

In the Matter of the Compensation of  
**STEVEN R. JOLL, Claimant**  
WCB Case No. 15-02689  
ORDER ON REVIEW  
Moore Jensen, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson. Member Lanning specially concurs.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that affirmed an Order on Reconsideration that awarded 8 percent whole person impairment for his left knee condition. On review, the issue is extent of permanent disability (permanent impairment).<sup>1</sup>

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

July 2, 2014, claimant compensably injured his left knee. (Exs. A, 2). In September 2014, SAIF accepted a left knee strain. (Ex. 2).

In October 2014, Dr. Wuest performed a left knee arthroscopy. (Ex. 2B). Post-operatively, Dr. Wuest diagnosed a medial meniscal tear, lateral femoral condylar injury, "directly attributable" to the work injury, and grade 2 to 3 retropatellar and femoral sulcus chondromalacia that he considered "chronic in nature." (*Id.*)

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<sup>1</sup> Following completion of the briefing schedule on January 20, 2016, SAIF submitted a memorandum of additional authorities including citations to a court decision issued on December 23, 2015, as well as 1997 legislative history. Claimant objects to SAIF's submissions as untimely. In addition, he submits supplemental argument regarding *Magana-Marquez v. SAIF*, 276 Or App 32 (2016), which issued after the briefing schedule was completed.

Appellate arguments submitted outside the briefing schedule will not be considered, unless authorized by the Board. *See* OAR 438-011-0020(2); *Betty L. Juneau*, 38 Van Natta 553, 556 (1986). However, any party may provide supplemental authorities to assist the Board in its review, but only if that authority was not in existence until the conclusion of the party's briefing according to the briefing schedule. *See Margaret B. Sparkes*, 47 Van Natta 1365 (1995); *Juneau*, 38 Van Natta at 556.

Here, the case and the legislative history cited by SAIF were in existence when it filed its reply brief. Because claimant objects to the consideration of these additional arguments, we grant his motion to strike SAIF's submission. In addition, claimant's citation to *Magana Marquez* as a supplemental authority has been considered because the court's decision issued after the submission of his reply brief. However, because no authorization was either sought or granted for supplemental briefing, we have not considered the parties' additional arguments regarding the *Magana-Marquez* decision.

In November 2014, SAIF accepted a left knee posterior horn medial meniscus tear. (Ex. 4).

In January 2015, Dr. Wuest opined that claimant had lost range of motion due to the injury. (Ex. 5). He attributed 75 percent of the impairment to claimant's accepted conditions, and 25 percent to body habitus, "co-morbid conditions," and preexisting conditions. (Ex. 5-3). Dr. Wuest determined that claimant's condition was medically stationary and released him to work without restrictions. (Ex. 6).

On February 19, 2015, a Notice of Closure awarded 6 percent permanent impairment. (Ex. 8). The impairment award included a 6 percent offset based on impairment awarded for a prior left knee injury. (Ex. 8-2). Claimant requested reconsideration without a medical arbiter. (Ex. 10).

In March 2015, Dr. Wuest opined that claimant's 2014 work injury was "at least" a material cause of his permanent disability for the left knee. (Ex. 9).

In April 2015, in response to the Appellate Review Unit's (ARU's) request for clarification of his "apportionment" opinion, Dr. Wuest indicated that claimant's disability from a prior 2005 left knee injury had resolved. (Ex. 11). After being provided with the definition of "preexisting condition" and "arthritis," by ARU, Dr. Wuest opined that 30 percent of the non-work-related impairment was due to body habitus, and 70 percent of that impairment was due to arthritis. (*Id.*)

A June 3, 2014 Order on Reconsideration increased claimant's permanent impairment award to 8 percent. (Ex. 12-4). In calculating this award, ARU determined that claimant's permanent disability from the 2005 injury had dissipated, such that an offset of the prior award was not appropriate. *See* OAR 436-035-0015. Additionally, ARU determined that claimant had "arthritis" as defined under ORS 656.005(24) and apportioned 83 percent of his permanent impairment findings to the accepted conditions under *Schleiss v. SAIF*, 354 Or 637 (2013). Claimant requested a hearing.

The ALJ affirmed the reconsideration order. In doing so, the ALJ interpreted Dr. Wuest's opinion to be that claimant's chondromalacia and retropatellar and femoral changes constituted "arthritis" and concluded that apportionment under OAR 436-035-0013(1) was not precluded under *Schleiss*.<sup>2</sup>

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<sup>2</sup> Claimant's claim was closed by a February 19, 2015 Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). *See* OAR 436-035-0003(1)

On review, claimant contends that, under *Schleiss*, apportionment is not appropriate in the absence of a “combined condition” acceptance and denial. Additionally, he asserts that the record was insufficient to establish the existence of left knee arthritis. Based on the following reasoning, we affirm the ALJ’s decision.

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). As the party challenging the Order on Reconsideration, claimant also has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Based on the following reasoning, we are not persuaded that claimant has satisfied his statutory burden.

In *Claudia S. Stryker*, 67 Van Natta 1003 (2015), we concluded that, under *Schleiss*, the “apportionment” rule applies where the record supports the existence of a legally cognizable “preexisting condition” and does not depend on a carrier’s “pre-closure” acceptance/denial of a combined condition. *Id.* at 1007. We have previously addressed claimant’s argument that apportionment is not appropriate in the absence of an acceptance of a combined condition. *See Maurice McDermott*, 67 Van Natta 1250, 1253 n 2 (2015). For the reasons expressed in the *McDermott* and *Stryker* decisions, we adhere to those holdings.

Claimant next argues that the record does not support the existence of a legally cognizable preexisting condition. We disagree.

In *McDermott*, we found that where a physician was provided with the statutory definition of “arthritis” and the physician provided a response regarding apportionment, that response established the existence of arthritis as a preexisting

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The applicable version of OAR 436-035-0013 provides in part:

“Except as provided by subsection (5) of this rule, where a worker has a superimposed or unrelated condition, only disability due to the compensable condition is rated, provided the compensable condition is medically stationary. Then, apportionment is appropriate. Disability is determined as follows:

“(1) The physician describes the current total overall findings of impairment, then describes those findings that are due to the compensable condition. In cases where a physician determines a specific finding (*e.g.*, range of motion, strength, instability, etc.) is partially attributable to the accepted condition, only the portion of those impairment findings that is due to the compensable condition receives a value. When apportioning impairment findings, the physician must identify any superimposed or unrelated conditions.”

condition. Here, ARU provided Dr. Wuest with the statutory definition of “arthritis” set forth in *Schleiss* and, in response, Dr. Wuest affirmed that a portion of claimant’s impairment was due to arthritis. (Ex. 11-2). In the context of ARU’s question, we are persuaded that Dr. Wuest’s response established the existence of “arthritis.” *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole); *Tony L. Clark*, 67 Van Natta 424, 431 (2015) (“attending-physician-ratified” findings, which were submitted after the physician had received definitions of “arthritis” and “arthritic condition” as set forth in *Schleiss* and *Hopkins* decisions, persuasively established that the claimant’s cervical degenerative disc disease constituted a legally cognizable preexisting condition and, as such, supported application of the “apportionment” rule).

Accordingly, based on the aforementioned reasoning, as well as that expressed in the ALJ’s order, we affirm.

#### ORDER

The ALJ’s order dated November 13, 2015 is affirmed.

Entered at Salem, Oregon on April 12, 2016

Member Lanning specially concurring.

For the reasons expressed in my dissenting opinions in *Stuart C. Yekel*, 67 Van Natta 1279 (2015), and *Claudia S. Stryker*, 67 Van Natta 1003 (2015) (Members Lanning and Weddell dissenting), I do not agree that the rating of permanent impairment is limited to the accepted conditions rather than the compensable work-related injury. Moreover, as explained in those dissents, I do not agree that apportionment of permanent impairment is proper absent the processing of a combined condition. However, under the principles of *stare decisis*, I follow the holdings in *Yekel* and *Stryker* and concur with the outcome in this case.