In the Matter of the Compensation of
MARY JO STROHM, Claimant
WCB Case No. 09-01260
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that awarded 7 percent whole person impairment and 22 percent work disability, whereas an Order on Reconsideration awarded 13 percent whole person impairment and 28 percent work disability. On review, the issue is extent of permanent disability (impairment and work disability). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

Claimant compensably injured her low back in September 2005. The SAIF Corporation accepted a lumbar strain and L5-S1 disc herniation. (Ex. 4). In May 2008, claimant's attending physician, Dr. Nelson, declared her conditions medically stationary and released her to light/medium work. (Ex. 13-2). Dr. Nelson found loss of lumbar range of motion (ROM), of which he attributed 50 percent to the accepted conditions and 50 percent to degeneration and stenosis. (Exs. 13, 15).

Using Dr. Nelson's findings, SAIF issued a Notice of Closure dated November 24, 2008, which awarded, *inter alia*, 6 percent whole person impairment for the reduced lumbar ROM and 18 percent work disability. (Ex. 16). The modified acceptance notice at closure provided that the accepted conditions did "not include a combined condition * * *." (Ex. 17). Claimant requested reconsideration. (Ex. 18).

A February 12, 2009 Order on Reconsideration affirmed that portion of the Notice of Closure that awarded 6 percent whole person impairment for the reduced lumbar ROM. (Ex. 19-3). The reconsideration order also awarded 5 percent impairment for a "chronic condition" of the lumbar spine and 2 percent whole person impairment for claimant's left foot. (*Id.*) After increasing claimant's social/vocational factors to a value of 15, the reconsideration order awarded 13 percent whole person impairment and 28 percent work disability. (Ex. 19-4).

Claimant requested a hearing, asserting that the lumbar ROM findings should not have been apportioned because SAIF had accepted a "combined condition." SAIF countered that it expressly did not accept a "combined condition," and additionally argued that the lumbar ROM findings should be awarded a value of zero because Dr. Nelson concluded that his findings were "invalid."

CONCLUSIONS OF LAW AND OPINION

Agreeing with SAIF that the lumbar ROM impairment findings were "invalid," the ALJ modified the reconsideration order by eliminating the impairment value for the reduced lumbar ROM. The ALJ also held that, in light of the impairment determination, any apportionment of the reduced lumbar ROM was moot.

On review, claimant contends that the reduced lumbar ROM findings were ratable, and that the impairment value for those findings should not be apportioned. We address each issue in turn.

For the purpose of rating claimant's permanent disability, only the opinions of claimant's attending physician at the time of claim closure, or any findings with which he or she concurred, and a medical arbiter's findings may be considered. *See* ORS 656.245(2)(b)(B); ORS 656.268(7); OAR 436-035-0007(5), (6);[1] *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994).

Here, no medical arbiter examination was performed. Consequently, we rely on Dr. Nelson's opinion to rate claimant's permanent impairment. Dr. Nelson made the following findings concerning claimant's lumbar ROM: forward flexion (15 degrees); extension (15 degrees); and lateral extension (20 degrees). (Ex. 13-1, -2). Both the Notice of Closure and Order on Reconsideration used these findings to rate claimant's permanent impairment. (Exs. 16-2, 19-3).

The ALJ, however, determined that Dr. Nelson's findings were "invalid" under OAR 436-035-0007(12) because Dr. Nelson observed that the "back examination inclinometry was not felt to be valid" on the date of the closing examination. (*See* Ex. 13-1). We disagree with the ALJ's conclusion.

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[1] Because claimant's claim was closed on November 24, 2008, the applicable standards are found in WCD Admin. Order No. 07-060 (eff. January 1, 2008). OAR 436-035-0003(1).

Under OAR 436-035-0007(12):

> "Validity is established for findings of impairment according to the criteria noted in the *AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev., 1990*, unless the validity criteria for a particular finding is not addressed in this reference, is not pertinent to these rules, or is determined by physician opinion to be medically inappropriate for a particular worker. Upon examination, findings of impairment which are determined to be ratable under these rules are rated unless the physician determines the findings are invalid and provides a written opinion, based on sound medical principles, explaining why the findings are invalid. When findings are determined invalid, the findings receive a value of zero. If the validity criteria are not met but the physician determines the findings are valid, the physician must provide a written rationale, based on sound medical principles, explaining why the findings are valid."

Here, although Dr. Nelson noted that the "back examination inclinometry was not felt to be valid" on the date of examination, he explained that he was nevertheless able to determine claimant's lumbar ROM in the degrees set forth above. (Ex. 13-1, -2). In other words, although the "*inclinometry* was not felt to be valid," Dr. Nelson did not opine that the ultimate lumbar spine ROM findings were invalid. To the contrary, Dr. Nelson's opinion indicated that his findings accurately reflected claimant's reduced lumbar ROM, and that those findings would be adequate to close claimant's claim. (*See id.*) Thus, we do not agree that Dr. Nelson concluded that the reduced lumbar ROM findings were "invalid." *See Donald F. Brown*, 58 Van Natta 874 (2006) (impairment findings found valid despite physician's statement that there were several hard questions to answer regarding the claimant's knee condition).

Moreover, to the extent that Dr. Nelson's opinion could be interpreted as stating that the impairment findings were "invalid," Dr. Nelson provided a written rationale that he was nevertheless able to determine claimant's impairment and make valid impairment findings. (*See* Ex. 13). Consequently, we find that Dr. Nelson "provide[d] a written rationale, based on sound medical principles,

explaining why the findings [were] valid." *See* OAR 436-035-0007(12). Accordingly, we reinstate the impairment findings as determined in the Order on Reconsideration.[2]

We next turn to claimant's assertion that, pursuant to OAR 436-035-0014(1)(c), the Order on Reconsideration improperly apportioned her disability. Under that provision:

> "Where a worker's compensable condition combines with a preexisting condition, under ORS 656.005(7), the current disability resulting from the total accepted combined condition is rated under these rules as long as the compensable condition remains the major contributing cause of the accepted combined condition (*e.g.*, a major contributing cause denial has not been issued under ORS 656.262(7)(b)). Apportionment of disability is not appropriate."

Claimant asserts that, despite Dr. Nelson's attribution of 50 percent of the reduced lumbar ROM to non-accepted conditions of stenosis and degeneration (*see* Exs. 13-2, 15), that "apportionment of disability is not appropriate" because SAIF accepted a "combined condition." We disagree. SAIF's acceptance notice limited its acceptance to a "disc herniation" and "lumbar strain." (Ex. 17). Moreover, the acceptance notice provided that these accepted conditions did "not include a combined condition." (*Id.*) Given that unequivocal language, we do not conclude that SAIF accepted a "combined condition." Accordingly, we affirm the Order on Reconsideration on the apportionment issue.

In sum, for the aforementioned reasons, we affirm the Order on Reconsideration in its entirety.

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[2] SAIF asserts that Dr. Nelson's estimate that claimant lost "about 50%" of her normal motion is not a measurable or ratable finding. Yet, Dr. Nelson also provided range of motion findings regarding claimant's forward flexion, extension, and lateral bending (in either direction). (Ex. 13-1, -2). Moreover, in response to SAIF's "pre-closure" request to apportion these lumbar motion findings, Dr. Nelson attributed 20 percent to claimant's lumbar strain and 30 percent to her L5-S1 disc herniation (with the remaining 50 percent to degeneration and stenosis). (Ex 15). In light of such circumstances, we disagree with SAIF's assertion that Dr. Nelson's impairment findings were not measurable or ratable under the Director's disability standards.

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 6 percent work disability increase between the ALJ's 22 percent award and our 28 percent award), not to exceed $6,000, payable by SAIF directly to claimant's counsel. ORS 656.386(3); OAR 438-015-0055(2).

ORDER

The ALJ's order dated July 27, 2009 is reversed. The Order on Reconsideration's award of 28 percent work disability is reinstated and affirmed. 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 6 percent work disability increase between the ALJ's 22 percent award and our 28 percent award), not to exceed $6,000, payable by SAIF directly to claimant's counsel.

Entered at Salem, Oregon on January 4, 2010