
In the Matter of the Compensation of
BILLY C. HURST, Claimant
WCB Case No. 10-05620
ORDER ON REVIEW
Douglas D Hagen, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Mills's order that awarded 8 percent whole person impairment and 20 percent work disability for a right knee condition, whereas an Order on Reconsideration had granted no awards. 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."

CONCLUSIONS OF LAW AND OPINION

In July 2009, claimant sustained a compensable injury, accepted as a right knee sprain. Claimant came under the care of Dr. Koon, who referred claimant for a physical capacities evaluation (PCE), which occurred in March 2010. Dr. Koon concurred with the PCE's impairment findings.

A Notice of Closure awarded 8 percent whole person impairment and 20 percent work disability. The employer requested reconsideration.

A medical arbiter panel examined claimant on September 1, 2010. Relying on the arbiter panel's impairment findings, a September 23, 2010 Order on Reconsideration eliminated the permanent impairment and work disability awards previously granted. Claimant requested a hearing.

In reinstating the permanent impairment and work disability awards in the Notice of Closure, the ALJ found that claimant established that impairment findings of the PCE, as concurred with by Dr. Koon, were more accurate than those of the medical arbiter panel. On review, the employer argues that the ALJ should have relied on the impairment findings of the medical arbiter panel and affirmed the reconsideration order. For the following reasons, we agree.

We initially observe that the sole issue on review is which examination should provide the impairment findings on which claimant's permanent disability should be based. Claimant does not dispute that the medical arbiters' examination does not support an award of permanent impairment. The employer does not dispute that the PCE findings as concurred with by Dr. Koon support the award of permanent impairment and work disability given in the Notice of Closure, which the ALJ reinstated.

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.¹ See ORS 656.245(2)(b)(B); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). Where, as here, a medical arbiter panel is used, impairment is established based on the medical arbiter panel's findings, except where a preponderance of the evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5); *John E. Harp*, 61 Van Natta 1520, 1523 (2009). Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter panel's unambiguous impairment findings. *Hicks v. SAIF*, 194 Or App 655, 659, *recons*, 196 Or App 146 (2004).

Here, the medical arbiter correctly identified the accepted condition to be rated as a right knee sprain. (Ex. 74-1). Based on its examination, the panel concluded that claimant's right knee condition had resolved without impairment or residual. The panel provided its findings regarding range of motion, strength, sensation, etc. The panel concluded there were no abnormal findings, permanent limitations or limitations on functional residual capacity. Having reviewed the arbiter's report, we find no ambiguity regarding their impairment findings. Pursuant to *Hicks*, we are not free to disregard those unambiguous findings, absent persuasive contrary evidence.

Moreover, a claimant's disability is determined as of the date of the Order on Reconsideration. ORS 656.283(7). The medical arbiter panel's September 1, 2010 examination took place much closer in time to the September 23, 2010 Order on Reconsideration than Dr. Koon's agreement with the March 11, 2010 PCE

¹ Because claimant's claim was closed in May 2010, the applicable standards are found in WCD Admin. Order 07-060 (eff. January 1, 2008). See OAR 436-035-0003(1).

findings. While the timing of the arbiter examination is not always dispositive, the fact that the arbiter examination was performed nearly six months later than the PCE and only three weeks before the reconsideration order lends more probative support for the arbiters' findings. See *Nelida Cabellero*, 59 Van Natta 1728, 1731 (2007) (medical arbiter's opinion more probative due in part to fact the examination was closer in time to the date of reconsideration); *Regina Monahan*, 56 Van Natta 3203, 3208 (2004) (same).

In discounting the medical arbiters' report, the ALJ reasoned that the panel recited an inaccurate history regarding the mechanism of injury. The panel reported that claimant sustained his right knee injury catching a package as it fell out of a truck. (Ex. 74-1). The ALJ understood that the injury occurred when claimant lost his footing and twisted his knee. Assuming, without deciding, that the arbiter panel's history was inaccurate, we are not persuaded that such an alleged inaccuracy bears significantly on persuasiveness of their impairment findings, given that the issue in this case involves measuring impairment findings, rather than determining whether impairment findings are causally related to an accepted condition.²

The ALJ also reasoned that, in comparison to the PCE report, the medical arbiters' report was "relatively cursory." However, after reviewing the arbiters' report, we perceive no significant deficiency in that document. The panel was provided with medical records, took a complete history, conducted a complete physical examination and provided their findings and conclusions. All questions asked by the appellate review unit representative were answered. Claimant notes that the panel did not discuss the PCE or Dr. Koon's concurrence. However, the arbiter panel is under no obligation to comment on another physician's assessment of impairment. *Lourdes Brown*, 60 Van Natta 2065, 2067 (2008).

Finally, the ALJ found that the arbiter panel did not properly measure claimant's right knee flexion when it had claimant go into a squat before his range of motion was measured. The ALJ questioned whether such a procedure involved claimant actively using his muscles to move the knee joint through range of motion. As the ALJ noted, however, this issue was not raised at hearing. Moreover, while the AMA guidelines require an examinee to lie flat, the applicable WCD Bulletin (239) does not describe any particular position for taking range of

² The record lacks medical evidence indicating that the precise body mechanics of claimant's injury was relevant to the measurement/assessment of his permanent impairment.

motion measurements.³ Under these circumstances, we are not persuaded that the method employed by the arbiter panel to measure range of motion rendered the impairment findings invalid.

In sum, we find that the medical arbiter impairment findings should be used in evaluating claimant's permanent disability. Thus, we reverse.

ORDER

The ALJ's order dated February 25, 2011 is reversed. The Order on Reconsideration is affirmed. The ALJ's "out-of-compensation" attorney fee is also reversed.

Entered at Salem, Oregon on September 8, 2011

³ Bulletin 239 requires an examiner to "measure the active movement of the joint while the worker is exerting full effort (unassisted by the examiner)."