
In the Matter of the Compensation of
JAMES A. NEIGEL, Claimant
Own Motion No. 16-00001OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Scott M Supperstein PC, Claimant Attorneys
Liberty NW Ins Corp, Carrier

Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of a November 9, 2015 Own Motion Notice of Closure (as corrected December 18, 2015) that awarded an additional 4 percent (7.68 degrees) scheduled permanent partial disability (PPD) for his “post-aggravation rights” new/omitted medical conditions (left arm/elbow post traumatic arthritis and left arm loose bodies).¹ Based on the following reasons, we modify the closure notice.

FINDINGS OF FACT

On August 16, 1994, claimant sustained a compensable injury when he fell approximately 30 feet from a crane onto the ground. The insurer accepted multiple facial fractures, basal skull fractures, left distal femur fracture, right wrist dislocation, left scapular fracture, left 7th rib fracture, left ulnar fracture, left radial head fracture, and right index finger PIP dislocation. (Ex. 1).

Claimant underwent multiple surgeries to repair the various fractures. On August 18, 1994, he underwent further left elbow surgery involving a partial excision of the left radial head and repair of the annular ligaments. (Exs. 6-7, 10-12). On March 9, 1995, the remainder of claimant’s left radial head was excised. (See Exs. 2-2, 6-9, 10-12).

A June 7, 1996 Notice of Closure (Determination Order) awarded 36 percent (69.12 degrees) scheduled PPD for the loss of use or function of the left arm,

¹ Claimant’s August 16, 1994 claim was accepted as a disabling claim and was first closed on June 7, 1996. Thus, claimant’s aggravation rights expired on June 7, 2001. Therefore, when claimant sought claim reopening in October 2014, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On February 26, 2015, the insurer voluntarily reopened claimant’s Own Motion claim for “post-aggravation rights” new/omitted medical conditions (left arm/elbow post traumatic arthritis and left arm loose bodies). ORS 656.278(1)(b), (5). On November 9, 2015, as corrected on December 18, 2015, the insurer issued its Notice of Closure.

24 percent (46.08 degrees) scheduled PPD for the loss of use or function of the right arm, and 6 percent (9 degrees) scheduled PPD for the loss of use or function of the left leg (knee). (See Exs. 2-2, 4-2).²

In August 1997, claimant underwent a left ulnar shortening osteotomy for left wrist ulnar carpal abutment. (See Exs. 6-10, 10-11-12). The insurer accepted a left wrist ulno carpal abutment. (See Exs. 4-1, 5-1).

An April 22, 1998 Notice of Closure awarded an additional 6 percent (11.52 degrees) scheduled PPD for the loss of use or function of the left arm, for a total award of 42 percent (80.64 degrees). (Ex. 2). That award was based on a 20 percent impairment value for left arm/elbow range of motion (ROM) combined with a 15 percent left arm impairment value for the 1995 radial head resection surgery and a 14 percent left arm impairment value (as converted from a 17 percent left wrist impairment value, which consisted of 10 percent for the 1997 distal ulnar resection surgery combined with 8 percent for left wrist ROM). (Ex. 2-2).³

Thereafter, the insurer accepted a bifrontal brain injury and cerebral concussion. (Ex. 3-2). A June 7, 2002 Notice of Closure, as modified by an October 17, 2002 Order on Reconsideration, awarded 10 percent (32 degrees) unscheduled PPD for these accepted conditions. (Exs. 3, 4).

In June 2014, claimant was injured while working for a subsequent employer when his right hand was crushed by a large beam and he used his left arm to push the beam off his hand. (Exs. 6-4, 10-4). He reported increased left elbow symptoms thereafter. (*Id.*) Claimant was referred to Dr. Wei, who recommended left elbow arthroscopic surgery to remove the loose bodies and noted that claimant might need a total elbow replacement in the future. (See Exs. 6-17, 10-4, -14).

² The June 7, 1996 Determination Order is not in the record. (The insurer is reminded to include copies of all Determination Orders, Notices of Closure, and Orders on Reconsideration when it submits copies of the record to the Board and claimant's counsel.) We may take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." This includes agency orders, such as a Determination Order. See *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985); *Annie L. Downs*, 67 Van Natta 1970, 1970 n 2 (2015).

³ The Notice of Closure worksheet indicates that a contralateral joint comparison was not used in calculating claimant's left wrist and arm/elbow ROM impairment values. (Ex. 2-2).

In December 2014, Dr. Hanna examined claimant at the insurer's request and diagnosed left arm and elbow post traumatic arthritis with left arm loose bodies, attributing them to the 1994 injury and resultant surgeries. (Ex. 6-16-17). Dr. Wei, claimant's attending physician, concurred with Dr. Hanna's opinion. (Ex. 6-1).

On January 19, 2015, the insurer modified its acceptance to include left arm/elbow post traumatic arthritis and left arm loose bodies. (Ex. 5). On February 26, 2015, it voluntarily reopened claimant's Own Motion claim for the aforementioned "post-aggravation rights" new/omitted medical conditions. (Ex. 9).

On February 25, 2015, Dr. Wei performed a left elbow osteocapsular arthroplasty and arthroscopic loose body removal. (Ex. 8).

In September 2015, Dr. Groman examined claimant at the insurer's request and noted that claimant was working light duty with a five-pound lifting limit and no repetitive activities. (Ex. 10-7). Dr. Groman found the following left/right arm/elbow ROM: 135/145 degrees flexion; 25/0 degrees extension; 30/75 degrees pronation; and 55/70 degrees supination. (Ex. 10-9). He observed that claimant had healed lacerations on the right medial elbow from a childhood injury, as well as healed lacerations on the right wrist/hand and fingers. (Ex. 10-8). Dr. Groman found 20 degrees valgus carrying angle on the left elbow and 10 degrees valgus on the right, and attributed the increase in valgus carrying angle to the 1994 work injury. (Ex. 10-9, -17).

Dr. Groman declared claimant's left arm/elbow post traumatic arthritis and left arm loose bodies conditions to be medically stationary, and referred to his examination findings for the purposes of claim closure. (Ex. 10-16-17). He opined that claimant was able to repetitively use his left upper extremity for more than two-thirds of a period of time. (Ex. 10-17). Dr. Groman considered the examination findings to be valid. (*Id.*) Dr. Wei concurred with Dr. Groman's report, with the exception of Dr. Groman's opinion regarding repetitive lifting. (Ex. 10-1).

An November 9, 2015 Own Motion Notice of Closure, as corrected on December 18, 2015, awarded an additional 4 percent (7.68 degrees), for a total award of 46 percent (88.32 degrees) scheduled PPD for the loss of use or function of the left arm. (Exs. 11-1, 12-1). That award was based on a 21 percent

impairment value for the left arm/elbow ROM,⁴ the previous 14 percent left arm impairment value from the 1998 closure notice (as converted from the 17 percent left wrist impairment value), a 10 percent impairment value for the 1995 left radial head resection surgery, a 7 percent impairment value for lateral deviation, and a 5 percent impairment value for a “chronic condition” limitation. (Exs. 11-2, 12-2).

Claimant requested review of the Notices of Closure, seeking an additional scheduled PPD award and the appointment of a medical arbiter. On February 5, 2016, we referred the claim to the Director for the appointment of a medical arbiter. *James A. Neigel*, 68 Van Natta 139 (2016).

On April 1, 2016, Dr. Bald, the medical arbiter, found the following left/right arm/elbow ROM: 140/148 degrees flexion; 26/0 degrees extension; 32/72 degrees pronation; and 64/74 degrees supination. According to Dr. Bald, claimant has not incurred any loss of use or function that is due exclusively to the newly accepted left arm loose bodies condition. He stated that claimant was significantly limited in the repetitive use of his left elbow as a result of the newly accepted left elbow post-traumatic arthritis condition. However, comparing his examination findings to an October 2000 examination, Dr. Bald opined that “it would not appear that today’s findings are related to the newly accepted conditions of left arm/elbow post-traumatic arthritis or left arm loose bodies, but in fact are directly related to the originally accepted conditions related to the left elbow.” He was not aware of any preexisting left elbow or forearm condition that contributed to claimant’s examination findings. Finally, Dr. Bald considered the findings to be valid for the purposes of rating claimant’s permanent impairment.

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of “post-aggravation rights” new/omitted medical conditions (left arm/elbow post traumatic arthritis and left arm loose bodies). 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 conditions. The PPD limitation set forth in ORS 656.278(2)(d) applies where there

⁴ The Notice of Closure worksheets indicate that a comparison with the contralateral right arm/elbow joint was not used in calculating claimant’s left arm/elbow ROM impairment values. (Exs. 11-2, 12-2).

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.

Here, all three factors are satisfied. Dr. Bald and Dr. Groman, as ratified by Dr. Wei, measured decreased ROM in claimant’s left arm/elbow. Dr. Bald and Dr. Wei also opined that claimant was significantly limited in the repetitive use of his left elbow. These impairment findings qualify for an impairment rating. Moreover, claimant’s “post-aggravation rights” new/omitted medical conditions (left arm/elbow post traumatic arthritis and left arm loose bodies) involved the same “injured body part” (left arm/elbow) that was the basis, in part, of his previous 42 percent (80.64 degrees) scheduled PPD award for the loss of use or function of the left arm.⁵

Therefore, the limitation in ORS 656.278(2)(d) applies to claimant’s scheduled PPD. However, before application of the statutory limitation, we redetermine claimant’s scheduled PPD pursuant to the Director’s standards. *See* OAR 436-035-0007(3); *Nielsen*, 55 Van Natta at 3207.

Claimant’s claim was closed by a November 9, 2015 Notice of Closure, as corrected on December 18, 2015. 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

⁵ Under OAR 436-035-0020(1), the arm begins with the head of the humerus and includes the elbow joint. Pursuant to OAR 436-035-0020(2), the forearm begins distal to the elbow joint and includes the wrist (carpal bones). Because claimant had impairment findings in two or more body parts (*i.e.*, his wrist/forearm and arm/elbow) in his left upper extremity at the time of the April 22, 1998 Notice of Closure, the total impairment findings in the distal body part (*i.e.*, forearm/wrist) were converted to a value in the most proximal body part (*i.e.*, arm/elbow) and then combined with impairment values for the most proximal body part. *See* OAR 436-035-0007(16) (WCD Admin. Order 96-072, effective February 15, 1997).

accurate and should be used. OAR 436-035-0007(5), (6); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Findings of impairment that are permanent and caused by the accepted condition 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).

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, the closure notice's 46 percent (88.32 degrees) scheduled PPD award was based on the impairment findings from Dr. Groman, as ratified and supplemented by Dr. Wei, claimant's attending physician and treating surgeon. For the following reasons, we find that a preponderance of the medical evidence establishes that Dr. Wei's impairment findings are more accurate than those of Dr. Bald, the medical arbiter.

Dr. Bald opined that claimant was significantly limited in the repetitive use of his left elbow as a result of the newly accepted left elbow post-traumatic arthritis condition. Yet, Dr. Bald also opined that his examination findings were not related to the newly accepted conditions of left arm/elbow post traumatic arthritis or left arm loose bodies. We find Dr. Bald's statements to be internally inconsistent and, therefore, ambiguous and unpersuasive.

In contrast, Dr. Groman documented claimant's permanent impairment findings attributable to the newly accepted conditions and the 1994 work injury. (Ex. 10-8-10, -15-17). Dr. Wei concurred with Dr. Groman's permanent impairment findings. (Ex. 10-1). Moreover, in doing so, Dr. Wei expressly took exception with Dr. Groman's opinion that claimant was able to use his left arm/elbow in a repetitive manner. (*Id.*) In light of Dr. Wei's familiarity with claimant's left elbow conditions (for which he performed surgery), we are persuaded that Dr. Wei considered the effects of claimant's newly accepted left elbow conditions in evaluating permanent impairment.

Under these particular circumstances, we conclude that a preponderance of the medical evidence establishes that the impairment findings from claimant's attending physician are more accurate than the inconsistent and ambiguous findings of the medical arbiter. Therefore, we find persuasive reasons to disregard Dr. Bald's medical arbiter findings. OAR 436-035-0007(5); *Banderas*, 252 Or App at 144-45; *Kevin T. Kinnamore*, 68 Van Natta 398, 405 (2016). Accordingly, we rely the report of Dr. Groman, as ratified and supplemented by Dr. Wei, to rate claimant's permanent impairment.

Based on Dr. Groman's ROM findings, we find that claimant is entitled to a 21 percent impairment value for the left arm/elbow. OAR 436-035-0100(1), (2), (4); OAR 436-035-0011(2). (Exs. 10-9, 11-2, 12-2).⁶

Dr. Groman found 20 degrees valgus carrying angle on claimant's left elbow and 10 degrees valgus on the right. (Ex. 10-9). He opined that the increase in valgus carrying angle of the left elbow compared to the right (*i.e.*, the 10 degree difference) was related to the 1994 work injury. (Ex. 10-17). Under such circumstances, a 7 percent left arm impairment value for mild lateral deviation at the elbow is warranted. OAR 436-035-0110(4)(a).⁷ (Exs. 11-2, 12-2).

On March 9, 1995, claimant underwent a left radial head resection, without replacement. (*See* Exs. 6-9, 10-12). Therefore, he is entitled to a 15 percent arm impairment value for that surgery. OAR 436-035-0110(5)(c).⁸

⁶ Dr. Groman observed that claimant had healed lacerations on the right medial elbow from a childhood injury. (Ex. 10-8). Additionally, claimant's previous left arm/elbow PPD award and the current Own Motion Notices of Closure award were rated without using a contralateral joint comparison. (Exs. 2-2, 11-2, 12-2). Moreover, as earlier noted, claimant was previously awarded 24 percent (46.08 degrees) scheduled PPD for the loss of use or function of his right arm. Finally, the parties do not contend that a contralateral joint comparison should be used in rating claimant's current left arm/elbow impairment. Accordingly, we rate claimant's left arm/elbow ROM impairment without a comparison to the contralateral right arm/elbow. *See Eric J. Stevenson*, 67 Van Natta 283, 288 (2015) (where the previous PPD awards rated permanent impairment without using a contralateral joint comparison, the claimant's current permanent impairment was also rated without using a contralateral joint comparison); *see also Monty E. Redding*, 64 Van Natta 1669, 1702 n 3 (2012) (where the record supported a conclusion that the claimant had a prior history of injury or disease in his contralateral right knee joint, a contralateral joint comparison was not appropriate).

⁷ "Mild" deviation means less than 20 degrees. OAR 436-035-0110(4)(a).

⁸ The April 1998 Notice of Closure awarded a 15 percent impairment value for the left radial head resection surgery. (Ex. 2-2). The 2015 Own Motion Notices of Closure worksheets noted the "Prior surgical award 3/9/95 = 10%." (Exs. 11-2, 12-2). However, because the prior surgical award was rated as 15 percent impairment, and because a radial head resection is an "irreversible finding," claimant is entitled to a 15 percent impairment value for the surgery. OAR 436-035-0005(7)(a)(B); OAR 436-035-0013(5); OAR 436-035-0110(5)(c).

Dr. Wei disagreed with Dr. Groman's opinion that claimant was able to use his left upper extremity "in a repetitive manner for more than two-thirds of a period of time." (Ex. 10-1, -17). In light of Dr. Wei's supplemental opinion, we conclude that claimant is entitled to a 5 percent impairment value for a "chronic condition" limitation in his left arm (elbow and above). OAR 436-035-0019(1)(d).

There are no other ratable permanent impairment findings.⁹ Therefore, we combine claimant's left arm/elbow impairment values as follows: 21 percent (ROM) combined with 15 percent (radial head resection) equals 33 percent; 33 percent combined with 7 percent (lateral deviation) equals 38 percent; 38 percent combined with 5 percent (chronic condition) results in a 41 percent impairment value for the left arm/elbow. OAR 436-035-0011(6); OAR 436-035-0019(2).

Claimant's prior (April 22, 1998) scheduled PPD award for the loss of use or function of the left arm/elbow was based, in part, on a 17 percent impairment value for his left *wrist* conditions, which was converted to a 14 percent left *arm* impairment value. (Ex. 2-2). The record does not establish that claimant's previously accepted left wrist conditions have worsened. Because the insurer accepted and voluntarily reopened claimant's claim for the "post-aggravation rights" new/omitted medical conditions, the extent of permanent disability must be redetermined. OAR 436-035-0007(3). When performing a redetermination of the extent of permanent disability, the amount of impairment caused by a condition other than the accepted new/omitted condition is not reevaluated and is given the same impairment value as established at the last arrangement of compensation. OAR 436-035-0007(3)(b); *David J. Thole*, 65 Van Natta 1554, 1549-50 (2013).

We now combine claimant's left arm impairment values as follows: 41 percent (current left arm/elbow impairment) combined with 14 percent (prior converted 17 percent left wrist/forearm value) results in a total impairment value of 49 percent (94.08 degrees) scheduled PPD for the loss of use or function of the left arm. OAR 436-035-0011(6); *Thole*, 65 Van Natta at 1550.

⁹ We acknowledge that, in his request for review of the November 9, 2015 Own Motion Notice of Closure (as corrected on December 18, 2015), claimant contested the lack of consideration of social-vocational factors. However, because his date of injury is before January 1, 2005, and because he does not have ratable unscheduled PPD for this reopened Own Motion claim, a consideration of "social-vocational" factors is not appropriate. See ORS 656.214(5) (Or Laws 1999, ch 876, § 2); ORS 656.726(4)(f)(D) (Or Laws 2003, ch 811, § 17); OAR 436-035-0008; *Monty E. Redding*, 64 Van Natta 1699, 1703 n 4 (2012).

As discussed above, the limitation in ORS 656.278(2)(d) applies. Therefore, claimant is entitled to additional scheduled PPD only to the extent that the PPD rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant's prior 42 percent (80.64 degrees) scheduled PPD award is less than his current 49 percent (94.08 degrees) scheduled PPD, which leaves a remainder of 7 percent (13.44 degrees). The November 9, 2015 Own Motion Notice of Closure, as corrected on December 18, 2015, awarded an additional 4 percent (7.68 degrees) scheduled PPD. Accordingly, we modify the Notice of Closure to award an additional 3 percent (5.76 degrees) scheduled PPD for loss of use or function of the left arm.¹⁰

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 3 percent (5.76 degrees) scheduled PPD award granted by this order), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(5); OAR 438-015-0040(1); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on June 30, 2016

¹⁰ Claimant's total award to date is 49 percent (94.08 degrees) scheduled PPD for the loss of use or function of the left arm. Claimant has also previously received a 24 percent (46.08 degrees) scheduled PPD for the loss of use or function of the right arm, 6 percent (9 degrees) scheduled PPD for the loss of use or function of the left leg (knee), and 10 percent (32 degrees) unscheduled PPD for the brain. (*See Ex. 4*).