
In the Matter of the Compensation of
CATHERINE E. ADLER, Claimant
WCB Case No. 15-01951
ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Naugle's order that awarded 15 percent whole person impairment for right shoulder conditions. On review, the issue is permanent disability (impairment).

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

On October 7, 2003, claimant sustained a prior compensable injury with a different employer that was accepted for right shoulder subacromial bursitis and lateral epicondylitis. (Ex. A). That claim was closed on May 18, 2004 without a permanent impairment award. (Ex. C).

On March 28, 2013, claimant had another compensable injury, which is the claim from which this present dispute arises. (Ex. 1). The SAIF Corporation accepted a right shoulder strain, impingement, tendinitis, and partial thickness rotator cuff tear of the supraspinatus tendon. (Ex. 8).

Dr. Butters, attending physician, attributed 90 percent of claimant's right shoulder impairment to the accepted conditions attributable to the March 2013 claim, and 10 percent of the impairment to preexisting conditions. (Ex. 7).

A December 19, 2014 Notice of Closure awarded 15 percent whole person permanent impairment concerning the March 2013 claim related to range of motion loss, strength loss and surgery. (Ex. 9-2). Claimant requested reconsideration.

In April 2015, Dr. Rischitelli performed a medical arbiter examination. (Ex. 12). After reviewing the medical records, he noted claimant's "pre-March 2013 injury" diagnoses of subacromial bursitis, mild recurrent subacromial bursitis, and calcific rotator tendonitis. (*Id.*) Dr. Rischitelli attributed 70 percent of claimant's impairment to the accepted right shoulder conditions and 30 percent to preexisting right shoulder calcific tendinitis and recurrent subacromial bursitis. (*Id.*)

Relying on the medical arbiter's "apportioning" impairment findings, an Order on Reconsideration found 16 percent permanent impairment. Consequently, the Notice of Closure award was increased to 16 percent. (Ex. 13). Claimant timely requested a hearing.

At the hearing level, the parties agreed that ARU had made a calculation error. Thus, they stipulated that the Order on Reconsideration's whole person impairment award was actually 15 percent.

The ALJ affirmed that 15 percent impairment award, relying on the medical arbiter's findings. The ALJ reasoned that apportionment was appropriate, even in the absence of an accepted combined condition, because claimant had qualified preexisting conditions. *See Schleiss v. SAIF*, 354 Or 637, 655 (2013) (to qualify for the apportionment of impairment, a cause must be legally cognizable); *Claudia S. Stryker*, 67 Van Natta 1003 (2015) ("apportionment" rule applied where the record supported the existence of a legally cognizable "preexisting condition" and did not depend on the carrier's "pre-closure" acceptance/denial of a combined condition).

On review, claimant asserts that her impairment findings should not be apportioned.¹ Based on the following reasoning, we disagree.

As the party challenging the Order on Reconsideration, claimant has the burden of establishing error in the prior resolution. *See Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000). Claimant also has the burden of proving the nature and extent of her disability. ORS 656.266(1).

We disagree with claimant's contention that the May 2004 Notice of Closure, which did not award any impairment for her prior shoulder claim, precludes the apportionment of her impairment findings to the conditions addressed by that closure, including subacromial bursitis. That Notice of Closure addressed whether claimant was entitled to a permanent impairment award due to her then-accepted conditions, including subacromial bursitis, at that time.

In contrast, the issue before us, in evaluating claimant's permanent impairment on closure of her March 2013 injury claim, is whether a portion of her impairment is attributable to the recurrent subacromial bursitis condition, an

¹ Claimant does not otherwise challenge the determination of her impairment based on Dr. Rischitelli's findings.

issue that was not, and could not have been, litigated in the context of the prior closure regarding her October 2003 injury claim. *See Drews v. EBI Cos.*, 310 Or 134, 140 (1990) (issue preclusion applies only if the issue was actually litigated and determined in a setting where its determination was essential to the final decision reached; claim preclusion does not require actual litigation, but requires the opportunity to litigate and the disposition of the matter by a final judgment). Accordingly, neither issue preclusion nor claim preclusion prevent the apportionment of claimant's impairment to her recurrent subacromial bursitis condition. *See Cynthia A. Yerton*, 59 Van Natta 1394 (2007) (claim preclusion prevented a claimant from challenging the "medically stationary" date in an unappealed Notice of Closure, but did not prevent her from attempting to establish that her condition was not medically stationary at a later time).

Claimant further asserts that she does not have preexisting conditions. For the following reasons, we disagree.

To qualify as a "preexisting condition" in an initial injury claim, a condition must contribute to disability or a need for treatment and, unless the condition is arthritis or an arthritic condition, the worker must have been diagnosed with, or obtained medical services for, the condition before the initial injury. *See ORS 656.005(24)(a); Patty A. Stafford*, 62 Van Natta 2493, 2496 (2010). As noted above, claimant's subacromial bursitis was diagnosed in 2003. Further, Dr. Rischitelli reviewed claimant's medical records and determined that she was diagnosed with calcific rotator cuff tendinitis in 2004. (Ex. 12-3). Finally, Dr. Rischitelli's opinion supports the conclusion that these conditions contribute to claimant's current disability or need for treatment. (Ex. 12-3, -7).

Under such circumstances, the record establishes that claimant's recurrent subacromial bursitis and calcific tendonitis are legally cognizable "preexisting conditions." Accordingly, claimant's permanent impairment findings must be apportioned between the accepted conditions and the preexisting right shoulder calcific tendonitis and recurrent subacromial bursitis conditions.² *See Schleiss*, 354 Or at 655.

² Based on "the record as a whole," claimant disputes the existence of calcific rotator cuff tendinitis and challenges Dr. Rischitelli's apportionment opinion. However, claimant does not dispute that her impairment should be based on Dr. Rischitelli's findings. Moreover, Dr. Rischitelli's opinion regarding the apportionment of claimant's impairment is unambiguous and we are not free to disregard it. *Becky L. Graham*, 58 Van Natta 1333, 1335 (2006); *see also Hicks v. SAIF*, 194 Or App 655, *adh's to as modified on recons*, 196 Or App 146, 152 (2004) (where the medical arbiter's report unambiguously attributes impairment to the compensable condition, the report provides the default determination of the claimant's impairment).

In conclusion, based on the aforementioned reasoning, as well as the reasons expressed in the ALJ's order, we conclude that the apportionment of claimant's permanent impairment findings was appropriate. *See* OAR 436-035-0013; *Stryker*, 67 Van Natta at 1008 (2015). Accordingly, we affirm.

ORDER

The ALJ's order dated September 21, 2015 is affirmed.

Entered at Salem, Oregon on February 23, 2016

Member Lanning specially concurring.

For the reasons expressed in my dissent in *Claudia S. Stryker*, 67 Van Natta 1003, 1008-1011 (2015) (Members Lanning and Weddell dissenting), I do not agree that permanent impairment can be apportioned unless a combined condition has been accepted and denied. However, under the principles of *stare decisis*, I follow the holding in *Stryker* and concur with the outcome in this case.