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In the Matter of the Compensation of  
**DWAYNE L. MINNER, Claimant**  
Own Motion No. 15-00046OM  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE  
Jodie Phillips Polich, Claimant Attorneys  
Bohy Conratt LLP, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of the June 2, 2015 Notice of Closure that did not award additional scheduled permanent partial disability (PPD) for his “post-aggravation rights” new/omitted medical conditions (right complete tear of ACL, posttraumatic ACL instability, right ACL ligament insufficiency, and complete ACL tear).<sup>1</sup> On review, claimant seeks additional PPD. We affirm the Notice of Closure.

#### FINDINGS OF FACT

Claimant sustained a compensable right knee injury on August 17, 1998. (Ex. 1). The self-insured employer accepted a right knee sprain, torn right medial meniscus, large chondral defect of the lateral femoral condyle, partial tear of the anterior cruciate ligament, and moderately severe synovitis with intra-articular fibrosis, internal derangement of the right knee with disruption of the anterior cruciate ligament, and secondary osteoarthritis/tricompartmental arthritis of the right knee. (Exs. 25-1, 17).

On April 9, 1999, Dr. Neitling performed arthroscopic partial medial and lateral meniscectomies, partial debridement of the anterior cruciate ligament, chondroplasty of the lateral femoral condyle and lateral tibial plateau, and a partial synovectomy. (Ex. 25-1).

A September 9, 1999 Notice of Closure awarded 17 percent (25.5 degrees) scheduled PPD for the loss of use or function of the right leg (knee). (Ex. 1).

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<sup>1</sup> Claimant’s August 17, 1998 claim was accepted as a disabling claim and was first closed on September 9, 1999. Thus, claimant’s aggravation rights expired on September 9, 2004. Therefore, when claimant sought claim reopening in January 2015, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On April 20, 2015, the self-insured employer voluntarily reopened claimant’s Own Motion claim for “post-aggravation rights” new/omitted medical conditions (right complete tear of ACL, posttraumatic ACL instability, right ACL ligament insufficiency, and complete ACL tear). ORS 656.278(1)(a), (b), and (5). On June 2, 2015, the employer issued its Notice of Closure.

On December 14, 2001, claimant underwent a second right knee surgery that included partial medial and lateral meniscectomies. (Ex. 25-2). A February 5, 2003 Notice of Closure awarded an additional 11 percent (16.5 degrees) scheduled PPD for the loss of use or function of the right leg (knee). (*Id.*)

On February 5, 2004, Dr. Neitling performed a chondroplasty of the right knee lateral and patellofemoral compartments, with a partial lateral meniscectomy. (*Id.*) A January 12, 2005 Notice of Closure did not award additional scheduled PPD for the right leg (knee). (Ex. 2) That closure was subsequently rescinded by a March 11, 2005 Order on Reconsideration. (Ex. 3-3).

On April 6, 2005, claimant underwent chondroplasty of the right knee femoral sulcus and a partial lateral meniscectomy with debridement of synovitis and chondromalacia. (Ex. 25-2). An August 17, 2005 Notice of Closure awarded an additional 17 percent (25.5 degrees) scheduled PPD for the loss of use or function of the right leg (knee). (Ex. 5).

On November 21, 2006, Dr. Bowman performed a right knee arthroscopic tricompartmental debridement and removal of a loose body. (Ex. 25-2). The Own Motion claim was voluntarily reopened.

On May 13, 2009, Dr. Anderson performed a right knee arthroscopic resection of a superior patellar osteophyte, with removal of loose bodies from the joint. (*Id.*)

On August 18, 2010, claimant underwent right knee surgery, including a partial lateral meniscectomy, chondroplasty of patella and femoral trochlea, and chondroplasty of medial femoral condyle. (*Id.*)

An August 15, 2011 Notice of Closure did not award additional scheduled PPD for the loss or use of function of the right leg (knee). (Ex. 21). On March 15, 2012, that closure notice was affirmed. (Exs. 25, 26). *Dwayne L. Minner*, 64 Van Natta 550, *recons den*, 64 Van Natta 682 (2012). At that point, claimant's award to date totaled 45 percent (67.5 degrees) scheduled PPD for the loss of use or function of the right leg (knee). *Id.*

In June 2012, claimant returned to Dr. Anderson, his attending physician, for treatment of increased right knee pain. (Ex. 27). In March 2013, Dr. Anderson recommended hyaluronic acid injections and considered getting a new brace. (Ex. 30). In May 2013, Dr. Anderson performed two injections. (Ex. 32-24). He performed a third injection in May 2014. (Ex. 32-36).

On January 11, 2015, claimant requested acceptance of several “post-aggravation rights” new/omitted medical conditions.<sup>2</sup> (Ex. 31).

On February 24, 2015, Dr. Swanson examined claimant and reviewed medical records and imaging studies on behalf of the employer. (Ex. 32). Among other findings, Dr. Swanson reported partial loss of plantar sensation in the right foot and 5/5 strength throughout both lower extremities. (Ex. 32-40). He measured the following right/left knee ranges of motion (ROM): 85/115 degrees flexion and 15/0 degrees extension. (Ex. 32-40-41). He considered the assessment valid. (Ex. 32-42).

Dr. Swanson noted that, at that time, claimant was not receiving any treatment for his right knee and did not need any current curative or palliative medical treatment, other than the home exercise program that he previously had been taught. (Ex. 32-46, -47). He also reasoned that, if the employer were required to accept any of the newly claimed “post-aggravation rights” new/omitted medical conditions, claimant remained medically stationary since Dr. Anderson’s January 27, 2011 examination. (Ex. 32-51; *see* Exs. 13, 14).

On March 5, and May 6, 2015, the employer sent Dr. Anderson a copy of Dr. Swanson’s February 24, 2015 report and asked whether he concurred with Dr. Swanson’s opinions. (Exs. 33, 37). Dr. Anderson did not respond to the employer’s requests for his opinion until August 19, 2015. (Ex. 39). At that time, he agreed with Dr. Swanson’s findings and impressions, with the exception that he believed that claimant would benefit from palliative treatment. (*Id.*)

In the meantime, on April 13, 2015, the employer accepted the following “post-aggravation rights” new/omitted medical conditions: right complete tear of ACL, posttraumatic ACL instability, right ACL ligament insufficiency, and complete ACL tear.<sup>3</sup> (Ex. 35). On April 20, 2015, the employer voluntarily reopened claimant’s Own Motion claim for those new/omitted medical conditions. (Ex. 36).

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<sup>2</sup> Specifically, claimant requested acceptance of the following “post-aggravation rights” new/omitted medical conditions: (1) right complete tear of the ACL; (2) right ACL ligament insufficiency; (3) posttraumatic ACL instability right knee; (4) posttraumatic arthrosis right knee; (5) chronic degenerative maceration of the anterior horn of the lateral meniscus and body of the medial meniscus – right knee; (6) moderate right knee effusion without significant intraarticular loose body visible; and (7) impingement by adjacent central osteophytes – right knee. (Ex. 31).

<sup>3</sup> The remaining conditions requested to be accepted by claimant were either noted to be encompassed within the previously accepted conditions or denied as symptoms, not conditions. (Exs. 31, 34).

On June 2, 2015, based on Dr. Swanson's February 2015 findings, a Notice of Closure declared claimant's right knee conditions medically stationary as of February 24, 2015, and awarded no additional scheduled PPD for the "post-aggravation rights" new/omitted medical conditions (right complete tear of ACL, posttraumatic ACL instability, right ACL ligament insufficiency, and complete ACL tear). (Ex. 38).

Claimant requested review of the June 2015 Notice of Closure, contending that his claim was prematurely closed because his attending physician did not provide permanent impairment findings before claim closure.<sup>4</sup> Alternatively, he sought an increased PPD award and the appointment of a medical arbiter. On November 6, 2015, we declined to consider the June 2015 Notice of Closure invalid and referred the claim to the Director for the appointment of a medical arbiter. *Dwayne L. Minner*, 67 Van Natta 2006 (2015).

On December 30, 2015, Dr. Heusch, the medical arbiter, measured the following right/left knee ROM: 95/140 degrees flexion and -18/0 degrees extension. He found muscle strength of 4/5 in the right quadriceps and hamstring, which he attributed to loss of motion in the right knee. He also stated that muscle strength testing of the lower extremities was 5/5 in all muscle groups. He found mild Grade I ACL instability, which he attributed to the newly accepted complete ACL tear. He measured 18 degrees of valgus deformity of the right knee (compared to a "normal" left knee), secondary to the severe tricompartmental osteoarthritis and not the complete ACL tear.

Dr. Heusch also found that claimant could not be on his feet for a total of more than two hours in an eight hour period, which he attributed to the severe tricompartmental osteoarthritis and not the complete ACL tear. He stated that claimant did not have a chronic condition caused by the complete ACL tear that significantly limited the repetitive use of his right knee. He found that claimant had a partial loss of plantar sensation of the right foot "secondary to injury that occurred at the time of his last arthroscopic surgery of August 18, 2010" and not due to the complete ACL tear.

Dr. Heusch considered the findings valid for rating permanent impairment and opined that 15 percent of the findings were due to the newly accepted complete ACL tear and 85 percent were due to the "pre-existing" severe tricompartmental osteoarthritis condition.

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<sup>4</sup> Claimant did not assert that his accepted right knee conditions were not medically stationary at claim closure.

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## CONCLUSIONS OF LAW AND OPINION

As a preliminary matter, by this reference, we adhere to, and republish, our reasoning in our prior decision rejecting claimant's procedural challenge to the June 2, 2015 Notice of Closure and holding that closure notice valid. *Minner*, 67 Van Natta at 2010.

The claim was reopened for the processing of "post-aggravation rights" new/omitted medical conditions (right complete tear of ACL, posttraumatic ACL instability, right ACL ligament insufficiency, and complete ACL tear). 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).

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 all three requirements are satisfied, we redetermine the claimant's permanent disability pursuant to the Director's standards for rating the "post-aggravation rights" new/omitted medical conditions before application of the limitation in ORS 656.278(2)(d). *Janine M. Porter*, 63 Van Natta 913, 918 (2011); *Nielsen*, 55 Van Natta at 3207-08.

Here, regarding claimant's right knee conditions, all three factors are satisfied. Dr. Heusch's examination found additional impairment, including decreased ROM, additional leg impairment due to mild ACL instability, extensive arthritis and a valgus deformity, and a "walking/standing" limitation. Claimant's partial medial and lateral meniscectomies also qualify for an impairment rating.

Moreover, claimant's "post-aggravation rights" new/omitted medical conditions (right complete tear of ACL, posttraumatic ACL instability, right ACL ligament insufficiency, and complete ACL tear) involve the same "injured body part" (the right knee) that was the basis of the prior 45 percent scheduled PPD awards for his previously accepted right knee conditions. 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 June 2, 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).

For the purpose of rating claimant's permanent impairment, 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)(C); ORS 656.268(7); *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 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); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (2004). In the absence of other medical evidence showing a different level of impairment or that impairment is not related to the injury, we are not free to reject a medical arbiter's unambiguous opinion as to the cause of the impairment merely because we find the opinion unpersuasive. *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146, 149 (2004).

Here, Dr. Heusch performed a thorough and complete examination, and documented objective findings of impairment that are permanent and caused by the compensable conditions. Because a preponderance of the medical evidence does not demonstrate that the attending physician's findings show a different level of impairment or that impairment is not related the injury, we rely on Dr. Heusch's opinion to rate claimant's permanent impairment. ORS 656.245(2)(b)(C); ORS 656.268(7); OAR 436-035-0007(5); *Hicks*, 196 Or App at 149-151.

At the outset, we acknowledge that Dr. Heusch attributed several impairment findings to the previously accepted "tricompartamental osteoarthritis" condition and ultimately opined that 15 percent of the impairment findings were due to the newly accepted complete ACL tear and 85 percent were due to the "pre-existing" tricompartamental osteoarthritis condition.

However, claimant's claim has been accepted for the preexisting condition; *i.e.*, tricompartamental osteoarthritis. (Ex. 17). Thus, Dr. Heusch did not identify a statutory "preexisting condition" that is not otherwise compensable. *See* OAR 436-035-0007(1)(b)(B)(ii); *Carmelo L. Villa*, 68 Van Natta 452 (2016); *see also*

OAR 436-035-0013(2)(b)(C); OAR 436-035-0014(1). Therefore, we rate claimant's permanent impairment based on Dr. Heusch's findings without "apportionment."

Dr. Heusch found the following right/left knee ROM: 95/140 degrees flexion and -18/0 degrees extension. Because claimant has no history of injury or disease to the contralateral joint, a comparison with the left knee is appropriate. OAR 436-035-0011(3). Accordingly, claimant receives the following right knee ROM values: 17.2 percent for flexion;<sup>5</sup> and 0 percent for extension.<sup>6</sup> OAR 436-035-0220(1), (2). These values are added for a total right knee ROM impairment value of 17.2 percent, which is rounded to 17 percent. OAR 436-035-0011(4).

Dr. Heusch also opined that claimant could not be on his feet for more than two hours in an eight-hour period. Therefore, claimant is entitled to a 15 percent impairment value for a right leg "walking/standing" limitation. OAR 436-035-0230(14).

Claimant has undergone partial medial and lateral meniscectomies, which each receive a right leg impairment value of 5 percent (*i.e.*, 5 percent impairment for the lateral meniscus and 5 percent impairment for the medial meniscus).<sup>7</sup> OAR 436-035-0005(7)(f)(C); OAR 436-035-0230(5)(d).

Dr. Heusch noted extensive arthritis and a valgus deformity of less than 20 degrees. This finding is valued at 5 percent impairment of the right leg. OAR 436-035-0230(4), (11)(b). He also found mild (Grade I) ACL instability, which is valued at 5 percent impairment of the right leg. OAR 436-035-0230(3).

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<sup>5</sup> This value is determined by comparing the flexion findings right/left as follows:  $95/140 = X/150$ ;  $X = 101.8$ , rounded to 102 degrees, which equals 17.2 percent impairment. See OAR 436-035-0011(3), (4); OAR 436-035-0220(1).

<sup>6</sup> Dr. Heusch found an extension ROM of -18 degrees, which exceeds the "maximum" full ROM for extension of 0 degrees. See OAR 436-035-0220(2). Under such circumstances, claimant's extension ROM is rated as 0 degrees, which results in 0 percent impairment. OAR 436-035-0007(7); OAR 436-035-0011(3)(a); OAR 436-035-0220(2).

<sup>7</sup> Although claimant underwent multiple partial medial and lateral meniscectomies, no additional value is awarded for multiple partial resections of a single meniscus. OAR 438-035-0230(5)(d); *David L. Curran*, 62 Van Natta 1347, 1351 (2010). Moreover, the standards provide no value for the other procedures that claimant underwent. OAR 436-035-0007(13)(a) (not all procedures receive a value under the standards); OAR 436-035-0230(5)(d).

Dr. Heusch stated that muscle strength testing of the lower extremities was 5/5 in all muscle groups. Although Dr. Heusch also noted muscle strength of 4/5 in the right quadriceps and hamstring, he attributed that to loss of ROM in the right knee. However, decreased strength due to a loss of ROM receives no rating for weakness in addition to that given for the loss of ROM. OAR 436-035-0230(9)(c). Therefore, claimant is not entitled to an impairment value for loss of strength.<sup>8</sup>

There are no other ratable impairment findings. Therefore, we combine the impairment findings as follows: 17 percent (ROM) combined with 15 percent (“walk/stand limitation”) equals 29 percent; 29 percent combined with 5 percent (partial lateral meniscectomy) equals 33 percent; 33 percent combined with 5 percent (partial medial meniscectomy) equals 36 percent; 36 percent combined with 5 percent (extensive arthritis) equals 39 percent; 39 percent combined with 5 percent (ACL instability) equals 42 percent; 42 percent combined with 5 percent (presumed plantar sensation loss)<sup>9</sup> equals 45 percent (67.5 degrees) scheduled PPD for the loss of use or function of the right leg (knee). OAR 436-035-0011(6).

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 previous awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant’s prior 45 percent (67.5 degrees) scheduled PPD award is the same as the current 45 percent (67.5 degrees) scheduled PPD for loss of use or function of the right leg (knee). Consequently, the limitation in ORS 656.278(2)(d) precludes an additional scheduled PPD award.<sup>10</sup>

Accordingly, the June 2, 2015 Notice of Closure is affirmed.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on May 11, 2016

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<sup>8</sup> Finally, Dr. Heusch found that claimant had a partial loss of plantar sensation of the right foot “secondary to injury that occurred at the time of his last arthroscopic surgery of August 18, 2010[.]” If ratable, this partial loss of plantar sensation would result in an impairment value of 5 percent of the right foot, which converts to 5 percent impairment of the leg. OAR 436-035-0210; OAR 436-035-0230(1)(a). However, for the reasons addressed below, even if this impairment is ratable, claimant is not entitled to an additional scheduled PPD award. *See* ORS 656.278(2)(d).

<sup>9</sup> Assuming that an impairment value is awardable based on Dr. Heusch’s finding of partial plantar sensation loss “secondary to injury that occurred at the time of his last arthroscopic surgery of August 18, 2010[.]”

<sup>10</sup> Claimant’s total award to date is 45 percent (67.5 degrees) scheduled PPD for loss of use or function of the right leg (knee).