

In the Matter of the Compensation of  
**MICHAEL F. SUMNAL, Claimant**

WCB Case No. 15-02698

ORDER ON REVIEW

Shlesinger & Devilleneuve Eugene, 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 did not award impairment for his left foot condition. On review, the issues are extent of permanent disability (permanent impairment).<sup>1</sup>

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

On September 16, 2014, claimant compensably injured his left foot. (Ex. 1). SAIF accepted a "left great toe fracture." (Ex. 3).

On September 24, 2014, Dr. Routhier diagnosed a left first toe distal phalanx fracture and left second toe sprain/contusion. (Ex. 2).

In December 2014, Dr. Routhier noted that claimant's pain was nearly resolved and he was released to full duty work. (Ex. 4).

In January 2015, Dr. Routhier noted that claimant continued to improve and that his condition was medically stationary. (Ex. 6).

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<sup>1</sup> Claimant moves to strike SAIF's argument that claimant's remedy is to file a new/omitted medical condition claim for the second toe injury. He contends that SAIF's argument is an "entirely new legal theory" that was not raised in written arguments at the hearing level. *See Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing). We disagree for several reasons.

To begin, the proposition advanced by SAIF is referenced in the *Yekel* decision, which is the holding challenged by claimant in his appellant's brief. *See Yekel*, 67 Van Natta at 1282. Moreover, rather than constituting a "new legal theory," SAIF's response is simply presenting a defense to claimant's argument that he is being prevented from obtaining a permanent impairment award for his second toe condition. Based on the aforementioned reasons, claimant's motion to strike is denied.

On February 20, 2015, a Notice of Closure did not award permanent impairment. (Ex. 8). Claimant requested reconsideration. (Ex. 9).

In May 2015, Dr. Rischitelli performed a medical arbiter examination. (Ex. 10). Dr. Rischitelli determined that claimant had reduced flexion of the second toe. (Ex. 10-4). He attributed the reduced flexion to claimant's work injury, but not to the accepted great toe fracture.

In June 2015, an Order on Reconsideration affirmed the Notice of Closure. (Ex. 11-2). Claimant requested a hearing, seeking a permanent impairment award.

Finding no such permanent impairment, the ALJ affirmed the Order on Reconsideration.

Citing *Stuart C. Yekel*, 67 Van Natta 1270, 1282 (2015), the ALJ reasoned that claimant's entitlement to permanent impairment was limited to his accepted conditions and direct medical sequela.

On review, claimant argues that *Yekel* was wrongly decided and, that he should be compensated for his second toe impairment. We decline to revisit our *Yekel* holding. In addition, based on the following reasoning, we affirm.

Claimant has the burden to establish the extent of his permanent disability and, as the party challenging the Order on Reconsideration, he has the burden to establish error in the reconsideration process. ORS 656.266(1); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000). Only findings of impairment that are permanent and caused by the accepted compensable condition, or a direct medical sequela, may be used to rate impairment. OAR 436-035-0007(1); *Yekel*, 67 Van Natta at 1285.

Here, claimant does not contend that his second toe impairment is due to an accepted condition or direct medical sequela. Rather, he acknowledges that the question of his entitlement to permanent impairment at this juncture is answered by the Board's holding in *Yekel*. We have previously determined that adhering to our holding in *Yekel* is the most administratively judicious approach, notwithstanding the court's footnote in *Magana-Marquez v. SAIF*, 276 Or App 32, 34 n 2 (2016). See *William Snyder*, 68 Van Natta 199, 200 n 1 (2016). Accordingly, we affirm the ALJ's determination that claimant is not entitled to a permanent impairment award for his accepted left great toe condition.

ORDER

The ALJ's order dated December 8, 2015 is affirmed.

Entered at Salem, Oregon on April 12, 2016

Member Lanning specially concurring.

For the reasons expressed in my dissenting opinion in *Stuart C. Yekel*, 67 Van Natta 1279 (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. However, under the principles of *stare decisis*, I follow the holding in *Yekel* and concur with the outcome in this case.