions and 60 percent to "other unrelated conditions." (Ex. 5-6, -7). In doing so, he identified claimant's "other unrelated conditions" as "degenerative osteoarthritis, shoulder impingement syndrome, right shoulder tendonitis, a downward sloping acromion, and abnormal signals in the superior and anterior labrum[.]" (Ex. 5-6).

Claimant argues that, based on the prior ALJ's order, his preexisting osteoarthritis included the "other unrelated conditions" identified by Dr. Nagel. Therefore, according to claimant, apportionment was not appropriate. The employer responds that there is no evidence that claimant's preexisting osteoarthritis included all of the listed "other unrelated conditions." For the following reasons, we agree with the employer's argument.

In evaluating claimant's "preexisting condition," the prior ALJ referenced the medical opinions of Drs. Thompson and Jany, who found that claimant had an osteophyte formation and bone spur impinging on his rotator cuff, causing a tear. (Ex. A-4 through 6). The prior ALJ concluded that claimant's "combined condition" consisted of a right shoulder rotator cuff tear combined with

preexisting osteoarthritis. (Ex. A-4). The prior ALJ's order did not identify any other conditions as part of the "preexisting condition" component of claimant's "combined condition." (*Id.*)

Here, neither Dr. Bynum nor Dr. Nagel opined that a downward sloping acromion, right shoulder tendonitis, or abnormal signals in the superior and anterior labrum were part of claimant's preexisting osteoarthritis. In the absence of a medical opinion indicating otherwise, we do not find that claimant's accepted preexisting osteoarthritis included those conditions. *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (because the Board is not an agency with specialized medical expertise, it must base its findings on medical evidence in the record); *Ilse Cancino*, 61 Van Natta 567, 568 (2009) (same).

Because Dr. Nagel's list of "other unrelated conditions" included "degenerative osteoarthrosis," which was part of claimant's accepted "combined condition," as well as other unaccepted conditions, we consider his apportioned findings to be ambiguous. As such, we are not persuaded that Dr. Nagel's "apportioned" findings accurately evaluate claimant's impairment attributable to his accepted conditions. *See Khrul v. Foremans Cleaners*, 194 Or App 125, 131 (2004) (medical arbiter's report must rate impairment caused by the compensable condition); *Kehoe*, 57 Van Natta at 2067.

We reach a different conclusion regarding the findings offered by Dr. Bynum, claimant's attending physician. At his closing examination, Dr. Bynum measured claimant's shoulder strength, ROM, and sensation. He reported decreased shoulder internal rotation findings to be 45 degrees on the right and 60 degrees on the left. Dr. Bynum found the remainder of claimant's shoulder ROM to be equal bilaterally. Dr. Bynum attributed the internal rotation findings to claimant's accepted conditions and surgery. (Ex. 4-118).

Under these circumstances, we are persuaded that a preponderance of the medical evidence demonstrates that Dr. Bynum's different impairment findings were more accurate than those of Dr. Nagel's and should be used to rate claimant's permanent disability due to his accepted conditions. As such, we find Dr. Bynum's opinion to be persuasive evidence to disregard Dr. Nagel's findings. *See Hicks*, 194 Or App at 659; OAR 436-035-0007(5).

Relying on Dr. Bynum's impairment findings, we proceed with our permanent impairment calculation. On December 14, 2006, claimant underwent surgery for his right shoulder rotator cuff tear. (Ex. 4-75). That surgery involved

partial resections of the acromion and clavicle. (Ex. 4-76, -77). Claimant is entitled to impairment values of 5 percent for his partial clavicle resection and 5 percent for his partial acromion resection. OAR 436-035-0330(13). In accordance with Dr. Bynum's August 2007 report, claimant was entitled to a right shoulder ROM impairment value of 1 percent.⁴ OAR 436-035-00330.

Claimant's right shoulder impairment values are combined as follows: 5 percent (clavicle surgery) combined with 5 percent (acromion surgery) equals 10 percent; 10 percent combined with 1 percent (ROM) equals 11 percent right shoulder impairment. OAR 436-035-0011(6).

Next, we address claimant's entitlement to social-vocational factors. Based on the prior ALJ's finding that claimant previously returned to his regular work on the green-chain, the current ALJ found that claimant was not entitled to social-vocational factors.

Claimant argues that he is entitled to have his social-vocational factors considered because, at the time of the February 21, 2008 Order on Reconsideration, he neither returned to regular work nor was he released to regular work by Dr. Bynum. In response, the employer argues that Dr. Bynum unequivocally released claimant to "regular work" without restrictions. The employer further contends that claimant did not prove that he was unable to return to his job at the time of injury. In doing so, the employer argues that there is no evidence that claimant's "regular work" exceeded the restrictions imposed by Dr. Nagel.

We find that claimant is entitled to have his social-vocational factors considered in rating his permanent disability. We reason as follows.

Because of claimant's August 12, 2003 date of injury, we apply ORS 656.214(5) (1999) and ORS 656.726(4)(f)(D) (Or Laws 2003, ch 811, § 17). *See Jeannine M. Dietz*, 60 Van Natta 2854, 2856 n 3 (2008) (because the date of

⁴ Claimant's internal rotation findings were 45 degrees for his right shoulder and 60 degrees for his left shoulder. (Ex. 4-118). Because claimant had no previous history of injury or disease in his left shoulder, we compare those findings, right/left, and calculate the proportionate impairment value as follows: $45/60 = X/90$; $X = 67.5$ degrees, which is rounded to 68 degrees. *See* OAR 436-035-0011(3), (4); OAR 436-035-0330(9). Claimant's proportionate right shoulder internal rotation (68 degrees) has an impairment value of 1 percent. OAR 436-035-0330(9). Because the remainder of claimant's shoulder ROM findings were equal bilaterally and do not exceed the values for ROM under the rules, claimant receives no additional impairment values for his right shoulder ROM. OAR 436-035-0011(3).

injury was before January 1, 2005, ORS 656.726(4)(f) (2003), Oregon Laws 2003, chapter 811, section 17, applied). Pursuant to ORS 656.726(4)(f)(D) (2003), claimant is entitled to a rating of impairment only (and not social-vocational factors) if: (i) he returned to regular work at the job held at the time of injury; (ii) his attending physician released him to regular work at the job held at the time of injury and the job is available but he fails or refuses to return to that job; or (iii) his attending physician released him to regular work at the job held at the time of injury but his employment was terminated for reasons unrelated to his injury. See OAR 436-035-0008(2)(b); see also OAR 436-035-0009(3).

“Regular work” means the job the worker held at the time of injury. OAR 436-035-0005(15). Claimant’s “regular work” or “job-at-injury” was as a “green-chain offbearer.” (Ex. 4-2, -10, -11, -44). Moreover, the employer concedes that, at the time of Dr. Bynum’s release, claimant “had been released to and [was] performing his (then) regular job as a heavy equipment operator[.]” (Ex. 4-6, -7). In doing so, the employer noted that claimant had not performed his “time of injury employment” since the summer of 2004. (Ex. 4-7).

We acknowledge the prior ALJ’s finding that claimant previously returned to his job on the green-chain, then subsequently worked as a stacker. (Ex. A-2). However, the determinative time to evaluate a worker’s disability is “as of the date of the issuance of the reconsideration order pursuant to ORS 656.268.” ORS 656.283(7); *Samantha K. Holtti*, 59 Van Natta 2456 (2007). Thus, the issue is whether claimant was released to his “regular work” by his attending physician as of the date of the February 21, 2008 Order on Reconsideration.

In October 2006, Dr. Bynum acknowledged that claimant’s “regular work” was as a green-chain puller. (Ex. 4-71). He also reported that claimant was able to perform “his current work as a heavy equipment operator because this only involves using hand controls at the waist level.” (*Id.*) In the corresponding 827 form, Dr. Bynum indicated that claimant’s “Work ability status” was “regular work.” (Ex. 4-73).

In May 2007, Dr. Bynum made the following recommendation: “Trial of regular work. He is not anticipating the need to do any work other than heavy equipment operating and is not likely to have to do any strenuous work with the shoulder at or above the shoulder level.” (Ex. 4-117). In his August 2007 closing report, Dr. Bynum reported that claimant’s right shoulder was “tolerating regular work without difficulty.” Dr. Bynum recommended that claimant “[c]ontinue regular work.” (Ex. 4-118).

Moreover, the heavy equipment operating job, to which Dr. Bynum released claimant, had different physical requirements than a green-chain offbearer, claimant's "at-injury" job. (Ex. 4-71, -117). In light of Dr. Bynum's October 2006 reports, as well as his references to claimant's heavy equipment operator job as "regular work," we do not find that Dr. Bynum's release to "continue regular work" referred to claimant's "regular work" as a green-chain offbearer. *Keith Weyerts*, 60 Van Natta 2770 (2008), *on recons*, 61 Van Natta 697 (2009) (declining to infer that a physician's release to "regular work" referred to the claimant's "at-injury" truck driver job, which required heavy lifting, when that physician did not indicate knowledge of the heavy lifting requirements and the claimant had been performing "light duty" in a "post-injury" job). Under such circumstances, claimant is entitled to have his social-vocational factors considered in rating his permanent disability. OAR 436-035-0008(2)(b).

Claimant's age as of the date of the February 21, 2008 reconsideration order was 37, which receives an age value of zero. OAR 436-035-0012(2)(b). He has a high school diploma, which receives a formal education value of zero. OAR 436-035-0012(4)(a). In the five years prior to the reconsideration order, claimant worked as a "green-chain offbearer," a "stacker," and a "heavy-equipment operator." (Exs. A-2, 4-11, -44, -71, -117). According to the *Dictionary of Occupational Titles* (DOT), a "green-chain offbearer" (DOT 663.686-018) has a Specific Vocational Preparation (SVP) of 2. A "stacker" (DOT 569.685-066) also has an SVP of 2. A "heavy-equipment operator" (DOT 859.683-010) has an SVP of 6.⁵ Using the highest SVP of 6, claimant's SVP value is 2. OAR 436-035-0012(5). Claimant's formal education value of zero is added to his SVP value of 2, for a total education value of 2. OAR 436-035-0012(3).

We now determine claimant's adaptability. The adaptability factor is a comparison of a worker's Base Functional Capacity (BFC) to his or her maximum Residual Functional Capacity (RFC). OAR 436-035-0012(7). BFC means an individual's demonstrated physical capacity before the date of injury. OAR 436-035-0012(8)(a). Determination of a worker's BFC includes the highest strength category of jobs successfully performed by the worker in the five years before the date of injury. OAR 436-035-0012(9)(a).

⁵ Claimant also contends that his heavy equipment operating jobs as a "scraper operator" (DOT 850.683-038) and a "power-shovel operator" (DOT 850.683-030) have SVPs of 5. An SVP of 5 would still receive an SVP value of 2. OAR 436-035-0012(5).

Claimant began working for the employer as a “green-chain offbearer” on October 4, 2002. (Ex. 4-10). Before working for the employer, claimant worked as a warehouse worker for approximately one year. (Ex. 4-44). Both a “green-chain offbearer” (DOT 663.686-018) and a “warehouse worker” (DOT 922.687-058) have strength categories of “medium.” Therefore, claimant’s BFC is “medium.” OAR 436-035-0012(9)(a).

RFC means an individual’s remaining ability to perform work-related activities despite medically determinable impairment due to the accepted compensable condition. OAR 436-035-0012(8)(b). RFC is evidenced by the attending physician’s release unless a preponderance of medical opinion describes a different RFC. OAR 436-035-0012(10)(a). The other medical opinion must include at least a second-level physical capacity evaluation (PCE) or work capacity evaluation (WCE) or a medical evaluation which addresses the worker’s capabilities for lifting, carrying, pushing/pulling, standing, walking, sitting, climbing, balancing, stooping, kneeling, crouching, crawling and reaching. OAR 436-035-0012(10)(b).

On August 15, 2007, Dr. Bynum, claimant’s attending physician, released him to work as a heavy-equipment operator without restrictions. (Ex. 4-118). As previously stated, a “heavy-equipment operator” has a strength category of “medium.” According to Dr. Nagel’s medical arbiter report, claimant was capable of occasionally lifting/carrying up to 50 pounds. (Ex. 5-6). Thus, Dr. Nagel’s report also supports an RFC of “medium.” *See* OAR 436-035-0012(8)(h). Because there is no preponderance of medical opinion describing an RFC different from Dr. Bynum’s release, claimant’s RFC is “medium.” OAR 436-035-0012(10)(a), (b).

Comparing claimant’s BFC of “medium” to his RFC of “medium,” claimant’s adaptability value is 1. OAR 436-035-0012(11). Using the adaptability scale, claimant’s 11 percent total impairment receives an adaptability value of 2. OAR 436-035-0012(13). Therefore, using the higher of the two values for adaptability, claimant’s adaptability value is 2. OAR 436-035-0012(14).

Claimant’s undisputed age/education value (2) multiplied by the adaptability value (2) equals 4 percent. OAR 436-035-0012(15)(e). Adding the impairment value of 11 percent to the social-vocational value of 4 percent results in 15 percent unscheduled PPD for the right shoulder. OAR 436-035-0008(2)(b).

Based on our calculations, the ALJ's order is modified. The ALJ's and the reconsideration order's 12 percent unscheduled PPD award is increased to 15 percent.

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, payable to claimant's counsel. ORS 656.386(3); OAR 438-015-0055(2).

ORDER

The ALJ's order dated October 31, 2008 is modified in part and affirmed in part. In addition to the ALJ's and the reconsideration order's 12 percent (38.4 degrees) unscheduled PPD award, claimant is awarded 3 percent (9.6 degrees) for a total of 15 percent (48 degrees) unscheduled PPD for the right shoulder. For services at hearing and on review, claimant's attorney is awarded 25 percent of the increased permanent disability compensation created by this order, not to exceed \$6,000, payable directly to claimant's counsel. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 14, 2009