
In the Matter of the Compensation of
TERRI L. PRESTON, Claimant
WCB Case No. 09-01227
ORDER ON REVIEW
Dunn & Roy PC, Claimant Attorneys
Julene M Quinn, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Smith's order that reduced claimant's whole person impairment award from 35 percent, as granted by an Order on Reconsideration, to 19 percent. On review, the issue is extent of permanent disability (impairment). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

After claimant filed a claim for right upper extremity symptoms on December 5, 2007, the SAIF Corporation accepted right medial epicondylitis and right carpal tunnel syndrome. Claimant underwent surgery on April 3, 2008. After surgery, claimant reported pain in her elbow, forearm, and wrist.

On September 29, 2008, Dr. Sotta, her attending physician, noted reduced strength and range of motion, but opined that claimant's conditions were medically stationary and released her to regular work. SAIF closed the claim by a Notice of Closure dated October 16, 2008,¹ with an award of 4 percent whole person impairment. Claimant requested reconsideration and the appointment of a medical arbiter.

Dr. Thiessen, a medical arbiter, examined claimant on December 18, 2008. At the request of the Appellate Review Unit (ARU), Dr. Thiessen offered clarifying reports on January 30, 2009 and February 2, 2009. Based on Dr. Thiessen's range of motion (ROM) findings for claimant's right elbow, wrist, thumb, and fingers, claimant's lost grip strength, and a "chronic condition" in

¹ The applicable disability rating standards for the date of claim closure are found in WCD Admin. Order 07-060 (eff. January 1, 2008). OAR 436-035-0003(1).

claimant's right wrist and right elbow, an Order on Reconsideration increased claimant's whole person impairment award to 35 percent. SAIF requested a hearing.

The ALJ found that claimant's forearm pain and nerve irritation symptoms were not caused by the accepted conditions or their direct medical sequelae. Reasoning that the medical arbiter attributed claimant's right wrist and elbow chronic condition and right elbow ROM findings to the forearm pain and nerve irritation symptoms, the ALJ removed those findings from the calculation of claimant's impairment. The ALJ also found that whereas Dr. Thiessen's right wrist ROM findings were based on the forearm pain and nerve irritation symptoms, Dr. Sotta's right wrist ROM findings were not. Therefore, the ALJ found that Dr. Sotta's right wrist ROM findings were more accurate than those of Dr. Thiessen, and used Dr. Sotta's right wrist ROM findings in the calculation of claimant's impairment. Accordingly, based on Dr. Thiessen's right thumb and finger ROM and right grip strength findings and on Dr. Sotta's right wrist ROM findings, the ALJ reduced claimant's impairment award to 19 percent.

Claimant disputes the ALJ's conclusion that certain impairment findings were not caused by the accepted conditions or their direct medical sequelae. As explained below, we agree with claimant's contention.

Conditions that are direct medical sequelae of the original accepted conditions are included in the rating of permanent disability unless they have been specifically denied. ORS 656.268(14); OAR 436-035-0007(1). A "direct medical sequela" is a condition that "originates or stems from an accepted condition that is clearly established medically." OAR 436-035-0005(6).

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 a medical arbiter's impairment findings when the arbiter unambiguously attributes the claimant's permanent impairment to the compensable condition. *Hicks v. SAIF*, 194 Or App 655, 659, *on recons*, 196 Or App 146 (2004). However, if an arbiter report is ambiguous regarding whether the impairment was due to the accepted conditions or their direct medical sequelae or to unaccepted conditions, it does not establish ratable impairment. *Khamphouk Thanasouk*, 60 Van Natta 20, 23 (2008).

As noted, Dr. Thiessen made impairment findings regarding claimant's right elbow and wrist ROM and right wrist and elbow chronic conditions. (Exs. 23-6, 25-3). Regarding the wrist and elbow chronic condition, he wrote that "the majority of [claimant's] disability with pain and decreased strength is related to forearm pain and nerve irritation, which is not part of the accepted condition." (Ex. 23-3). Dr. Thiessen reported that "dorsi and volar wrist flexion and pronation, supination are related to forearm pain and nerve irritation and not related to the accepted conditions." (Ex. 23-4). Nevertheless, Dr. Thiessen also stated that claimant "had nerve irritation that may be * * * secondary to the surgery." (*Id.*) Thus, his initial report was ambiguous regarding the relationship between the wrist and elbow findings and the accepted conditions.

Dr. Thiessen's January 30, 2009 report, however, was not ambiguous. In that report, Dr. Thiessen specifically agreed that claimant's wrist range of motion and strength loss were "due to the accepted condition(s) or direct medical sequela thereof." (Ex. 25-2, emphasis original). He explained that those findings were "related to stiffness & pain post surgical with nerve irritation at elbow." (*Id.*) He also concluded that claimant was significantly limited in the ability to repetitively use the elbow and wrist "due to a diagnosed chronic and permanent medical condition arising out of the accepted condition(s) or direct medical sequelae." (Ex. 25-3). Thus, Dr. Thiessen indicated that claimant suffered from post-surgical stiffness, pain, and nerve irritation, which are direct medical sequelae of the accepted conditions. Further, Dr. Thiessen unambiguously attributed claimant's right wrist and elbow impairment findings to the accepted conditions and their medical sequelae.

Because, in his supplemental report, Dr. Thiessen unambiguously attributed claimant's elbow and wrist impairment findings to the accepted conditions and direct medical sequelae, we use his findings unless a preponderance of the medical evidence demonstrates that different findings by Dr. Sotta are more accurate and should be used. We do not find such a preponderance of the medical evidence.

SAIF contends that Dr. Sotta's September 29, 2008 report establishes that any nerve irritation was not related to the compensable injuries. In support of its contention, SAIF notes that Dr. Sotta opined that in addition to the accepted conditions, claimant had "[r]ight forearm pain of an undetermined etiology, not related to work." (Ex. 19). SAIF also notes that Dr. Sotta had previously opined that claimant had ongoing right forearm symptoms of unclear etiology and possible cervical radiculitis. (Exs. 9-1, 15-1, 16-2).

Dr. Thiessen reviewed claimant's records, including Dr. Sotta's chart notes, and performed a thorough examination. (Ex. 23-1). He considered Dr. Sotta's opinions and explained why a negative nerve conduction study was consistent with his diagnosis of nerve irritation secondary to surgery. (Ex. 23-4).

Despite Dr. Sotta's assertion that claimant's ongoing right forearm symptoms were distinct from the accepted conditions and unrelated to work, he did not explain why he reached that conclusion. After weighing the medical record, we do not conclude that a preponderance of the medical evidence demonstrates that Dr. Sotta's findings are more accurate than those of Dr. Thiessen. Therefore, impairment is established based on Dr. Thiessen's findings.

Because impairment is established based on Dr. Thiessen's findings, we reinstate and affirm the Order on Reconsideration's permanent disability award.² Accordingly, we reverse the ALJ's order.

Because the employer requested a hearing regarding the Order on Reconsideration and we have reinstated and affirmed the permanent disability award in that order, claimant's compensation was therefore not ultimately reduced or disallowed as a result of the employer's hearing request. Accordingly, claimant's attorney is entitled to an assessed fee for services at the hearing level. ORS 656.382(2); *Crystal L. DeLeon*, 61 Van Natta 1777 (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 at the hearing level is \$3,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

In addition, 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 (*i.e.*, the 16 percent whole person impairment increase between the ALJ's 19 percent award and our 35 percent award), not to exceed \$6,000, payable by SAIF directly to claimant's counsel. ORS 656.386(3); OAR 438-015-0055(2).

² The parties do not otherwise dispute the reconsideration order's calculation of claimant's whole person impairment.

ORDER

The ALJ's order dated September 2, 2009 is reversed. The Order on Reconsideration's award of 35 percent whole person impairment is reinstated and affirmed. For services at the hearing level, claimant's counsel is awarded an assessed fee of \$3,000, payable by SAIF. In addition, claimant's counsel is awarded an "out-of-compensation" attorney fee award equal to 25 percent of the increased compensation created by this order (*i.e.*, the 16 percent whole person impairment increase between the ALJ's 19 percent award and our 35 percent award), not to exceed \$6,000, payable by SAIF directly to claimant's counsel.

Entered at Salem, Oregon on January 13, 2010