
In the Matter of the Compensation of
WILLIAM E. HANNAH, Claimant
Own Motion No. 15-00034OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Welch Bruun & Green, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of an April 28, 2015 Own Motion Notice of Closure that awarded 34 percent (51 degrees) scheduled permanent partial disability (PPD) for his “post-aggravation rights” new/omitted medical condition (osteoarthritis of medial compartment of right knee).¹ Based on the following reasons, we modify the closure notice.

FINDINGS OF FACT

On December 22, 1986, claimant sustained a compensable right knee injury. (Ex. 3). The insurer accepted a right knee medial meniscus tear. (*See* Exs. 4, 49, 50).² On April 16, 1987, claimant underwent a right knee partial medial meniscectomy. (Ex. 11).

A February 11, 1988 Determination Order closed the claim without a permanent disability award. (Ex. 20).

In February 2014, claimant began treating with Dr. Borus for right knee pain. (Ex. 35). Dr. Borus diagnosed post-traumatic medial compartment arthritis, status post-meniscectomy and a recent January 2014 injury. (Ex. 35-1).

¹ Claimant’s December 22, 1986 claim was accepted as a disabling claim and was first closed on February 11, 1988. Thus, claimant’s aggravation rights expired on February 11, 1993. Therefore, when claimant sought claim reopening in March 2014, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On June 2, 2014, the insurer voluntarily reopened claimant’s Own Motion claim for a “worsened condition” (right knee medial meniscus tear), as well as an accepted “post-aggravation rights” new/omitted medical condition (osteoarthritis of medial compartment of right knee). ORS 656.278(1)(a), (1)(b), (5). On April 28, 2015, the insurer issued its Notice of Closure.

² The at-injury employer was insured by an insurer that subsequently became insolvent. (*See* 63-1). Thereafter, Oregon Insurance Guaranty Association (OIGA), through TriStar Risk Management/Insurance Group (TriStar), became responsible for the covered claims of that insolvent insurer. (*See* Exs. 50, 63-1, 66-1, 67). Under these circumstances, we identify the carrier as “the insurer.”

In April 2014, claimant and Dr. Borus filed an 827 form concerning the 1986 right knee injury. (Ex. 43). Dr. Borus recommended a partial right knee replacement of the medial compartment. (Ex. 44).

On June 2, 2014, the insurer accepted and voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" worsened condition (right knee medial meniscus tear) and a "post-aggravation rights" new/omitted medical condition (osteoarthritis of medial compartment of right knee). (Exs. 49, 50).

On July 9, 2014, Dr. Borus performed a unicompartmental knee replacement of the right knee medial compartment. (Ex. 55).

On January 20, 2015, Dr. McNeill examined claimant related to his 1986 right knee injury, as well as a February 23, 2000 left knee injury. (Ex. 63). Dr. McNeill found 110 degrees flexion and +5 degrees extension in claimant's right knee. (Ex. 63-9). He noted that claimant had "1+" Lachman and anterior drawer instability in the right knee. (*Id.*) Dr. McNeill opined that claimant's objective findings in his right and left knees were consistent with his subjective complaints, and that there were no invalid findings. (Ex. 63-11). Dr. McNeill did not consider claimant's right knee condition to be medically stationary, noting that he continued to have soreness and instability. (*Id.*) He reported that claimant had pain and tenderness localized to the medial tibial plateau where his prosthesis had been inserted. (Ex. 63-12). Dr. McNeill restricted claimant from climbing ladders and telephone poles, and lifting more than 25 pounds. (*Id.*)³ He also opined that claimant probably will require a revision of his right hemiarthroplasty to a total knee arthroplasty. (*Id.*) Dr. McNeill asked when he anticipated claimant to reach medically stationary status. Dr. McNeill responded that only Dr. Borus and claimant could decide whether any further right knee rehabilitation would be beneficial. (Ex. 63-13).

In a March 13, 2015 letter, Dr. Borus acknowledged Dr. McNeill's opinion that claimant may require a revision to a total knee replacement, but stated that it was not necessary at the present time. (Ex. 65). He stated that claimant's right knee was "medically optimized," but that he would not be able to return to his regular work. (*Id.*)

³ Dr. McNeill subsequently clarified that claimant's right knee instability would preclude him from climbing poles and prolonged walking. (Ex. 64).

In an April 2015 report, Dr. Borus stated that claimant's right knee condition was medically stationary on March 31, 2015, the date of his last clinical evaluation. (Ex. 66-1). He considered Dr. McNeill's January 2015 impairment findings to be appropriate for rating claimant's permanent impairment. (*Id.*) Dr. Borus also restricted claimant to "no ladders, no squatting, no kneeling, no lifting >50 lbs." (Ex. 66-2).

An April 28, 2015 Notice of Closure closed claimant's Own Motion claim for the "post-aggravation rights" worsened condition (right knee medial meniscus tear) and the "post-aggravation rights" new/omitted medical condition (osteoarthritis of medial compartment of right knee). (Ex. 67-1). The closure notice awarded 34 percent (51 degrees) scheduled PPD for the loss of use or function of the right leg (knee). (*Id.*) That award was based on a 20 percent impairment value for the right knee surgery, a 14 percent impairment value for loss of range of motion (ROM), and a 5 percent impairment value for "Lachmans" instability. (Ex. 67-2).

Claimant requested review of the closure notice, seeking additional PPD and the appointment of a medical arbiter. On July 29, 2015, we referred the claim to the Director for the appointment of a medical arbiter. *William E. Hannah*, 67 Van Natta 1358 (2015).⁴

On September 26, 2015, Dr. Mahylis, the medical arbiter, found, with regard to the new/omitted medical condition, the following right knee ROM: 128 degrees flexion; and 0 degrees extension. He noted that claimant had a history of prior injury to the contralateral left knee joint. Dr. Mahylis found no strength loss, sensory loss, or instability. He stated that claimant was not significantly limited in the repetitive use of the right knee due to the accepted condition or a chronic and permanent medical condition arising out of the accepted condition. He reported that claimant had an antalgic gait on his left knee, which indicated that the left knee pain played a large role in claimant's pain profile. Dr. Mahylis concluded that, because claimant had undergone the medial unicompartmental knee arthroplasty to treat his newly accepted right knee medial compartment

⁴ In that order, we noted that, to the extent the insurer's April 28, 2015 closure pertains to the "worsened" condition claim under ORS 656.278(1)(a), claimant is not entitled to a referral for an arbiter examination because he is not entitled to a permanent disability award for a "worsened" condition claim. *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recons*, 54 Van Natta 1552 (2002), *aff'd Dougan v. SAIF*, 193 Or App 767 (2004), *vacated*, 339 Or 1 (2005); *Clarence R. Wikel*, 55 Van Natta 1329 (2003).

osteoarthritis, “the arthritic cause of his right knee pain has been removed, thus his current right knee pain is likely due to another medical cause and not due to the accepted condition.”

Dr. Mahylis opined that “0% of the current examination findings and ongoing disability is due to the accepted condition from [claimant’s] work injury.” He reasoned that claimant’s accepted right knee medial compartment osteoarthritis had been treated following the July 2014 surgery. Dr. Mahylis also noted that claimant had pain and loss of ROM in both of his knees, and that the presence of retropatellar pain to palpation and painful patellar crepitus with knee motions suggested that claimant’s pain was due to another cause and not related to the accepted condition. Dr. Mahylis reasoned that the surgical treatment of the unicompartmental arthroplasty “would have removed the pain generating agent in his right knee” and, as such, “his right knee medial compartment osteoarthritis has been surgically corrected and his right knee pain is likely due to another cause.” Finally, Dr. Mahylis concluded that all examination findings were considered valid for the purposes of rating impairment.

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of “post-aggravation rights” new/omitted medical condition (osteoarthritis of medial compartment of right knee). Such a claim may qualify for payment of permanent disability compensation. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004).

We first determine whether ORS 656.278(2)(d) applies to limit any award of scheduled PPD for the “post-aggravation rights” new/omitted medical condition. The PPD limitation set forth in ORS 656.278(2)(d) applies where there is (1) “additional impairment” to (2) “an injured body part” that has (3) “previously been the basis of a [PPD] award.” *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003). If those conditions are satisfied, the Director’s standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate “post-aggravation rights” new or omitted medical condition claims. Under such circumstances, we redetermine the claimant’s permanent disability pursuant to those standards before application of the limitation in ORS 656.278(2)(d). *Jeffrey L. Heintz*, 59 Van Natta 419 (2007); *Nielsen*, 55 Van Natta at 3207-08. On the other hand, where it is determined that the limitation in ORS 656.278(2)(d) does not apply, the permanent disability for the “post-aggravation rights” new/omitted medical condition is rated under the Director’s standards without “redetermination” of disability. *Terry L. Rasmussen*, 56 Van Natta 1136 (2004).

Here, all three factors are not satisfied regarding claimant's right knee condition. Specifically, he has not received a prior permanent disability award for the right leg (knee). Therefore, the limitation on permanent disability benefits set forth in ORS 656.278(2)(d) does not apply. *Johnathan M. Myers*, 65 Van Natta 1174, 1176 (2013). Consequently, claimant's new/omitted medical condition is rated under the Director's standards without a "redetermination" of disability.

Claimant's claim was closed by an April 28, 2015 Own Motion Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). *See* OAR 436-035-0003(1).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, except where a preponderance of the medical 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); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Only findings of impairment that are permanent and caused by the accepted condition, direct medical sequela, or a condition directly resulting from the work injury may be used to rate impairment. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(1), (2); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994). If the loss of use or function of a body part or system is not caused in any part by the compensable injury, the loss is not due to the compensable injury and the worker is not eligible for an award for impairment. OAR 436-035-0007(1)(b)(C).

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's permanent impairment to the compensable condition, "the medical arbiter's report provides the default determination of a claimant's impairment." *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146, 152 (2004). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, claimant argues that the impairment findings from Dr. McNeill, as ratified and supplemented by Dr. Borus (his attending physician), should be used to rate his permanent impairment. The insurer contends that Dr. Mahylis's medical arbiter findings should be used. For the following reasons, we agree with claimant's arguments.

Dr. Mahylis, the medical arbiter, found decreased ROM on examination. He apportioned zero percent of the findings to the accepted conditions. In offering that assessment, Dr. Mahylis noted that claimant had pain and loss of motion in both knees. He further opined that claimant's right knee medial compartment osteoarthritis had been surgically corrected following the July 2014 surgery, which "would have removed the pain generating agent in his right knee," and therefore claimant's right knee pain "is likely due to another cause."

However, Dr. Mahylis did not identify another cause for claimant's right knee pain (*e.g.*, a denied condition, a superimposed condition, or a statutory "preexisting condition" that is not otherwise compensable). *See* OAR 436-035-0007(1)(b)(B)(ii); *see also* OAR 436-035-0013(2)(b)(C). Furthermore, Dr. Mahylis's opinion, which was primarily based on his assertion that claimant's accepted condition was surgically corrected, does not provide for consideration of impairment caused by any direct medical sequelae (*e.g.*, claimant's right knee unicompartmental arthroplasty) of the accepted condition. OAR 436-035-0006(2)(b); OAR 436-035-0013(2)(b)(C)(ii).

Moreover, pain is considered in the impairment values under the rules to the extent that it results in valid measurable impairment. OAR 436-035-0007(8). Findings of impairment that are determined to be ratable under the rules are rated unless the physician determines the findings are invalid. OAR 436-035-0007(11).

Here, Dr. Mahylis found decreased right knee ROM, which he stated was valid for the purposes of rating impairment. In the absence of a reasonable explanation for this apparent inconsistency, we consider Dr. Mahylis's report to be ambiguous.

In contrast, Dr. McNeill, whose findings were ratified and supplemented by Dr. Borus (claimant's attending physician), found decreased right knee ROM and considered the effects of claimant's right knee injuries and surgeries, as well as his left knee injuries and surgeries. (Exs. 63, 64, 65, 66). In addition, Dr. McNeill opined that claimant's objective findings were consistent with his subjective complaints, stated that there were no invalid findings, and reported the physical findings that were related to the osteoarthritic condition. (Ex. 63-11-12).

Under these particular circumstances, we conclude that a preponderance of the medical evidence establishes that the different findings from claimant's attending physician are more accurate than the ambiguous findings of the medical arbiter and should be used to rate claimant's impairment. Therefore,

we find persuasive reasons to disregard the medical arbiter's findings. *See* OAR 436-035-0007(5); *Banderas*, 252 Or App at 144-45; *Jerald M. Souther*, 67 Van Natta 412, 416 (2015).

Accordingly, we rate claimant's permanent impairment based on the findings of Dr. McNeill, as ratified and supplemented by Dr. Borus.⁵ Dr. McNeill found 110 degrees flexion and +5 degrees extension in claimant's right knee. (Ex. 63-9). Because claimant has a history of injury or disease to the left knee joint, a contralateral comparison is not appropriate. OAR 436-035-0011(3). Therefore, claimant receives the following right knee ROM values: 14 percent for flexion; and 0.5 percent for extension. OAR 436-035-0220(1), (2). These values are added for a total right leg ROM impairment value of 14.5 percent, which is rounded to 15 percent. OAR 436-035-0011(2), (4).

Claimant receives a surgical impairment value of 20 percent for the July 2014 right knee unicompartmental arthroplasty. OAR 436-035-0230(5)(d). He does not receive a separate value for the previous right knee medial meniscectomy surgery. OAR 436-035-0230(5)(d), (e); *Daniel J. Bergmann*, 67 Van Natta 338, 344 (2015).

Claimant is entitled to a 5 percent impairment value if a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, he is significantly limited in the repetitive use of his right upper leg (knee and above). OAR 436-035-0019(1)(b). "Magic words" are not required, provided the record contains the opinion of the attending physician, or physician with whom the attending physician concurred, from which it can be found that claimant is significantly limited in the repetitive use of the relevant body part due to a chronic and permanent medical condition. *See Spurger v. SAIF*, 266 Or App 183, 192 (2014); *Jeffrey L. Heintz*, 67 Van Natta 1164, 1168-69 (2015).

⁵ We acknowledge that Dr. McNeill's findings were obtained on January 20, 2015, while claimant's accepted right knee condition was not considered "medically stationary." (*See* Ex. 63-11). Nevertheless, Dr. Borus declared claimant's condition to be medically stationary on March 31, 2015, but expressly determined that Dr. McNeill's findings were appropriate for rating claimant's permanent impairment. (Ex. 66-1). Considering Dr. Borus's familiarity with claimant's right knee conditions (as well as his left knee conditions), we find that Dr. McNeill's impairment findings, as ratified and supplemented by Dr. Borus, appropriately address claimant's permanent impairment due to the accepted right knee condition.

Here, neither Dr. McNeill nor Dr. Borus expressly addressed whether claimant was significantly limited in the repetitive use of his right knee. Nevertheless, we review their findings to determine whether they establish a significant limitation in the repetitive use of claimant's right leg (knee). *Spurger*, 266 Or App at 192.

In determining whether claimant is entitled to a "chronic condition" impairment value under OAR 436-035-0019(1), we must determine "whether the loss of function to a body part created a significant limitation to [his] ability to use the affected body part repetitively." See *Gonzalez v. SAIF*, 183 Or App 183, 190-91 (2002). In *Angelica M. Spurger*, 67 Van Natta 1798, 1804 (2015) (on remand), we concluded that "the plain and ordinary meaning of 'significantly limited' denotes a limitation that is meaningful or important." Moreover, in its December 22, 2014 "Industry Notice," the Workers' Compensation Division (WCD) defined "significant" as "having or expressing a meaning; meaningful" or "important; notable; valuable," and defined "limited" as "confined or restricted." In that notice, the WCD stated that it "interprets the relevant inquiry under OAR 436-035-0019(1) as follows: Because of a permanent and chronic condition caused by the compensable injury, is the worker unable to repetitively use the body part for more than two-thirds of a period of time?"⁶ The WCD's notice stated that it "will apply the above inquiry to any Notice of Closure received starting Dec. 23, 2014."

Here, this Own Motion Notice of Closure was filed on April 28, 2015, *after* the effective date of the WCD's "Industry Notice." (Ex. 67). The Board is required to apply the Director's standards for the evaluation and determination of

⁶ Finally, that notice provides, in pertinent part:

"In applying those definitions to OAR 436-035-0019(1), it is necessary to establish when a confinement or restriction to the 'repetitive use' of a body part is important, meaningful, or notable. In the context of work restrictions, a repetitive use limitation is generally compensable when the worker is limited to 'frequent' repetitive use or action. Although OAR 436-035-0019(1) provides an award for impairment, WCD finds it reasonable to adopt an equivalent standard for the limited purpose of defining when a confinement or restriction is important, meaningful, or notable. Accordingly, WCD will interpret *confined or restricted ('limited')* 'repetitive use' under OAR 436-035-0019(1) as *important, meaningful, or notable ('significant')* when the worker is limited to *frequent use of the body part*. Consistent with the use of the term in the context of work restrictions, frequent means the ability to use the body part for up to two-thirds of a period of time." (Emphasis added).

disability in rating permanent disability for “post-aggravation rights” new/omitted medical condition claims. ORS 656.278(1)(b). Although the WCD’s “Industry Notice” is not a “standard,” it explains the “WCD’s interpretation of when a worker is ‘significantly limited in the repetitive use’ of a body part under OAR 436-035-0019(1).” Deference is given to an agency’s plausible interpretation of its rule, including an interpretation made in the course of applying the rule. *See Godinez v. SAIF*, 269 Or App 578, 583 (2015); *Spurger*, 67 Van Natta at 1802. Accordingly, in determining whether claimant is “significantly limited in the repetitive use” of his right knee under OAR 436-035-0019(1), we apply the Director’s standards, including and considering the WCD’s interpretation of that rule as explained in its “Industry Notice.”

Here, Dr. Borus expressly identified claimant’s restrictions “no ladders, no squatting, no kneeling, no lifting >50 lbs.” (Ex. 66-2).⁷ We find that Dr. Borus’s opinion establishes that claimant is significantly limited in the repetitive use of his right knee due to a chronic and permanent medical condition. In this regard, we are persuaded that Dr. Borus’s limitation to “no” climbing, squatting, or kneeling constitutes an “important, meaningful, or notable” limitation in the repetitive use of the right knee, as it is a *complete* limitation (*i.e.*, more than two-thirds of a period of time) in the ability to use that body part. *See Spurger*, 67 Van Natta at 1804.

Under these particular circumstances, we find that the record persuasively supports a finding that claimant is entitled to a 5 percent impairment value for a “chronic condition” limitation in his right leg (knee). OAR 436-035-0019(1)(b); *see Debra J. Walker*, 67 Van Natta 2153, 2157 (2015) *see also Heintz*, 67 Van Natta at 1169 n 6.

Dr. McNeill found “1+” instability in claimant’s right knee. (Ex. 63-9). However, because claimant had a prosthetic knee replacement, he is not entitled to an impairment value for Grade 1+ instability. OAR 436-035-0230(3)(d).

There are no other ratable permanent impairment findings. Therefore, we combine claimant’s impairment values as follows: 20 percent (surgery) combined with 15 percent (ROM) equals 32 percent; 32 percent combined with 5 percent (chronic condition) results in a total impairment value of 35 percent (52.5 degrees) scheduled PPD for the loss of use or function of the right leg (knee). OAR 436-035-0011(6); OAR 436-035-0019(2).

⁷ Dr. Borus also stated that, due to his right knee condition (for which he underwent a partial replacement of the medial compartment), claimant was not able to return to his previous occupation due to the high demand of his job description. (Ex. 65).

As noted above, the ORS 656.278(2)(d) limitation does not apply. Consequently, we modify the Notice of Closure to award 35 percent (52.5 degrees) scheduled PPD for claimant's "post-aggravation rights" new/omitted medical condition (osteoarthritis of medial compartment of right knee). This results in an increased award of 1 percent (1.5 degrees) scheduled PPD over the 34 percent (51 degrees) scheduled PPD awarded by the April 28, 2015 Notice of Closure.⁸

Because our decision results in increased scheduled PPD, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased scheduled PPD compensation created by this order (the 1 percent (1.5 degrees) scheduled PPD award granted by this order), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(4); OAR 438-015-0040(1); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on January 14, 2016

⁸ Claimant's total award to date is 35 percent (52.5 degrees) scheduled PPD for the loss of use or function of the right leg (knee).