

In the Matter of the Compensation of  
**FLOYD A. OWENS, Claimant**

WCB Case No. 08-07105

ORDER ON REVIEW

Malagon Moore & Jensen, Claimant Attorneys  
The Law Office Of Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman. Member Lowell concurs in part and dissents in part.

The self-insured employer requests review of Administrative Law Judge (ALJ) Myzak's order that: (1) affirmed an Order on Reconsideration that awarded 42 percent (134.4 degrees) unscheduled permanent partial disability (PPD) for claimant's cervical and thoracic injuries, 14 percent (26.88 degrees) scheduled PPD for loss of use or function of the left arm, and 48 percent (72 degrees) scheduled PPD for loss of use or function of the left leg; and (2) awarded a \$5,000 carrier-paid attorney fee under ORS 656.382(2). On review, the issues are extent of permanent disability (scheduled and unscheduled) and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant was compensably injured while pulling green chain on April 19, 2002. The employer accepted cervical and thoracic strains and a T1 fracture. The employer closed the claim in January 2003 with 2 percent unscheduled PPD for the thoracic spine.

The employer accepted an aggravation claim for the cervical and thoracic strain conditions in April 2003. Claimant's employment with the employer was terminated in 2004, after which he worked as a carpenter.

The employer accepted a C6-7 disc bulge as a new/omitted medical condition in May 2005. In July 2006, claimant had a discectomy and fusions at C5-6 and C6-7. The employer accepted pseudoarthrosis at C5-6 and C6-7 as new/omitted medical conditions in August 2007. Claimant had further surgery to address the pseudoarthrosis at C5-6 and C6-7 in September 2007.

The employer closed the claim for the aggravation and new/omitted medical conditions on June 20, 2008, with a total award of 28 percent unscheduled PPD for the cervical and thoracic spine. Claimant requested reconsideration and the appointment of a medical arbiter. Dr. Melson conducted a medical arbiter examination on September 29, 2008.

Based on Dr. Melson's report, the Appellate Review Unit (ARU) issued an Order on Reconsideration that increased claimant's scheduled and unscheduled PPD awards. The ARU found 34 percent unscheduled impairment, based on significant limitation in the repetitive use of the cervical and thoracic spine, surgery to the cervical spine, and impairment due to the T1 fracture. Additionally, the ARU found claimant entitled to a value of 8 for social/vocational factors. Accordingly, the ARU increased claimant's unscheduled PPD award to 42 percent. The ARU also awarded 14 percent scheduled PPD for loss of use or function of the left arm and 48 percent scheduled PPD for loss of use or function of the left leg, based on severity of motor loss in those extremities. The ALJ affirmed the Order on Reconsideration.

On review, the employer contends that claimant's thoracic impairment should not have been redetermined because he had not demonstrated that the thoracic strain had actually worsened. The employer further contends that the impairment findings of Dr. Weller, claimant's attending physician, are more accurate than those of Dr. Melson. Finally, the employer contends that claimant is not entitled to a value for social/vocational factors because he was released to return to his job at injury and, alternatively, that his residual functional capacity (RFC) is "heavy" rather than "medium." As explained below, we disagree with the employer's contentions.

### Unscheduled Impairment

Because claimant's thoracic strain claim was reopened under ORS 656.273 and then closed, we compare his thoracic strain at the time of the current claim closure with the thoracic strain as it existed at the time of the last award or arrangement of compensation to determine if there is a change in his overall PPD award. OAR 436-035-0016(1).<sup>1</sup> We do not redetermine the impairment value of the thoracic strain if it has not actually worsened.<sup>2</sup> OAR 436-035-0016(2).

The acceptance of an aggravation claim does not automatically establish that the underlying condition has actually worsened, and therefore does not automatically trigger a redetermination of impairment. An "actual worsening" must be shown by comparing the present condition with the condition as it existed

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<sup>1</sup> Because the aggravation claim was closed on June 20, 2008, the disability standards in WCD Admin. Order 07-060 (eff. January 1, 2008) apply.

<sup>2</sup> We also do not redetermine impairment due to the T1 fracture, which was not included in the reopened aggravation claim. OAR 436-035-0016(2).

at the time of the earlier award or arrangement of compensation. *Stepp v. SAIF*, 304 Or 375, 381 (1987); *see also Jeffrey Townsend*, 58 Van Natta 563 (2006); *Marvin H. Arthur*, 54 Van Natta 761 (2002); *Sandra L. Kay*, 50 Van Natta 1415 (1998). In the absence of such a comparison, or if such a comparison shows that the condition is unchanged or improved, there has been no worsening. *Stepp*, 304 Or at 381.

The employer contends that no such comparison shows that claimant's thoracic condition has worsened. We disagree with this contention.

The January 2003 Notice of Closure awarded 2 percent impairment for claimant's T1 fracture, but did not include an award of impairment due to the thoracic strain. (Ex. 23-2). The lack of an award for the thoracic strain reflected the conclusion of Dr. Streitz, who was then claimant's attending physician, that claimant had "no significant functional residual" and "no permanent impairment" from the thoracic strain. (Exs. 12, 18-2).

Dr. Melson, the medical arbiter following the closure of claimant's aggravation claim, correctly identified the accepted conditions and opined that they caused thoracic range of motion (ROM) loss and that claimant was significantly limited in the repetitive use of his thoracic spine due to the accepted conditions. (Ex. 215-1-3, -15). He further explained that the T1 fracture, which may not be redetermined because it was not included in the aggravation acceptance, did not contribute to the measured thoracic impairment. (Ex. 215-3). Comparing claimant's present thoracic condition, as described by Dr. Melson, with his thoracic condition at the time of the January 2003 closure, we conclude that the thoracic strain has "actually worsened." *Karen M. Isley*, 54 Van Natta 2364, 2368 (2002).<sup>3</sup> Therefore, we redetermine claimant's thoracic impairment.

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<sup>3</sup> Citing *Arthur*, the employer contends that a specific declaration by a doctor that there had been a worsening is necessary to find such a worsening. Therefore, the employer contends that because Dr. Melson did not explicitly compare claimant's current condition with his condition as it existed in January 2003, a worsening cannot be inferred from claimant's worsened impairment findings.

In *Arthur*, however, the arbiter expressly opined, "It is my opinion based on the above findings that [the claimant's] medical condition has not worsened since the last award of compensation." 54 Van Natta at 763. There was no contrary medical opinion. *Id.* Thus, our holding in *Arthur* was not based on a failure to specifically declare that there had been a worsening. Rather, our holding was based on a record that showed that no such worsening had occurred.

Here, by contrast, there is medical evidence that claimant had no permanent thoracic impairment due to the compensable conditions in January 2003 and that he now has significant permanent thoracic impairment. Such evidence is sufficient to support a finding of an actual worsening. *Isley*, 54 Van Natta at 2368.

Having found claimant entitled to redetermination of his thoracic impairment, we note that the parties do not dispute the accuracy of the ARU's calculation of cervical and thoracic impairment on review. Therefore, we conclude that claimant is entitled to a 34 percent permanent impairment value for his cervical and thoracic spine.

### Social/Vocational Factors

Claimant is not entitled to consideration of social/vocational factors in the evaluation of his unscheduled PPD 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 but his employment was terminated for reasons unrelated to his injury. 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 injury was before January 1, 2005, ORS 656.726(4)(f) (Or Laws 2003, ch 811, § 17) applied). However, if he has not returned or been released to regular work, he is entitled to consideration of social/vocational factors in the calculation of his unscheduled permanent disability. OAR 436-035-0008(2)(b). "Regular work" means the job claimant held at the time of injury. OAR 436-035-0005(15).

Claimant's employment was terminated in 2004. (Ex. 73-1). Because the record does not indicate that the termination of claimant's employment resulted from his work injury, ORS 656.726(4)(f)(D)(iii) (2003) provides that he may not receive a value for social/vocational factors if his attending physician released him to his job at injury. *Sandra E. Rickon*, 61 Van Natta 311, 318 (2009). Claimant's job at injury was pulling green chain. (Ex. 1-2). Therefore, whether he receives social/vocational factors depends on whether his attending physician released him to return to pulling green chain.

On April 10, 2008, claimant's then attending physician, Dr. Gallo, identified claimant's "job-at-injury" as "journeyman carpenter" and released him to "regular duty work." (Ex. 202-1-2). At that time, Dr. Gallo relinquished responsibility for claimant's ongoing care to Dr. Weller, his primary care physician. (Ex. 202-2). Dr. Weller examined claimant on May 9, 2008. (Ex. 205-1). The employer then asked Dr. Weller:

“[W]ith regard to his release to work status, [claimant] was pulling Greenchain when he was injured. We need to confirm that ‘regular release’ means he could return to his job at injury. Dr. Gallo released him to lift over 100 [pounds]. Do you agree?” (Ex. 203-2).

On July 13, 2008, Dr. Weller responded that claimant “continues to be released to regular work.” (*Id.*)

Because Dr. Gallo believed that claimant’s “job-at-injury” was as a “journeyman carpenter,” her April 10, 2008 work release was insufficient to release claimant to his job at injury. *Shannon Ludahl*, 60 Van Natta 631, 633 (2008).

When the employer solicited a work release from Dr. Weller, it correctly identified claimant’s job at injury as pulling green chain. However, Dr. Weller did not affirmatively opine that claimant could return to pulling green chain, nor did she indicate that she had independently evaluated claimant’s ability to perform such work. Instead, Dr. Weller merely “continue[d]” Dr. Gallo’s work release. (Ex. 203-2). Under such circumstances, the record does not persuasively establish that claimant was released to regular work. Therefore, he is entitled to consideration of social/vocational factors in the calculation of his unscheduled PPD.

Claimant’s adaptability value is the only social/vocational factor in dispute. The Order on Reconsideration’s social/vocational award of 8 was based on an adaptability value of 4. The adaptability value of 4 was, in turn, based on the unscheduled impairment value of 34 percent.

One method of calculating claimant’s adaptability value is to compare claimant’s base functional capacity (BFC) to his residual functional capacity (RFC). OAR 436-035-0012(7). Another method of calculating claimant’s adaptability value is to derive the adaptability value from his total unscheduled impairment. OAR 436-035-0012(13), (14). Claimant is entitled to the higher of the two adaptability values. OAR 436-035-0012(14).

The parties agree that claimant’s BFC is “heavy.” RFC is established by the attending physician’s release, unless a preponderance of evidence describes a different RFC. OAR 436-035-0012(10)(a).

The employer contends that Dr. Weller released claimant to “heavy” work. In support of its contention, the employer cites Dr. Weller’s opinion discussing Dr. Gallo’s previous work release. As noted, Dr. Gallo had released claimant to work as a journeyman carpenter, and Dr. Weller had continued that release. (Exs. 202-1-2, 203-2).

Again, although the employer accurately identified claimant’s job at injury as pulling green chain and alleged that claimant was released to lift over 100 pounds, Dr. Weller did not affirmatively opine that claimant could return to such work. Rather, she merely continued Dr. Gallo’s earlier release to carpentry work. Such work is “medium.” *Dictionary of Occupational Titles* 860.381-022.

Based on Dr. Weller’s continuation of Dr. Gallo’s release to carpentry work, claimant’s RFC is “medium.” Claimant’s BFC of “heavy,” compared to his RFC of “medium” results in an adaptability value of 3. OAR 436-035-0012(11).

Claimant’s unscheduled impairment of 34 percent results in an adaptability value of 4. OAR 436-035-0012(13).

Because the adaptability value of 4, based on claimant’s unscheduled impairment, is greater than the adaptability value of 3, based on his BFC and RFC, claimant receives an adaptability value of 4. Therefore, we affirm the value of 8 for social/vocational factors. Based on a value of 8 for social/vocational factors and 34 percent unscheduled impairment, claimant is entitled to an award of 42 percent unscheduled PPD for the cervical and thoracic spine.

### Scheduled PPD

Because Dr. Melson performed the medical arbiter examination, impairment is established based on his objective findings, unless a preponderance of the medical evidence demonstrates that different findings by Dr. Weller, claimant’s attending physician, are more accurate and should be used instead. OAR 436-035-0007(5); *Hicks v. SAIF*, 194 Or App 655, 659-60, *recons*, 196 Or App 146 (2004).

Dr. Melson considered claimant’s medical records and performed a thorough examination of claimant.<sup>4</sup> (Ex. 215-1). Dr. Melson found impairment to the left arm and leg, which he attributed to “failed fusion & spinal cord involvement.”

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<sup>4</sup> Although the dissent notes that Dr. Melson did not mention Dr. Gallo’s chart notes in which she noted good fusions at C5-6 and C6-7, her January 9, 2008 and March 14, 2008 chart notes bear the “MEDICAL ARBITER” stamp indicating that they were provided for Dr. Melson’s review. (Exs. 174-1, 184).

(Exs. 215-2, 216-2). He opined that due to the spinal cord impairment, claimant could “use the involved upper extremity for self care, grasping, and holding but has difficulty with digital dexterity.” (Ex. 216-3). This finding supports the Order on Reconsideration’s 14 percent impairment award for the left arm. OAR 436-035-0110(10) (providing for an impairment award for motor loss in an arm due to brain or spinal cord damage, in lieu of impairment values for weakness, chronic condition, or reduced range of motion). Addressing the severity of motor loss in claimant’s left leg, Dr. Melson opined that claimant “can rise to a standing position and can walk with difficulty but is limited to level surfaces. There is variability as to the distance the worker can walk.” (Ex. 216-3). This finding supports the Order on Reconsideration’s 48 percent impairment award for the left leg. OAR 436-035-0230(10) (providing for an impairment award for motor loss in a leg due to brain or spinal cord damage, in lieu of impairment values for weakness, chronic condition, or reduced range of motion).

The employer contends that Dr. Weller made contrary impairment findings that were more accurate than Dr. Melson’s. When Dr. Weller examined claimant on May 9, 2008, she noted pain in the neck and left shoulder that seemed to be reduced with walking activity. (Ex. 205-1). She described no other significant findings regarding claimant’s gait or lower extremities, and further opined that claimant had full strength in his upper extremities. (Ex. 205-1-2). Thus, Dr. Weller did not attribute left arm or left leg impairment to the accepted conditions. (Ex. 205-2). The employer contends that the record does not support Dr. Melson’s diagnosis of a failed fusion and, therefore, Dr. Weller’s findings are more accurate.

As noted above, impairment is based on Dr. Melson’s findings unless a preponderance of the medical evidence demonstrates that different findings by Dr. Weller are more accurate. We do not find such preponderance of the evidence.

Although Dr. Weller did not attribute any left arm or leg impairment to the accepted conditions, neither did she opine that the failed fusion diagnosed by Dr. Melson was not present. She simply did not observe, and therefore did not address, the arm and leg symptoms that Dr. Melson attributed to the failed fusion. Thus, Dr. Weller’s opinion does not weigh for or against Dr. Melson’s findings. Because the arm and leg symptoms appear to have developed after Dr. Weller’s May 9, 2008 examination, Dr. Melson’s opinion is more probative. *See James A. Hanson*, 50 Van Natta 23, 24 (1998).

The dissent contends that the opinions of Dr. Gallo and Dr. Lockfeld, a consulting neurologist, support Dr. Weller's findings because they dispute the presence of a failed fusion. However, we cannot consider their opinions in evaluating claimant's impairment.

Pursuant to ORS 656.245(2)(b)(C), with the exception of a medical arbiter appointed pursuant to ORS 656.268(7), only the attending physician at the time of claim closure may make findings concerning a worker's impairment. OAR 436-035-0007(5); *Tektronix, Inc. v. Watson*, 132 Or App 483, 485-86 (1995). If the attending physician concurs with findings made by other medical providers, such findings may also be used to determine impairment. OAR 436-035-0007(6); *Tektronix*, 132 Or App at 486.

The dissent reasons that using the opinions of Drs. Gallo and Lockfeld to evaluate whether Dr. Weller's impairment findings are more accurate than Dr. Melson's impairment findings is permissible because doing so does not use the impairment findings of Drs. Gallo or Lockfeld, but simply helps us weigh the impairment findings of the attending physician against those of the medical arbiter. Based on *Tektronix, Libbett v. Roseburg Forest Prods.*, 130 Or App 50 (1994), and *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994), however, we do not consider the opinions of Drs. Gallo and Lockfeld.

*Koitzsch* considered the use of a carrier-arranged "independent medical examiner's" (IME's) report to "support or impeach" the impairment findings of the claimant's attending physician. The court noted that the purpose of ORS 656.245's proscription against the use of impairment findings from medical experts who are not attending physicians was to eliminate reliance on IMEs in the evaluation of injured workers' disability.<sup>5</sup> 125 Or App at 670. The court considered the carrier's argument that there is a difference between using an IME's impairment findings for impeaching an attending physician's impairment findings, on one hand, and for actually rating impairment, on the other hand, and concluded:

"However, the statute does not make that distinction. An independent medical examiner's impairment findings that the employer offers for impeachment are, nonetheless, findings regarding the worker's impairment that evaluate the disability. The legislature intended to permit only the attending physician to make such findings." *Id.*

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<sup>5</sup> *Koitzsch* did not address the use of a medical arbiter's impairment findings to evaluate impairment under ORS 656.268(7).

Thus, *Koitzsch* held that the impairment findings of an IME could not be considered, even for the purpose of evaluating the attending physician's impairment findings.

*Libbett* considered the use of non-medical evidence to evaluate a claimant's impairment. The court concluded that ORS 656.245 did not prohibit the consideration of non-medical evidence, but explained that, based on *Koitzsch*, we are prohibited from relying "on independent medical examinations for any purpose in [our] evaluation of a worker's disability." 130 Or App at 52.

In *Tektronix*, the opinions of four medical experts, an attending physician, a consulting physician, an IME, and a medical arbiter, were considered. The court explained that the attending physician's opinion may be considered for the purpose of rating impairment, as may the opinion of the IME if the attending physician ratified that opinion. 132 Or App at 485-86. The court also explained that a medical arbiter's opinion may be considered, and that no subsequent medical evidence may be used to rate the claimant's impairment. *Id.* at 486. Thus, *Tektronix* held that for the purpose of evaluating a worker's impairment, the record "includes the reports that claimant's attending physician issued before the medical arbiter's report, the medical arbiter's report, and any report related to impairment that is ratified by the attending physician before the medical arbiter's report." *Id.*; see also *Carl A. Nottage*, 53 Van Natta 394, 395 (2001) (the "preponderance of medical evidence" is limited to the findings from the attending physician at the time of claim closure, findings with which the attending physician concurred, and a medical arbiter); *Adam J. Delfel*, 50 Van Natta 1041, 1043 (1998).

In *Tektronix*, the court concluded that the IME's opinion could not be considered because it was written after the medical arbiter's report. *Id.* However, it concluded that the consulting physician's report could be considered in evaluating the claimant's impairment because its findings had been adopted by the attending physician. *Id.* at 487.

The dissent notes that *Koitzsch* and *Libbett* specifically addressed the use of IME findings, and that *Tektronix* excluded only such findings. However, the statutory scheme described by *Tektronix* makes no distinction between IMEs, on the one hand, and other medical experts who are not medical arbiters or attending physicians, and whose findings have not been ratified by an attending physician, on the other hand. All such experts fall outside the three categories of medical experts who may offer impairment findings. Indeed, although *Tektronix* stated that "reports of independent medical examiners are not admissible for the purpose of

rating impairment unless those findings are ratified by the claimant's attending physician," it held that the consulting physician's findings could be considered only because those findings had been ratified by the attending physician. *Id.* at 486, 487.

Here, consideration of the opinions of Drs. Gallo or Lockfeld to evaluate the impairment findings of Drs. Weller and Melson would effectively, if less directly, use the opinions of Drs. Gallo or Lockfeld to evaluate claimant's impairment. Because Drs. Gallo and Lockfeld were neither attending physicians at closure nor medical arbiters, and Dr. Weller has not ratified their findings, we may not consider their opinions for that purpose. *Libbett*, 130 Or App at 52; *Koitzsch*, 125 Or App at 670. Therefore, the relevant record for the purpose of evaluating claimant's impairment is limited to Dr. Weller's and Dr. Melson's findings. *Tektronix*, 132 Or App at 486.

Limiting our evaluation of claimant's impairment to the findings of Drs. Weller and Melson, we do not find that a preponderance of the medical evidence demonstrates that Dr. Weller's findings regarding left arm and leg impairment are more accurate than Dr. Melson's findings. Therefore, based on Dr. Melson's findings, we conclude that claimant is entitled to 14 percent scheduled PPD for loss of use or function of the left arm and 48 percent scheduled PPD for loss of use or function of the left leg.

#### Attorney Fees

The ALJ awarded claimant's counsel a \$5,000 assessed attorney fee, payable by the employer, because claimant's compensation award was not disallowed or reduced. ORS 656.382(2). (Or Laws 2009, ch 526, §§ 3, 6). On review, the employer argues that the attorney fee award was excessive. Claimant contends that the ALJ's attorney fee award was justified by the value of the interest involved, the skill of the attorneys, and the time devoted to the case because of the complexity of the issues. For the following reasons, we affirm the ALJ's attorney fee award.

We review the attorney fees issue *de novo*, considering the specific contentions raised on review, in light of the factors set forth in OAR 438-015-0010(4), as applied to the particular circumstances of this case. Those factors are: (1) the time devoted to the case; (2) the complexity of the issues involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; and (8) the assertion of frivolous issues or defenses.

The hearing was conducted “on the record,” without an in-person hearing. The record was limited to the 218 exhibits developed for the Order on Reconsideration pursuant to ORS 656.268(7)(h) and ORS 656.283(7). The issue was the extent of claimant’s scheduled and unscheduled PPD. The value of the interest involved and the benefit secured for claimant were significant.

Considering these factors in light of the record and the parties’ arguments, we conclude that the ALJ’s attorney fee award for claimant’s attorney’s services in defending the Order on Reconsideration was reasonable. In reaching this conclusion, we have particularly considered the nature of the proceedings, the time that claimant’s counsel devoted to the issue (as represented by the hearing record, including written closing arguments, claimant’s attorney fee request, and the employer’s objection on review), the skill of the attorneys, and the risk that claimant’s counsel might go uncompensated. Accordingly, the ALJ’s \$5,000 assessed attorney fee award is affirmed.

Claimant’s attorney is also entitled to an assessed fee for services on review regarding the extent of permanent disability issue. ORS 656.382(2) (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 review regarding the extent of permanent disability issue is \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant’s respondent’s brief), the complexity of the issue, and the value of the interest involved. Claimant’s counsel is not entitled to an attorney fee for services devoted to the attorney fee issue. *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).

### ORDER

The ALJ’s order dated April 30, 2009 is affirmed. For services on review regarding the permanent disability issue, claimant’s attorney is awarded an assessed fee of \$3,000, payable by the employer.

Entered at Salem, Oregon on April 15, 2010

Member Lowell concurring in part and dissenting in part.

Although I agree with the majority’s conclusion that claimant’s thoracic condition worsened, justifying redetermination of his thoracic impairment, I disagree with the majority’s conclusions that claimant was not released to regular

work and that Dr. Weller's finding of no left arm or leg impairment is not more accurate than Dr. Melson's arbiter examination findings. Accordingly, I offer this partial dissent.

Claimant is not entitled to consideration of social/vocational factors in the calculation of his unscheduled permanent partial disability (PPD) if he was released to his job at injury. ORS 656.726(4)(f)(D)(iii) (Or Laws 2003, ch 811, § 17). I would find that claimant was released to his job at injury.

Although Dr. Gallo's April 10, 2008 work release misidentified claimant's "job-at-injury" as "journeyman carpenter," Dr. Weller opined that claimant "continues to be released to regular work" in response to a query from the employer that accurately stated that claimant "was pulling Greenchain when he was injured." (Ex. 203-2). Thus, rather than merely "continuing" Dr. Gallo's previous work release, Dr. Weller considered claimant's ability to return to pulling green chain, the job at injury, and determined that he could return to such work. Therefore, I would find that claimant is not entitled to consideration of social/vocational factors in the calculation of his unscheduled PPD. Rather, I would conclude that claimant's unscheduled disability award should be based on impairment alone; *i.e.*, 34 percent unscheduled PPD.

I would also conclude that claimant is not entitled to scheduled PPD for loss of use or function of his left arm or left leg.

As the majority notes, the impairment findings of Dr. Melson, the medical arbiter, are used unless a preponderance of the medical evidence demonstrates that different findings by Dr. Weller, claimant's attending physician, are more accurate and should be used instead. OAR 436-035-0007(5); *Hicks v. SAIF*, 194 Or App 655, 659-60, *recons*, 196 Or App 146 (2004). I would find such a preponderance of the evidence. I begin by summarizing the relevant evidence.

Dr. Gallo performed the September 11, 2007 surgery to address claimant's pseudarthrosis at C5-6 and C6-7. (Ex. 174-1). On January 9, 2008, Dr. Gallo opined that imaging showed "excellent progression of interbody fusion at both levels." (Ex. 184). On March 14, 2008, she described digital imaging as showing "solid interbody fusions at both C5-6 and C6-7." (Ex. 193). On April 10, 2008, she performed a closing examination and described claimant's gait and stance as "unremarkable." (Ex. 202-2).

When Dr. Weller examined claimant on May 9, 2008, she found full strength in claimant's upper extremities and found no lower extremity impairment. (Ex. 205-1-2). A cervical MRI was performed on July 8, 2008. (Ex. 210-1). The MRI report noted the fusions at C5-6 and C6-7 and postoperative and degenerative changes in the cervical spine. (*Id.*)

Dr. Gallo reviewed the MRI and examined claimant on August 13, 2008. (Ex. 212). She noted that claimant was complaining of weakness in the left leg and numbness in the left leg and left arm. (*Id.*) She described the MRI as showing "an unremarkable appearance" at C5-6 and C6-7, and noted that claimant's symptoms did not include radicular pain. (*Id.*) She opined that claimant's left arm and leg symptoms were unrelated to the accepted conditions. (*Id.*)

On September 25, 2008, Dr. Lockfeld, a neurologist, examined claimant and reviewed the July 8, 2008 MRI. (Ex. 214-3). He noted giveaway weakness in the left arm and leg, and described the weakness as "somewhat inconsistent." (*Id.*) He "d[id] not find any evidence that [claimant] has a cervical myelopathy causing his left leg symptoms, nor for that matter his left arm symptoms." (*Id.*)

Dr. Melson performed his medical arbiter examination on September 29, 2008. He summarized claimant's medical history up to April 1, 2008, including several imaging studies taken before the September 11, 2007 surgery. (Ex. 215-1). However, he did not mention Dr. Gallo's January 9, 2008, March 14, 2008, or August 13, 2008 chart notes, Dr. Lockfeld's examination, or indicate that he had considered any imaging of claimant's cervical spine taken after the September 11, 2007 surgery. (*Id.*) He noted left arm and leg impairment, which he attributed to "failed fusion and spinal cord impairment." (Exs. 215-2, 216-2-3).

Although Dr. Melson attributed claimant's left arm and leg symptoms to a failed fusion with spinal cord involvement, he did so without considering imaging performed after the September 11, 2007 surgery. By contrast, after reviewing the July 8, 2008 MRI, Dr. Gallo ruled out the fusion as the source of claimant's left arm and leg symptoms. Similarly, after reviewing the MRI, Dr. Lockfeld ruled out spinal cord damage as the source of claimant's left arm and leg symptoms.

Drs. Gallo and Lockfeld offered well reasoned opinions based on complete information, including the July 8, 2008 MRI that showed the fusions to be "unremarkable" and physical examination while claimant was complaining of symptoms similar to those described by Dr. Melson. Their opinions support Dr. Weller's findings because they confirm the absence of a failed fusion with spinal cord impairment.

Accordingly, based on the preponderance of the evidence, I would find that Dr. Weller's finding that claimant had no left arm or leg impairment due to the compensable injury (as supported by the opinions of Drs. Gallo and Lockfeld) is more accurate than Dr. Melson's findings of left arm and leg impairment.

Citing *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994), *Libbett v. Roseburg Forest Prods.*, 130 Or App 50 (1994), and *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995), the majority declines to consider the opinions of Drs. Gallo and Lockfeld in weighing the opinions of Drs. Weller and Melson. However, *Koitzsch*, *Libbett*, and *Tektronix* do not prevent us from considering all relevant medical evidence from non-attending physicians in determining a preponderance of the evidence.

As the majority notes, we are statutorily precluded from basing claimant's permanent disability award on *impairment* findings that were not made, or adopted, by the attending physician or made by the medical arbiter. ORS 656.245(2)(b)(C) provides, "Except as otherwise provided in this chapter, only a physician \* \* \* who is serving as the attending physician at the time of claim closure may make findings regarding the worker's impairment for the purpose of evaluating the worker's disability." ORS 656.268(7) provides for the appointment of a medical arbiter to evaluate a claimant's impairment. However, when presented with differing findings by the attending physician and the medical arbiter, we are directed, by statute and rule, to look to the preponderance of the *medical evidence* to determine *which* impairment findings are more accurate and should be used. ORS 656.726(4)(f)(B) (2003) ("Impairment is established by a preponderance of medical evidence"); OAR 436-035-0007(5); *see also O'Connor v. Liberty Northwest Ins. Corp.*, 232 Or App 419, 426 (2009) (findings of attending physician, or with which the attending physician concurs, are used if "a preponderance of the medical evidence shows that the attending physician's findings are more accurate" than the medical arbiter's findings).

It is not disputed that the opinions of Drs. Gallo and Lockfeld are "medical evidence." *See SAIF v. Lewis*, 335 Or 92, 97 (2002) ("the opinion of a medical expert \* \* \* qualifies as 'medical evidence'"). Rather, the majority reasons that under *Koitzsch* and its progeny, consideration of such medical evidence would base claimant's permanent disability on impairment findings that we are statutorily barred from considering. *Koitzsch*, however, does not stand for that proposition.

*Koitzsch* addressed the use of the findings and opinion of an independent medical examiner (IME) to impeach the impairment findings of the attending physician. 125 Or App at 668. There were no medical arbiter findings regarding impairment. Thus, there was no reason to invoke the exception to the general rule in ORS 656.245 that only the attending physician's findings may be considered in evaluating the worker's impairment.

Here, by contrast, there was a medical arbiter examination. Therefore, we must choose whether to base claimant's impairment on the attending physician's findings or the medical arbiter's findings. This circumstance was not addressed by *Koitzsch*, and it is for this purpose that we are directed to review the preponderance of the medical evidence, rather than simply the preponderance of a smaller "record" containing only the opinions provided or adopted by the attending physician or provided by the medical arbiter.

I would also not apply *Koitzsch's* progeny to exclude the opinions of Drs. Gallo and Lockfeld from consideration in weighing Dr. Melson's opinion against Dr. Weller's opinion. *Libbett* described *Koitzsch's* interpretation of ORS 656.245 as eliminating reliance on IMEs "for any purpose in [our] evaluation of a worker's disability." 130 Or App at 52. However, *Libbett* addressed the consideration of non-medical evidence in evaluating medical evidence of a claimant's disability. *Id.* It did not proscribe the use of any non-IME evidence. Further, it did not address the use of evidence that may not, itself, be used to rate a claimant's impairment to, instead, weigh an attending physician's opinion against a medical arbiter's opinion. Its holding allowing consideration of non-medical evidence in evaluating a worker's impairment has no relevance to this case.

Similarly, *Tektronix* did not address this question. There, both the attending physician and a medical arbiter evaluated the claimant's impairment, and the carrier submitted the impairment findings of other experts, including an IME. 132 Or App at 485. The court excluded the findings of the IME from consideration. *Id.* at 486-87. However, as in *Koitzsch* and *Libbett*, the court did not exclude the opinions of non-IME experts from consideration or address whether opinions from medical experts other than the attending physician and the medical arbiter could be used to weigh the attending physician's opinion against a medical arbiter's opinion.

Therefore, I find it proper to consider the opinions of Drs. Gallo and Lockfeld in evaluating whether Dr. Weller's impairment findings were more accurate than Dr. Melson's impairment findings. Based on the preponderance of the evidence, I would conclude that they were. Accordingly, I would find that claimant is not entitled to scheduled PPD for his left arm and leg impairment.

In conclusion, I would find that claimant is entitled to only 34 percent unscheduled PPD, and no scheduled PPD. Because the majority finds otherwise, I respectfully dissent.