
In the Matter of the Compensation of
PAUL G. MAY, Claimant
WCB Case No. 15-01218
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

The self-insured employer requests review of Administrative Law Judge (ALJ) Brown's order that affirmed an Order on Reconsideration that awarded 27 percent whole person permanent impairment for claimant's right bicep condition. On review, the issue is extent of permanent disability (impairment).

We adopt and affirm the ALJ's order with the following supplementation.

As a result of claimant's May 13, 2013 injury, the employer accepted a right bicep strain. (Ex. 26). A November 20, 2014 Notice of Closure¹ awarded no permanent impairment. (Ex. 111). Claimant requested reconsideration and the appointment of a medical arbiter.

An Order on Reconsideration relied on the medical arbiter panel's findings of impairment, including strength loss, loss of range of motion, and a significant restriction in repetitive activities due to the accepted right bicep strain. (Ex. 116-2). Claimant was granted 27 percent whole person permanent impairment. The employer requested a hearing.

Reasoning that the arbiter panel unambiguously related its impairment findings to the accepted right bicep strain, the ALJ affirmed the Order on Reconsideration.

On review, the employer contends that the arbiter panel's impairment findings are attributable to denied or non-accepted conditions and that the findings of the attending physician, Dr. Truong, were not due to the accepted bicep strain condition. Relying on *Stuart C. Yekel*, 67 Van Natta 1279 (2015), the employer argues that only impairment for the accepted condition, including any direct medical sequelae, can be rated. Based on the following reasoning, we affirm.

¹ Because claimant's claim was closed by a November 20, 2014 Notice of Closure, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). See OAR 436-035-0003(1).

Where, as here, a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, 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 compensable condition may be used to rate impairment. OAR 436-035-0007(1); *Kruhl v. Foreman Cleaners*, 194 Or App 125, 130-31 (2004).

Here, the medical arbiter panel was aware of claimant's denied conditions and attributed his permanent impairment to his accepted bicep strain condition. (Ex. 114-1, -5). Under such circumstances, we agree with the ALJ's conclusion that the medical arbiter's panel unambiguously related claimant's permanent impairment to the right bicep strain. *See Young K. Tunguyen*, 65 Van Natta 1427, 1429 (2013) (medical arbiter's unambiguous impairment findings followed).

In contrast to the medical arbiter panel's findings, Dr. Truong's opinion suggests some possible inconsistencies. Specifically, he first agreed that claimant's right bicep strain was medically stationary without any permanent impairment (Ex. 107), but subsequently stated that claimant was "nearing medically stationary status and will have some permanent impairments from his on the job injury." (Ex. 109-4). Without further explanation, we consider Dr. Truong's findings insufficient to conclude that they are more accurate than the arbiter panel's findings. *See Jason D. Netherton*, 68 Van Natta 270, 271 (2016) (arbiter findings followed because attending physician's impairment findings not considered more accurate); *Jamie Martinez-Medina*, 68 Van Natta 77, 79 (2016) (same).

Consequently, we rely on the medical arbiter panel's findings to rate claimant's permanent impairment. OAR 436-035-0007(5); *Tunguyen*, 65 Van Natta at 1429. Based on those findings, the record supports the Order on Reconsideration's award of 27 percent whole person permanent impairment. Accordingly, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$3,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as

represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

ORDER

The ALJ's order dated October 28, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, payable by the employer.

Entered at Salem, Oregon on April 11, 2016