

In the Matter of the Compensation of
MICHAEL J. TERLESKI, Claimant
WCB Case No. 08-02796, 08-02318
ORDER ON REMAND (REMANDING)

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Reviewing Panel: Members Langer and Biehl.

This matter is before the Board on remand from the Court of Appeals. *SAIF v. Terleski*, 240 Or App 378 (2011). The court has reversed our order, *Michael J. Terleski*, 61 Van Natta 948, *recons*, 61 Van Natta 1776 (2009), that reinstated an Order on Reconsideration's 27 percent permanent impairment award for a bilateral wrist condition, whereas an Administrative Law Judge's (ALJ's) order had awarded 10 percent permanent impairment. In reaching our conclusion, we found no error in the Appellate Review Unit's (ARU's) determination that claimant's "left wrist instability" was a permanent disability addressed by OAR 436-035-0110(3). Reasoning that the aforementioned Director's rule refers to "hand disability" (which does not encompass the wrist under OAR 436-035-0020(3)), the court has reversed our decision and remanded for consideration of claimant's request for the promulgation of a temporary rule under ORS 656.726(4)(f)(D) (2003).¹ Having considered the parties' supplemental briefs, we conclude that Director consideration of a temporary rule is appropriate. We reason as follows.

In September 2005, claimant compensably injured both wrists. In October 2007, the SAIF Corporation issued a Notice of Closure that awarded 10 percent whole person impairment for the bilateral wrist injuries. (Ex. 34). Claimant requested reconsideration and appointment of a medical arbiter.

The medical arbiter, Dr. Heusch, documented loss of range of motion in both wrists that was due entirely to the accepted condition. (Ex. 38-4, -5). Dr. Heusch also found that claimant was significantly limited in the ability to repetitively use both wrists. (Ex. 38-5).

¹ Because claimant was injured in September 2005, ORS 656.726(4)(f)(D) (Or Laws 2003, ch 657, § 3, 13, ch 171, § 1 (eff. January 1, 2004), compiled as a note after ORS 656.726 (2003)) applies. The statute has subsequently been amended so that, rather than adopt a "temporary rule," the Director "shall, in the order on reconsideration, determine the extent of permanent disability that addresses the worker's impairment." See ORS 656.726(4)(f)(D) (Or Laws 2007, ch 270, § 7, 8, ch 274, § 2 (2007)). That amendment, however, does not apply here, because claimant's date of injury preceded the amendment's effective date.

An initial March 17, 2008 Order on Reconsideration awarded 10 percent whole person impairment, noting that the Appellate Review Unit (ARU) was awaiting a clarification from the medical arbiter regarding claimant's left wrist instability. (Ex. 40-1, -4). Dr. Heusch subsequently provided that clarification, concluding that claimant had severe (greater than 20 degrees) instability of the left wrist. (Ex. 41-1).

Based on that clarification, an April 9, 2008 Order on Reconsideration awarded 45 percent impairment for left wrist instability pursuant to OAR 436-035-0110(3).² Combining the previous loss of range of motion and chronic condition findings, the April 2008 reconsideration order awarded 27 percent whole person impairment. SAIF requested a hearing.

The ALJ modified the April 2008 Order on Reconsideration and awarded 10 percent whole person impairment, concluding that OAR 436-035-0110(3) did not rate left wrist instability, and that the standards adequately addressed claimant's impairment. Deferring to the ARU's interpretation of its own rules, we found no error in the ARU's reconsideration order and reversed the ALJ's order. *Terleski*, 61 Van Natta at 948, *recons*, 61 Van Natta at 1776.

As set forth above, the court reversed our order, finding that claimant's left wrist instability could not be rated under OAR 436-035-0010(3). The court remanded for consideration of whether we should remand to the Director for promulgation of a temporary rule under ORS 656.726(4)(f)(D) (2003). Based on the following reasoning, we conclude that Director consideration of a temporary rule is appropriate.

The Director has broad authority to adopt disability standards pursuant to ORS 656.726(4)(f). *David Boyack*, 55 Van Natta 1278 (2003). If the Director finds that a worker suffers from an impairment that results in disability, and that disability is not addressed by existing standards, the Director must promulgate a rule that addresses the worker's particular impairment. *Shubert v. Blue Chips*, 330 Or 554, 561 (2000). "Disability," however, cannot be "found" in the way that an ordinary fact would be found. *Aubrie M. Chaney*, 55 Van Natta 2541, 5433 (2003). Rather, disability is a legal conclusion arising out of medical facts of impairment in combination with the pertinent legal criteria. *Id.* (citing *Shubert*, 330 Or at 559).

² Because claimant's claim was closed by an October 22, 2007 Notice of Closure, the applicable standards are found in WCD Admin. Order 05-074 (eff. January 1, 2006). OAR 436-035-0003(1).

When a disability is not addressed by the existing standards, we have the authority to remand a claim to the Director for promulgation of a temporary rule. *See Gallino v. Courtesy Pontiac-Buick-GMC*, 124 Or App 538, 541-42 (1993). On the other hand, we have determined that, when the Director has found that a claimant's disability was addressed by the current disability standards, remand for a temporary rule is not appropriate. *Boyack*, 55 Van Natta at 1279; *see also Voleen Toten*, 55 Van Natta 1715 (2003).

Here, the Director indicated that claimant's left wrist instability constituted an impairment that resulted in disability. (Exs. 40, 41, 42). Although the Order on Reconsideration stated that the standards addressed claimant's disability, that conclusion was premised on the Director's understanding that OAR 436-035-0110(3) applied to the left wrist instability. (*Id.*) As set forth above, the court has determined that the cited provision does not apply to claimant's disability. Because the Director previously relied on OAR 436-035-0110(3) in concluding that the standards addressed claimant's disability, it is not clear that the Director would have arrived at that same conclusion if OAR 436-035-0110(3) was not applicable. Accordingly, under these particular circumstances, the record does not establish that the existing standards address claimant's disability.

In so finding, we disagree with SAIF's assertion that, because claimant received impairment values for range of motion loss and a "chronic condition," the standards necessarily addressed his disability. The Order on Reconsideration separately awarded a left wrist chronic condition award under OAR 436-035-0019(1)(c), as well as an impairment award for the contested left wrist instability under OAR 436-035-0110(3). This alone indicates that the ARU determined that the instability was not encompassed within the chronic condition award, and that both awards were necessary to address claimant's disability. Moreover, the ARU sought clarification from the medical arbiter concerning the extent of claimant's left wrist instability and subsequently awarded a value for the instability that was *in addition to* the value for range of motion loss. (*See Exs. 40-3, 41, 42-1*). The ARU's actions indicate that claimant was entitled to a left wrist instability award distinct from the range of motion loss, and that an impairment award for such instability was necessary to adequately address claimant's disability.

Accordingly, we remand to the Director for consideration of the promulgation of a temporary rule that addresses claimant's disability. *See ORS 656.726(4)(f)(D)* (2003).

We have previously determined that, when remanding to the Director for the adoption of a temporary rule, it is likewise appropriate to remand the case to the Hearings Division. *See Milan P. Shubert*, 53 Van Natta 135, 136 (2001). In this way, the litigants will be able to present their respective arguments regarding the extent of claimant's permanent disability to an ALJ once the Director completes the "temporary rule" review. Thereafter, any party dissatisfied with the ALJ's order may request Board review.

Therefore, on reconsideration of our July 8, 2009 order, we vacate the ALJ's September 17, 2008 order and remand the case to ALJ Otto for further proceedings consistent with this order. Once the Director addresses this temporary rule matter, those proceedings shall be conducted in any manner that the ALJ deems will achieve substantial justice. Thereafter, the ALJ shall proceed to resolve the remaining issues and issue a final, appealable order.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 25, 2011