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In the Matter of the Compensation of  
**SCOT T. CAMPBELL, Claimant**  
WCB Case Nos. 08-05943, 08-05682  
ORDER ON REVIEW  
Malagon Moore et al, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Mundorff's order that: (1) declined to remand for a medical arbiter examination; (2) affirmed an Order on Reconsideration's 30 percent (96 degrees) unscheduled permanent partial disability (PPD) award for cervical conditions; and (3) affirmed the Order on Reconsideration's penalty award under ORS 656.268(5)(e). On review, the issues are claim processing, remand, extent of unscheduled PPD, and penalties. We affirm in part, modify in part, and reverse in part.

#### FINDINGS OF FACT

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

Claimant had a 2001 claim for bilateral ulnar neuropathies, which was closed on May 1, 2006, with no PPD award. (Exs. 1A, 4).

On April 30, 2003, claimant compensably injured his neck. SAIF accepted a cervical strain and later reopened the claim for an accepted C7 radiculopathy condition. (Exs. 4, 26).

In January 2008, Dr. Herring, claimant's attending physician, referred him for a closing examination. The evaluator's findings included decreased cervical ranges of motion (ROM) and slightly decreased right arm strength. The report concluded that claimant could lift 30 pounds occasionally, 15 pounds frequently, and could occasionally reach. The evaluator also considered claimant's condition to be medically stationary as of January 31, 2008. (Exs. 18, 19).

In February 2008, Dr. Herring concurred with the closing examination report. In doing so, he added that he "[could not] disagree with any exam differences. The overall conclusion I agree with." (Ex. 21).

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In March 2008, Dr. Herring attributed claimant's decreased cervical ROM to the cervical radiculopathy. (Ex. 22-1). Dr. Herring also stated:

“You ask what conditions are causing the work restrictions. Again, my comments are limited to the neck and right upper extremity at today's visit. I have portion [sic] limitations as approximately 50% related to his C7 radiculopathy and neck pain, 30% related to the right ulnar neuropathy, and 20% related to the right carpal tunnel syndrome. These are approximations at best and arrived at by discussion with [claimant].” (Ex. 22-2).

In subsequent reports, Dr. Herring continued to apportion 50 percent of claimant's work restrictions to his C7 radiculopathy and neck pain. (Exs. 23, 27, 28).

An April 10, 2008 Notice of Closure awarded 7 percent scheduled PPD (for decreased right arm strength) and 14 percent unscheduled PPD. The unscheduled PPD award was based on decreased cervical ROM (using findings from a November 2007 medical evaluation), and an adaptability value of 2.5. The adaptability value was based on a base functional capacity (BFC) of “heavy” and a residual functional capacity (RFC) of “light,” for a value of 5. Determining that 50 percent of claimant's work restrictions were related to his compensable conditions, the Notice of Closure apportioned 50 percent of the adaptability value to claimant's cervical conditions. (Ex. 25).

In his June 9, 2008 request for reconsideration, claimant disagreed with the impairment findings used to rate permanent disability and requested a medical arbiter examination. (Ex. 29). The Appellate Review Unit (ARU) postponed the reconsideration process for the purpose of referral for medical arbiter review. (Ex. 30).

On July 16, 2008, in response to a May 28, 2008 letter from claimant's attorney, Dr. Herring indicated that claimant had “chronic condition” limitations in his neck and right arm due to the compensable conditions. Dr. Herring further stated that, “focus[ing] on the cervical strain/C7 radiculopathy conditions only,” claimant was precluded from returning to his at-injury job. (Ex. 31).

On July 18, 2008, claimant submitted Dr. Herring's response to the ARU for inclusion in the reconsideration record and withdrew his request for a medical arbiter examination. Claimant asked the ARU to cancel the scheduled medical arbiter examination. (Ex. 32).

On July 24, 2008, claimant filed an amended request for reconsideration, checking the box indicating that he disagreed with the rating of permanent disability and provided additional clarifying information. Claimant did not check the box indicating that he disagreed with the impairment findings used to rate permanent disability. (Ex. 33). Thereafter, the ARU cancelled the scheduled medical arbiter examination. (Ex. 34).

Noting that claimant withdrew his disagreement with the impairment findings, the ARU relied on the record developed at claim closure and additional information from Dr. Herring in determining claimant's permanent disability. (Ex. 35-1). Based on the January 31, 2008 closing examination, as ratified by Dr. Herring, as well as Dr. Herring's July 16, 2008 letter, the ARU affirmed the Notice of Closure's 7 percent (13.44 degrees) scheduled PPD award (based on different impairment findings), but modified the unscheduled PPD award. (Ex. 35-3). The ARU found a 20 percent permanent impairment value for claimant's cervical ROM and "chronic condition" limitation. (*Id.*) Based on a BFC of "heavy" and an RFC of "light," the ARU found claimant's adaptability value to be 5, for a total of 30 percent (96 degrees) unscheduled PPD.<sup>1</sup> (Ex. 35-4). The ARU did not apportion the adaptability value.

The ARU also assessed a penalty under ORS 656.268(5)(e). In doing so, the ARU did not base its penalty on Dr. Herring's "post-closure" cervical "chronic condition" limitation. (Ex. 35-4, -5). Instead, the ARU assessed a penalty based on increased compensation in unscheduled PPD from claimant's cervical ROM findings and adaptability value. The ARU reasoned that SAIF used cervical ROM findings from an initial evaluation report, rather than the closing examination report. (Ex. 35-4). The ARU also found no support for SAIF's apportionment of the adaptability value. (*Id.*) SAIF requested a hearing.

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<sup>1</sup> The parties do not dispute claimant's total age/education value of 2.

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## CONCLUSIONS OF LAW AND OPINION

The ALJ declined SAIF's request to remand the claim for a medical arbiter examination, affirmed the Order on Reconsideration's unscheduled PPD award, affirmed the penalty award under ORS 656.268(5)(e), and awarded claimant's counsel a \$3,000 attorney fee under ORS 656.382(2). On review, SAIF argues that the claim should be remanded to the ALJ to await receipt of a medical arbiter examination/report because claimant disagreed with the impairment findings used to rate permanent disability. Alternatively, SAIF contends that claimant's adaptability value should be apportioned according to Dr. Herring's opinion. Finally, SAIF argues that a penalty is not warranted because the increase in compensation at reconsideration was based on information it could not reasonably have known at claim closure. We address SAIF's arguments in turn.

### Remand

The ALJ declined to remand the claim for a medical arbiter examination, reasoning that claimant amended his request for reconsideration and withdrew his disagreement with the impairment findings used to rate his permanent disability. The ALJ noted that SAIF neither requested reconsideration of its own Notice of Closure, nor cross-requested reconsideration. The ALJ further reasoned that OAR 436-030-0185 did not limit claimant's ability to amend his request for reconsideration.<sup>2</sup> We adopt and affirm this portion of the ALJ's order, with the following supplementation.

If a party objects to the Notice of Closure, the objecting party must first request reconsideration by the Director. ORS 656.268(5)(c). At the reconsideration proceeding, pursuant to rules adopted by the Director, the parties may correct information in the record that is erroneous and may submit any medical evidence that should have been but was not submitted by the attending physician at the time of claim closure. ORS 656.268(6)(a)(B). If the basis for objection to a Notice of Closure is disagreement with the impairment used in rating a worker's disability, the Director shall refer the claim to a medical arbiter appointed by the Director. ORS 656.268(7)(a).

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<sup>2</sup> Because of claimant's June 9, 2008 request for reconsideration, the applicable rules are found in WCD Admin. Order 07-059 (eff. January 2, 2008). OAR 436-030-0003(1).

Citing *Birrer v. Principal Fin. Group*, 172 Or App 654 (2001), *Duran C. Beasley*, 58 Van Natta 859 (2006), and *Daniel J. Hines*, 55 Van Natta 337 (2003), SAIF argues that, once claimant disagrees with impairment findings used to rate permanent disability, a medical arbiter must be appointed and claimant cannot “waive” the medical arbiter examination. SAIF further argues that claimant may not withdraw his disagreement with the impairment findings, or his request for a medical arbiter examination, after the reconsideration proceeding has been postponed. For the following reasons, we disagree.

Claimant argues that *Birrer*, *Beasley*, and *Hines* are irrelevant because, here, the Director *did* appoint a medical arbiter. (Exs. 30, 34). We agree with claimant, but also find those cases distinguishable on other grounds. Unlike the claimants in *Birrer*, *Beasley*, and *Hines*, claimant here filed an amended request for reconsideration and withdrew his request for a medical arbiter examination. (Exs. 32, 33). In his amended request for reconsideration, claimant *did not* indicate that he disagreed with the impairment findings used to rate permanent disability. Instead, he checked the box indicating that he disagreed with the rating of permanent disability, with the understanding that he would not be scheduled for a medical arbiter examination. (Ex. 33-2).

In *Randy M. Mitchell*, 44 Van Natta 2304 (1992), we held that the claimant was not prohibited from withdrawing his objection to impairment findings and, thereby, waiving his right to a medical arbiter examination. *Id.* at 2306. In that case, it was unclear whether the claimant’s request for reconsideration was based on a disagreement with the impairment findings. *Id.* at 2305. However, we concluded that, even if it was, “[claimant] may withdraw this objection and thereby waive his right to a medical arbiter.” *Id.* We reasoned that nothing precluded a party from withdrawing its previous objection to the impairment findings. *Id.* We further explained:

“[I]t is the objecting party which frames the basis of its objection and thereby determines whether appointment of a medical arbiter pursuant to ORS 656.268(7) is required.  
\* \* \* In other words, a party that does not object to a  
\* \* \* Notice of Closure on the basis of a disagreement with the impairment used in rating the worker’s disability may not use the statutes defensively to have an Order on Reconsideration declared invalid for failure to appoint a medical arbiter, unless the party that had objected joins in the motion.” *Id.*

SAIF also argues that, by submitting additional or different impairment findings into the record, claimant explicitly disagreed with the impairment findings used in rating his disability. We disagree.

In *Mark A. Pendell*, 45 Van Natta 1036 (1993), a Notice of Closure issued based on the attending physician's pre-closure report. The claimant requested reconsideration, indicating that he disagreed with the impairment findings from his attending physician. The claimant also submitted a supplemental report from his attending physician regarding the extent of his PPD. The supplemental report did not indicate the date of the examination on which the findings were based.

The pertinent question in *Pendell* was whether the supplemental report constituted a disagreement with the impairment findings requiring the appointment of a medical arbiter. The first step in resolving this question involved a determination of whether the supplemental report could be considered, in the reconsideration proceeding, as medical evidence that "should have been but was not submitted by \* \* \* the attending physician at the time of claim closure."<sup>3</sup> *Id.* at 1038. Interpreting ORS 656.268(5) to be a grant of authority to receive evidence from the attending physician establishing the full extent of the worker's impairment at claim closure, we found that the attending physician's impairment findings, which formed the bases for the Notice of Closure, was limited and did not address all inquiries into PPD. *Id.* at 1039. We concluded that the supplemental report was more complete and took into account the rating standards and, therefore, could be considered. *Id.*

Here, like the supplemental report in *Pendell*, Dr. Herring's supplemental report was more complete than the "pre-closure" findings, which were limited and did not address all inquiries into the full extent of claimant's impairment. (Ex. 31). Moreover, SAIF did not challenge claimant's submission of Dr. Herring's July 16

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<sup>3</sup> Similar to the *current* version of ORS 656.268(6)(a)(B), the applicable law in *Pendell* provided, in pertinent part:

"At the reconsideration proceeding, the worker or the insurer or self-insured employer may correct information in the record that is erroneous and may submit any medical evidence that should have been but was not submitted by the physician serving as the attending physician at the time of claim closure." ORS 656.268(5) (1991).

“post-closure” report, even after claimant withdrew his request for a medical arbiter and filed his amended request for reconsideration. Therefore, the supplemental report can be considered. ORS 656.268(6)(a)(B); *Pendell*, 45 Van Natta at 1039.

The second step in *Pendell* concerned a determination of whether, in light of the conclusion that the supplemental report could have been considered in the reconsideration proceeding, the claimant waived his request for appointment of a medical arbiter. 45 Van Natta at 1039. We acknowledged that, standing alone, his disagreement with impairment findings would invoke the mandatory appointment of a medical arbiter under ORS 656.268(7). Nevertheless, we found that, because the claimant agreed with the supplemented findings of his attending physician, he did not disagree with the impairment findings. Therefore, we concluded that the claimant waived his objection to the impairment findings. *Id.*

Here, we acknowledge that claimant initially disagreed with the impairment findings used to rate PPD. (Ex. 29). However, in his amended request for reconsideration, he did not disagree with Dr. Herring’s impairment findings and submitted additional medical evidence to supplement those “pre-closure” findings. (Exs. 31, 32, 33). Therefore, we find that claimant withdrew his objection to the impairment findings used to rate impairment. *Pendell*, 45 Van Natta at 1039.

Because we find that Dr. Herring’s supplemental report may be considered, and because claimant agreed with Dr. Herring’s impairment findings, as supplemented, claimant properly waived his request for a medical arbiter. *Id.* Moreover, because SAIF did not request reconsideration of the Notice of Closure based on a disagreement with the impairment findings used to rate PPD, it may not use ORS 656.268(7) to have the Order on Reconsideration declared invalid. *Mitchell*, 44 Van Natta 2305.

SAIF further argues that the reconsideration proceeding must be completed within 18 days, unless postponed for a medical arbiter examination or if the *Director* requires additional information. ORS 656.268(6)(b), (d). Thus, SAIF contends that the statutory time limits do not allow the 60-day postponement for *claimant* to gather additional information or to amend his reconsideration request to waive a medical arbiter examination. Under ORS 656.268(6)(d), the reconsideration proceeding may be postponed for an additional 60 days “if within the 18 working days the department mails notice of review by a medical arbiter.” The statute does not require the medical arbiter examination to occur.

Moreover, the reconsideration proceeding begins on the Director's receipt of a worker's request for reconsideration and must be completed within 18 working days plus the additional 60 calendar days where a notice for a medical arbiter review was timely mailed. ORS 656.268(6)(d), OAR 436-030-145(2)(a). Once the reconsideration proceeding is initiated, issues must be raised and further evidence submitted within the timeframes allowed for processing the reconsideration request. OAR 436-030-0115. Evidence received or issues raised 14 days after the reconsideration proceeding begins will be considered to the extent practicable. OAR 436-030-0145(3)(a).

Here, claimant faxed his initial request for reconsideration, in which he disagreed with the impairment findings used in rating his disability, to the ARU on June 9, 2008. (Ex. 29). The ARU's June 27, 2008 Notice of Postponement of Reconsideration Proceeding for the purpose of referral for medical arbiter review stated, "This is to notify all parties that the Order on Reconsideration due July 03, 2008, is now scheduled to be issued (mailed) by September 01, 2008, after the receipt and review of a medical arbiter report." (Ex. 30). Claimant faxed to the ARU his amended reconsideration request, in which he did not disagree with the impairment findings used in rating his disability, on July 24, 2008. (Ex. 33).

We acknowledge that claimant's amended reconsideration request was filed more than 14 days after the reconsideration proceeding began. OAR 436-030-0145(3)(a). Nonetheless, it was submitted before September 1, 2008, the date on which the ARU stated that the reconsideration proceeding must be completed. OAR 436-030-0115(5). Thus, assuming, without deciding, that the statutory time limits in ORS 656.268(5)(d) apply to amendments to reconsideration requests, claimant amended his request within those parameters.<sup>4</sup>

We further acknowledge that claimant submitted Dr. Herring's "post-closure" supplemental report to the ARU on July 18, 2008, more than 14 days after the reconsideration proceeding began. (Ex. 32). Nonetheless, the ARU, in response to the receipt of that report and claimant's amended request for reconsideration, cancelled the medical arbiter examination and considered the supplemental report in the reconsideration proceeding. (Exs. 34, 35-2).

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<sup>4</sup> Assuming that the Director received claimant's request for reconsideration on June 9, 2008, 18 days plus an additional 60 calendar days means that the statutory time frame for completing the reconsideration process would be August 26, 2008. Therefore, claimant's July 24 amended reconsideration request would still fall within the statutory time limits under ORS 656.268(5)(d).

Pursuant to OAR 436-030-0145(3)(a), we conclude that the ARU found it “practicable” to consider the supplemental report and the issue raised in claimant’s amended request for reconsideration.

Finally, we agree with the ALJ’s conclusion that OAR 436-030-0185(7) and (8) limit claimant’s ability to *withdraw* his request for reconsideration, not amend it.<sup>5</sup> For the aforementioned reasons, we decline SAIF’s remand request.

### Unscheduled PPD

In affirming the Order on Reconsideration’s unscheduled PPD award, the ALJ did not apportion claimant’s adaptability value because Dr. Herring noted that the compensable conditions alone were sufficient to limit claimant to “light” work. The ALJ also found that claimant had no ratable disability from his accepted ulnar neuropathies (under a different claim) and was able to perform “heavy” work until the exacerbation of his C7 radiculopathy.

SAIF argues that claimant’s ulnar neuropathies and carpal tunnel syndrome (CTS) were unrelated conditions that interfered with his ability to work and, therefore, apportionment is appropriate. *See* OAR 436-035-0013.<sup>6</sup> In doing so, SAIF contends that Dr. Herring consistently attributed 50 percent of claimant’s work restrictions to the compensable cervical conditions. SAIF further argues that

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<sup>5</sup> OAR 436-030-0185 provides:

“(7) A worker requesting reconsideration may *withdraw* the request for reconsideration without agreement of the other parties only if:

“(a) No additional information has been submitted by the other parties;

“(b) No medical arbiter exam has occurred, and

“(c) The insurer has not requested reconsideration under OAR 436-030-0145.

“(8) Notwithstanding (7) above, if additional information has been submitted by the other party(ies), a medical arbiter exam has occurred or the insurer has requested reconsideration, the reconsideration request will not be dismissed unless all parties agree to the *withdrawal*.” (Emphasis added).

<sup>6</sup> Because of claimant’s April 10, 2008 Notice of Closure, the applicable standards are found in WCD Admin. Order 07-060 (eff. January 1, 2008). OAR 436-035-0003(1).

Dr. Herring did not state that the cervical conditions alone limited claimant to “light” work. Claimant responds that apportionment is not appropriate because his ulnar neuropathies and CTS were neither “superimposed” nor “unrelated” conditions under OAR 436-035-0013. We agree with SAIF’s contentions.<sup>7</sup>

For unscheduled PPD, the criteria for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. ORS 656.214(5) (Or Laws 1999, ch 876, § 2). Unscheduled disability is rated on the permanent loss of use or function of a body part, area, or system and due to an accepted compensable, consequential or combined condition, and any direct medical sequelae, as modified by the factors of age, education, and adaptability. OAR 436-035-0008(2).

Except for irreversible findings of impairment due to the compensable condition, where a worker has a superimposed or unrelated condition, only disability due to the compensable condition is rated, provided the compensable condition is medically stationary.<sup>8</sup> OAR 436-035-0013. Then, apportionment is appropriate. *Id.*

Here, Dr. Herring concurred with the closing examination report that claimant’s compensable conditions were medically stationary as of January 31, 2008. (Exs. 19-5, 21). Dr. Herring apportioned 30 percent of claimant’s work restrictions to his right ulnar neuropathy, and 20 percent to his right CTS. (Exs. 22, 23, 27, 28). Neither Dr. Herring nor any other physician opined that claimant’s ulnar neuropathies and CTS were related to his compensable 2003 injury, or the direct medical sequela of his compensable conditions. Consequently, we conclude that claimant’s right ulnar neuropathy and CTS were “unrelated” conditions and, as such, apportionment is appropriate. OAR 436-035-0013(2).

We next determine whether Dr. Herring restricted claimant to “light” work due solely to the compensable conditions.<sup>9</sup> For the following reasons, we find that he did not.

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<sup>7</sup> The parties agree that an “offset” under OAR 436-035-0015 does not apply because claimant did not have a prior award of permanent disability related to his ulnar neuropathy claim.

<sup>8</sup> “Superimposed condition” means a condition that arises after the compensable injury or disease which contributes to the worker’s overall disability or need for treatment but is not the result of the original injury or disease. Disability from a superimposed condition is not rated. OAR 436-035-0005(18).

<sup>9</sup> The parties do not dispute that claimant’s RFC is “light.”

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). In claims where a worker's adaptability factor is determined under OAR 436-035-0012 and is affected by the compensable condition, the physician describes any loss of RFC due only to the compensable condition and only that portion receives a value. OAR 436-035-0013(2). In *Daniel R. Swink*, 55 Van Natta 2895 (2003), we apportioned 10 percent of the claimant's RFC to the compensable condition, based on a medical arbiter's report. Similarly, in *Hector M. Beltran*, 52 Van Natta 711 (2000), we apportioned 25 percent of the claimant's adaptability value to his compensable condition, based on a medical arbiter's report.

Claimant argues that those cases are distinguishable because they were based on *former* OAR 436-035-0007(2)(b), which has been removed. The *former* versions of the rule (both WCD Admin. Order 98-055, eff. July 1, 1998, and WCD Admin. Order 99-056, eff. April 26, 1999) provide:

“In claims for the hip, shoulder, spine, pelvis or abdomen, where a worker's adaptability factor (residual functional capacity) is affected by the compensable condition, the physician shall describe any loss of residual functional capacity due only to the compensable condition and only that portion shall receive a value.”

The current version of OAR 436-035-0013(2) provides:

“In claims where a worker's adaptability factor is determined under OAR 436-035-0012 and is affected by the compensable condition, the physician describes any loss of residual functional capacity due only to the compensable condition and only that portion receives a value.”

We find no substantive differences between the current and *former* version of the “apportionment” rules.<sup>10</sup> Therefore, we reject claimant's argument.

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<sup>10</sup> Claimant cites *David L. Waine*, 58 Van Natta 2412 (2006), where we did not apportion the claimant's adaptability value under the current version of the rule. However, in doing so, we reasoned that the medical arbiter did not apportion the claimant's RFC between his compensable injury and a prior injury. *Id.* at 2413. Thus, *Waine* is inapposite.

Here, Dr. Herring opined that claimant's cervical ROM and "chronic condition" limitations (for his right arm and neck) were due to the compensable conditions. (Ex. 22-1). In addressing claimant's *work restrictions*, Dr. Herring attributed "50% related to his C7 radiculopathy and neck pain, 30% related to the right ulnar neuropathy, and 20% related to the right [CTS]." (Ex. 22-2). He continued to opine that claimant's "radicular component and neck pain accounted for about 50% of his *work restrictions*." (Exs. 23-2, 27-2) (emphasis added). In May 2008, Dr. Herring stated that he previously apportioned claimant's pains and "no changes are made." (Ex. 28-2).

We acknowledge Dr. Herring's July 2008 letter indicating that, "focus[ing] on the cervical strain/C7 radiculopathy conditions only," claimant was precluded from returning to his at-injury job. (Ex. 31). However, Dr. Herring did not state that claimant was limited to "light" work due only to the compensable conditions. Reading Dr. Herring's reports as a whole, we find that the most reasonable interpretation of his opinion is that claimant was not released to his at-injury work, but that 50 percent of his work restrictions are due to the compensable conditions. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency); *see also Trevor A. Smith*, 49 Van Natta 704, 705-06 (1997) (determination of permanent disability was based on the most reasonable interpretation of the claimant's work release based on the attending physician and medical arbiter reports). Therefore, apportionment of claimant's adaptability value is appropriate. OAR 436-035-0013(2).

Based on our conclusions, we determine claimant's adaptability value. Comparing his BFC of "heavy" to his RFC of "light," claimant's adaptability value using the RFC scale would be 5. OAR 436-035-0012(7), (11). Based on Dr. Herring's opinion, claimant's adaptability value is apportioned: 50 percent of 5 results in an adaptability value of 2.5. OAR 436-035-0013(2). However, using the adaptability scale, claimant's adaptability value is 3 (based on 20 percent unscheduled impairment).<sup>11</sup> OAR 436-035-0012(13), (14). Therefore, using the higher of the two values, claimant's adaptability value is 3. OAR 436-035-0012(14).

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<sup>11</sup> Dr. Herring attributed claimant's decreased cervical ROM and "chronic condition" limitation to the compensable conditions. (Exs. 22, 31). Therefore, adaptability is determined based on those impairment findings. OAR 436-035-0013(3).

Next, we determine claimant's social-vocational factor used in the calculation of his unscheduled PPD benefits. OAR 436-035-0008(2)(b). Claimant's undisputed age and education factors are added, for a value of 2. OAR 436-035-0012(15)(c). The age/education value (2) is multiplied by the adaptability value (3) for a social-vocational factor of 6. OAR 436-035-0012(15)(e). Adding claimant's undisputed unscheduled impairment value (20 percent) to his social-vocational factor (6) results in 26 percent (83.2 degrees) unscheduled PPD for his compensable cervical conditions. OAR 436-035-0008(2)(b)(B).

Accordingly, the ALJ's order is modified. The ALJ's and Order on Reconsideration's 30 percent unscheduled PPD award is reduced to 26 percent.

Because claimant's unscheduled PPD award as granted by the Order on Reconsideration has been reduced as a result of SAIF's hearing request, we also reverse the ALJ's \$3,000 assessed attorney fee award. *See* ORS 656.382(2); *Deborah M. Brown*, 60 Van Natta 289, 291 (2008).

### Penalty

In affirming the Order on Reconsideration's PPD awards, the ALJ also affirmed the penalty awarded under ORS 656.268(5)(e). SAIF argues that the increase in compensation for PPD was based on information contained in Dr. Herring's July 16, 2008 "post-closure" report, which it could not reasonably have known at the time of claim closure. SAIF further contends that the increase in compensation was due to the ARU's incorrect conclusion that apportionment of the adaptability value was inappropriate. Therefore, according to SAIF, a penalty under ORS 656.268(5)(e) is not warranted. Based on the following reasoning, we reverse the penalty award.

As of the April 10, 2008 Notice of Closure, Dr. Herring had opined that 50 percent of claimant's work restrictions were due to his compensable conditions. (Exs. 22, 23). Moreover, at claim closure, the record did not support "chronic condition" limitations in claimant's neck or arm. In the July 16, 2008 "post-closure" report, Dr. Herring indicated that claimant had "chronic condition" limitations in his neck and right arm due to the compensable conditions. (Ex. 31).

The Notice of Closure's 7 percent scheduled PPD award was based on right arm strength loss findings, which were based on a November 2007 initial evaluation report. (Exs. 11-6, 25-2, 35-2-3). The 14 percent unscheduled PPD

award was also based on decreased cervical ROM findings contained in the November 2007 report, as well as an apportioned adaptability value. (Exs. 11-6, 25-2, 35-4-5).

Although the Order on Reconsideration affirmed the Notice of Closure's 7 percent scheduled PPD award, it did so on different bases. The ARU awarded 2 percent scheduled impairment for right arm strength loss, based on the January 2008 closing examination report, and 5 percent scheduled impairment for right arm "chronic condition" limitation, based on Dr. Herring's "post-closure" report. (Exs. 19, 31, 35-2-3). The ARU calculated 16 percent impairment for decreased cervical ROM, based on the closing examination report, 5 percent cervical "chronic condition" limitation, based on the "post-closure" report, and unapportioned adaptability value. (Ex. 35-3-5).

In determining the penalty award, the ARU excluded increases based on the "post-closure" "chronic condition" limitations. (Ex. 35-4-5). However, the ARU calculated only unscheduled PPD without the cervical "chronic condition" limitation, not scheduled PPD without the right arm "chronic condition" limitation. (Ex. 35-5).

We agree that the increases in compensation based on cervical and right arm "chronic condition" limitations were based on Dr. Herring's "post-closure" report, which SAIF could not reasonably have known at the time of claim closure. Furthermore, because we find that apportionment is appropriate, there is no increase in compensation attributable to claimant's adaptability value.<sup>12</sup>

Therefore, excluding increases based on the "post-closure" "chronic condition" limitations, we determine whether a penalty under ORS 656.268(5)(e) is warranted. The Notice of Closure awarded 7 percent (13.44 degrees) scheduled PPD and 14 percent (44.8 degrees) unscheduled PPD. The requisite increase for a penalty under ORS 656.268(5)(e) is 25 percent or more of the compensation to be paid to claimant for permanent disability. *See Clarence W. Hewitt*, 56 Van Natta 2521 (2004), *recons*, 57 Van Natta 1, 8 (2005) (as a prerequisite to a penalty under ORS 656.268(5)(e), the Director must order an increase by 25 percent or more of the monetary amount paid to the worker for scheduled or unscheduled disability).

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<sup>12</sup> Even assuming that Dr. Herring later clarified that claimant's work restrictions were due solely to his compensable conditions, that information was contained in Dr. Herring's "post-closure" report, which SAIF could not reasonably have known at the time of claim closure.

The monetary amount awarded in the Notice of Closure was \$15,756.16. (Ex. 25). \$15,756.16 multiplied by 25 percent results in a requisite increase of \$3,939.04. For the following reasons, we find that a penalty is not warranted.

The parties do not dispute the Order on Reconsideration's scheduled PPD award. Excluding the right arm "chronic condition" limitation, claimant's scheduled PPD award would be 2 percent (3.84 degrees), based on "pre-closure" information. Excluding the cervical "chronic condition" limitation, and apportioning claimant's adaptability value, his unscheduled PPD award would be 21 percent (67.2 degrees), based on "pre-closure" information.<sup>13</sup> Therefore, based on "pre-closure" information, claimant would have a total of 71.04 degrees scheduled and unscheduled PPD.<sup>14</sup>

The monetary value of the 2 percent scheduled award (paid at \$559 per degree) would be \$2,146.56. The monetary value of the 21 percent unscheduled award (paid at \$184 per degree for the first 64 degrees, and \$321 per degree for 3.2 degrees) would be \$12,803.20. Thus, the total value of the scheduled and unscheduled PPD award would be \$14,949.76.

Because \$14,949.76 is less than the amount awarded in the Notice of Closure (\$15,756.16), there is no increase in compensation based on the "pre-closure" information. Thus, a penalty is not warranted. ORS 656.268(5)(e). Accordingly, the ALJ's and Order on Reconsideration's penalty award is reversed.

### ORDER

The ALJ's order dated January 22, 2009 is affirmed in part, modified in part, and reversed in part. In lieu of the ALJ's and Order on Reconsideration's 30 percent (96 degrees) unscheduled PPD award, claimant is awarded 26 percent (83.2 degrees) unscheduled PPD. The ALJ's \$3,000 attorney fee award is reversed. The ALJ's and Order on Reconsideration's penalty award is also reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on July 15, 2009

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<sup>13</sup> Claimant's undisputed unscheduled impairment is 16 percent. (Ex. 35). Using the adaptability scale, claimant's adaptability value would be 2. OAR 436-035-0012(13). Because 2.5 is greater than 2, claimant's adaptability value would be 2.5. OAR 436-035-0012(14). The age/education value (2) is multiplied by the adaptability value (2.5) for a social-vocational factor of 5. OAR 436-035-0012(15)(e). Adding the unscheduled impairment value (16) to the social-vocational factor (5), claimant's unscheduled PPD would be 21 percent (67.2 degrees). OAR 436-035-0008(2)(b)(B).

<sup>14</sup> Because claimant's total sum of scheduled and unscheduled PPD would be 71.04 degrees, he would be at least 20 percent disabled. OAR 436-030-0175(3).