
In the Matter of the Compensation of
JAMES E. MANNING, Claimant
Own Motion Nos. 16-000100M, 15-000680M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Welch Bruun & Green, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of: (1) the September 29, 2015 Own Motion Notice of Closure that purported to award an additional 10 percent (19.2 degrees) scheduled permanent partial disability (PPD) for his “worsened condition” (left elbow fracture) and a then-“unreopened” “post-aggravation rights” new/omitted medical conditions (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome); and (2) the January 22, 2016 Own Motion Notice of Closure that did not award additional scheduled PPD for his “reopened” “post-aggravation rights” new/omitted medical conditions (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome) beyond that granted by the September 2015 closure notice.¹ On review, claimant seeks an additional scheduled PPD award. For the following reasons, we vacate the PPD award granted by the September 2015 Notice of Closure and modify the January 2016 Notice of Closure.

FINDINGS OF FACT

On December 8, 1992, claimant sustained a compensable left elbow dislocation and fracture injury. A May 6, 1993 Determination Order awarded 17 percent (32.64 degrees) scheduled PPD for the loss of use or function of the left arm. (*See Ex. 50-2*).²

¹ Claimant’s December 8, 1992 claim was accepted as a disabling claim and was first closed on May 6, 1993. Thus, claimant’s aggravation rights expired on May 6, 1998. Therefore, when he sought claim reopening in April 2013, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On January 23, 2014, the insurer voluntarily reopened claimant’s Own Motion claim for a “worsened condition” (left elbow fracture). ORS 656.278(1)(a), (5). On August 8, 2014, the insurer accepted claimant’s claim for “post-aggravation rights” new/omitted medical conditions (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome). On September 29, 2015, the insurer issued a Notice of Closure. On January 16, 2016, the insurer voluntarily reopened claimant’s Own Motion claim for the aforementioned “post-aggravation rights” new/omitted medical conditions. ORS 656.278(1)(b), (5). On January 22, 2016, the insurer issued another Notice of Closure.

² The May 1993 Determination Order was not included 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

In February 2012, Dr. Taylor, neurologist, diagnosed left ulnar motor neuropathy and signs of motor conduction block at Guyon's canal based on a nerve conduction study (NCS) and recommended surgical decompression at the wrist. (Ex. 7). In May 2012, Dr. Woolley, claimant's treating surgeon for a previous left hand injury with a different employer, performed the recommended surgery. (Ex. 10). After claimant's symptoms did not improve, Dr. Taylor obtained another NCS, which showed ulnar nerve compression at the elbow. (Ex. 15).

In December 2012, Dr. Woolley opined that claimant had left ulnar nerve compression at the elbow related to his left elbow dislocation and fracture injury, and recommended ulnar nerve decompression and transposition surgery at the left elbow. (Ex. 19).

In April 2013, claimant requested that the insurer accept left cubital tunnel syndrome. (Ex. 24).

In September 2013, Dr. Woolley performed left elbow cubital tunnel decompression and ulnar nerve subcutaneous transposition surgery to treat claimant's left cubital tunnel syndrome and elbow arthritis. (Ex. 30). Thereafter, pursuant to an October 2013 stipulation, the insurer agreed to accept claimant's claim for left elbow post traumatic arthritis and left elbow cubital tunnel syndrome. (Exs. 32, 33).

On January 23, 2014, the insurer voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" "worsened condition" (left elbow fracture). (Ex. 38).

In April 2014, claimant underwent another left elbow arthroscopic surgery for his posttraumatic arthritis with severe ulnar neuropathy. (Ex. 40).

On July 21, 2014, Dr. Woolley opined that claimant's left upper extremity conditions from his 1992 injury were medically stationary and performed a closing examination. (Ex. 44).

notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned." This includes agency orders, such as a Determination Order. See *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985); *Claude E. Harris*, 43 Van Natta 492, 494 (1991).

On August 8, 2014, the insurer accepted “post-aggravation rights” new/omitted medical conditions (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome). (Ex. 46).

A September 29, 2015 Own Motion Notice of Closure purportedly closed the “worsened condition” claim and “post-aggravation rights” new/omitted medical condition claim. That closure notice awarded an additional 10 percent (19.2 degrees) scheduled PPD for the loss of use or function of the left arm. (Ex. 50). Claimant requested review, seeking additional PPD and the appointment of a medical arbiter. (Ex. 52).

In November 2015, we notified the parties that the September 29, 2015 Own Motion Notice of Closure referred to “new/omitted medical conditions” (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome), but that there was no indication that an Own Motion claim had been reopened for those “post-aggravation rights” new medical conditions.

On January 16, 2016, the insurer voluntarily reopened claimant’s Own Motion claim for “post-aggravation rights” new/omitted medical conditions (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome). (Ex. 54).

On January 22, 2016, an Own Motion Notice of Closure for the aforementioned “post-aggravation rights” new/omitted medical condition claim did not award additional permanent disability beyond that granted by the September 2015 Notice of Closure. (Ex. 55). Claimant requested review of the closure notice, seeking additional PPD and the appointment of a medical arbiter.

In an April 6, 2016 Interim Order, we addressed the 2015 and 2016 Own Motion Notices of Closure in tandem, and referred the 2016 claim closure to the Director for the appointment of a medical arbiter. *James E. Manning*, 68 Van Natta 492 (2016). We further noted that, although there was no dispute that the reopened “worsened condition” claim was properly closed by the September 2015 Own Motion Notice of Closure, claimant was not statutorily entitled to permanent disability benefits or the appointment of a medical arbiter for a “worsened condition.” *Id.* at 493.

On June 7, 2016, Dr. Kane, the medical arbiter, found the following left/right elbow ranges of motion (ROM): 125/135 degrees flexion; 30/5 degrees extension³; 85/90 degrees pronation; and 60/85 degrees supination. Dr. Kane

³ Although Dr. Kane reported “-30” degrees left elbow extension, he stated that “[t]here is contracture with limitations as noted above in extension and supination of the left elbow.” We interpret such findings to mean that claimant had 30 degrees retained left elbow extension. OAR 436-035-0011(2).

noted that claimant had a prior right hand/wrist surgery, but no history of right elbow disease or injury of significance. He found 3/5 strength in the left hand, “innervated by the ulnar nerve with fibers originating at the C8 root level.” Dr. Kane reported diminished left hand sensation in the ulnar territory on the volar and dorsal surfaces to Grade II (8 mm of two-point discrimination), and that the remainder of the left hand palmar surface had normal Grade I (6 mm of two-point discrimination) sensation. There was no hypersensitivity of the left digits or palm. He also opined that claimant was significantly limited in the repetitive use of the left upper extremity. Dr. Kane considered the findings to be valid and completely attributable to the newly accepted conditions.

CONCLUSIONS OF LAW AND OPINION

At the outset, we note that, because an Own Motion claim for the “post-aggravation rights” new/omitted medical conditions (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome) had not been reopened at the time the September 29, 2015 Own Motion Notice of Closure issued, that closure notice pertains only to the reopened “worsened condition” claim. However, claimant is not statutorily entitled to permanent disability benefits or the appointment of a medical arbiter for “post-aggravation rights” “worsened condition” claims, as explained in our Interim Order. *See Jimmy O. Dougan*, 54 Van Natta 1213, *recons*, 54 Van Natta 1552 (2002), *aff'd Dougan v. SAIF*, 193 Or App 767 (2004), *vacated*, 339 Or 1 (2005); *Von D. Bailey*, 59 Van Natta 847, 849 (2007); *Timothy R. Marino*, 58 Van Natta 766 (2006).

Thus, because the September 29, 2015 Own Motion Notice of Closure is limited to the reopened “worsened condition” claim, we vacate that portion that purported to award an additional 10 percent (19.2 degrees) scheduled PPD benefits. Consequently, we determine claimant’s permanent disability for his “post-aggravation rights” new/omitted medical conditions under the January 22, 2016 Own Motion Notice of Closure.

The claim was reopened for the processing of “post-aggravation rights” new/omitted medical conditions (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome). 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 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. Kane found decreased left arm ROM, loss of left hand strength, and a “chronic condition” limitation in the left arm. These impairment findings qualify for an impairment rating. Moreover, claimant’s “post-aggravation rights” new/omitted medical conditions (left elbow post traumatic arthritis and left elbow cubital tunnel syndrome) involved the same “injured body part” (left arm) that was the basis of his previous 17 percent scheduled PPD award.

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 January 22, 2016 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 his 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); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012).

Dr. Kane, the medical arbiter, performed a thorough and complete examination. Because a preponderance of the medical evidence does not demonstrate that the attending physician’s findings are more accurate, we rely on Dr. Kane’s opinion to rate claimant’s permanent impairment.

Dr. Kane found the following left/right elbow ROM: 125/135 degrees flexion; 30/5 degrees extension; 85/90 degrees pronation; and 60/85 degrees supination. Because claimant does not have a history of injury or disease in the right elbow joint, a contralateral comparison is appropriate. OAR 436-035-0011(3). Therefore, he is entitled to the following impairment values: 3.2 percent for flexion; 5.2 percent for extension; zero percent for pronation, and 3 percent for supination.⁴ OAR 436-035-0100(1), (2), (4). These values are added for a total impairment value of 11.4, which is rounded to 11 percent for left arm ROM. OAR 436-035-0011(2), (4); OAR 436-035-0100(4).

Dr. Kane found 3/5 strength in the left hand, “innervated by the ulnar nerve with fibers originating at the C8 root level.” Because claimant has a history of injury or disease in the right hand/wrist, a contralateral comparison for loss of strength is not appropriate. OAR 436-035-0011(3). Loss of strength is determined by multiplying the percentage value for the grade of strength by the impairment value of the involved nerve. OAR 436-035-0011(7). Grade 3/5 loss of strength is valued at 50 percent. OAR 436-035-0011(7)(a). The ulnar nerve (above mid-forearm) has a forearm impairment value of 44 percent. OAR 436-035-0110(10). Therefore, 50 percent (3/5 strength) multiplied by 44 percent (ulnar nerve (above mid-forearm)) results in a 22 percent impairment value for the left forearm. OAR 436-035-0011(7).

⁴ We compare claimant’s left/right elbow flexion findings as follows: $125/135 = X/150$; $X = 138.89$ degrees, which rounds to 139 degrees; 139 degrees equals 3.2 percent impairment. OAR 436-035-0011(3), (4); OAR 436-035-0100(1).

The value for claimant’s left elbow extension finding is calculated by first finding the complement of the extension values, then using the same left/right comparison method as for flexion, and finally reverting the compared “complement” finding back to extension. *See* OAR 436-035-0011(3). The complement for 30 degrees left elbow extension is 120 degrees ($150 - 30$), and the complement for 5 degrees right elbow extension is 145 degrees ($150 - 5$). We compare the complement measurements as follows: $120/145 = X/150$; $X = 124.13$ degrees. This is reverted back to 25.87 degrees extension ($150 - 124.13$), which is rounded to 26 degrees. 26 degrees extension equals 5.2 percent impairment. OAR 436-035-0011(3), (4); OAR 436-035-0100(2).

Because claimant’s left and right elbow pronation findings do not meet the threshold (minimum) findings established in these rules, no value is granted. OAR 436-035-0007(13); OAR 436-035-0100(4).

Given claimant’s right elbow supination findings, the result is the same whether impairment is rated using a contralateral comparison or the standards. OAR 436-035-0011(3); OAR 436-035-0100(4).

Because there are impairment findings in more than one body part of claimant's left upper extremity, the total impairment findings in the distal body part are converted to a value in the most proximal body part.⁵ OAR 436-035-0011(5); *Frederick S. Hawkins*, 62 Van Natta 1988 (2010). Therefore, claimant's 22 percent left hand/forearm impairment value is converted to an 18 percent impairment value for the left arm. OAR 436-035-0090.

Claimant argues that Dr. Kane's findings support an impairment value for Grade II (8 mm) loss of sensation in the ulnar territory on the volar and dorsal surfaces of the left hand due to the accepted left cubital tunnel syndrome. A finding of 8 millimeters of two-point discrimination is graded as "less than normal" sensation. OAR 436-035-0110(1)(b). Nevertheless, the Director's rules do not provide for an impairment value unless the loss of sensation in the ulnar nerve area reaches at least 11 millimeters of two-point discrimination ("protective sensation"). See OAR 436-035-0110(1)(b), (g). Consequently, because claimant's "less than normal" loss of palmar sensation in the left hand does not meet the threshold (minimum) findings established in these rules, no value for left hand sensory loss is granted. *Id.*; OAR 436-035-0007(13).

Dr. Kane opined that claimant was significantly limited in the repetitive use of the left upper extremity. Therefore, he is entitled to a 5 percent impairment value for a "chronic condition" limitation in the left arm (elbow and above). OAR 436-035-0019(1)(d).

There are no other ratable permanent impairment findings.⁶ We combine the ratable impairment values as follows: 18 percent (converted arm value) combined with 11 percent (ROM) equals 27 percent; 27 percent combined with 5 percent (chronic condition) results in a total impairment value of 31 percent (59.52 degrees) scheduled PPD for the loss of use or function of the left arm. OAR 436-035-0011(5), (6); OAR 436-035-0019(2).

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

⁵ The arm begins with the head of the humerus and includes the elbow joint. OAR 436-035-0020(1). The forearm begins distal to the elbow joint and includes the wrist (carpal bones). OAR 436-035-0020(2).

⁶ Although claimant underwent various left elbow surgeries, those surgeries are not surgical procedures that receive values under the rules. OAR 436-035-0007(13)(a); OAR 436-035-0110(5).

Natta at 3208. In this instance, claimant's prior 17 percent (32.64 degrees) scheduled PPD award is less than his current 31 percent (59.52 degrees) scheduled PPD, which leaves a remainder of 14 percent (26.88 degrees). The January 22, 2016 Own Motion Notice of Closure did not award additional scheduled PPD beyond that granted by the September 29, 2015 Notice of Closure.

Accordingly, we modify the January 22, 2016 Own Motion Notice of Closure to award an additional 14 percent (26.88 degrees) scheduled PPD for loss of use or function of the left arm.⁷ Additionally, as addressed above, the September 29, 2015 Own Motion Notice of Closure is limited to the reopened "worsened condition" claim, for which claimant is not statutorily entitled to permanent disability benefits. Thus, we vacate that portion of the September 29, 2015 closure notice that purported to award additional scheduled PPD based on the "worsened condition" claim.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 (14 percent (26.88 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). This attorney fee is not subject to the offset from the "vacated" September 2015 Notice of Closure award. OAR 438-015-0085(2).⁹

IT IS SO ORDERED.

Entered at Salem, Oregon on September 13, 2016

⁷ Claimant's total award to date is 31 percent (59.52 degrees) scheduled PPD for the loss of use or function of the left arm.

⁸ Nevertheless, because claimant is not entitled to double payment, the insurer is allowed to offset any previous payment of permanent disability benefits made pursuant to its September 29, 2015 Notice of Closure against the permanent disability award granted by this order. See *James F. McClintock*, 66 Van Natta 1, 4 n 4 (2014); *Dale M. Ackler*, 56 Van Natta 2809, 2824 n 14 (2004); *William L. Jelley*, 56 Van Natta 116, 124 n 5 (2004).

⁹ In the event that any portion of the PPD award granted by this order has already been paid to claimant, his attorney is authorized to seek recovery of the attorney fee granted by this order in the manner prescribed in *Jane A. Volk*, 46 Van Natta 681, *recons*, 46 Van Natta 1017 (1994), *aff'd on other grounds*, *Volk v. America West Airlines*, 135 Or App 565 (1995), *rev den*, 322 Or 645 (1996). See, e.g., *Thomas R. Van Epps*, 67 Van Natta 108 (2015); *David J. Albano*, 55 Van Natta 4028, 4034 (2003).