

In the Matter of the Compensation of
JEFFREY T. REILLY, Claimant
WCB Case No. 15-01903
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that affirmed an Order on Reconsideration that awarded 4 percent whole person impairment for a right wrist condition. On review, the issue is the extent of permanent disability (impairment). We modify.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

In October 2013, claimant, who delivers roofing material for the employer, developed pain in his right wrist from lifting and moving roofing shingles. (Ex. 1). SAIF accepted a right wrist sprain and right carpal tunnel syndrome. (Exs. 2, 6).

Based on the impairment findings of claimant's attending physician, Dr. DiPaola, a Notice of Closure awarded 12 percent whole person impairment for right wrist range of motion loss. (Ex. 7).

SAIF requested reconsideration of the Notice of Closure. (Ex. 8). Dr. Rabie performed a medical arbiter examination. (Ex. 9). On reconsideration, the Appellate Review Unit (ARU) relied on Dr. Rabie's impairment findings, determined that Dr. Rabie had apportioned 50 percent of the impairment findings to the accepted right wrist conditions, and awarded 4 percent whole person impairment for right wrist range of motion (ROM) loss. (Ex. 10-2, -4). Claimant requested a hearing.

The ALJ affirmed the Order on Reconsideration. In doing so, the ALJ determined that Dr. Rabie had attributed 50 percent of the impairment findings (right wrist range of motion loss) to the accepted right wrist sprain and right carpal tunnel syndrome, and that a preponderance of the medical evidence did not establish that Dr. DiPaola's impairment findings were more accurate than Dr. Rabie's.

On review, claimant contends that Dr. DiPaola's impairment findings were more accurate than Dr. Rabie's. Moreover, he seeks an "unapportioned" permanent impairment value for his right wrist findings, asserting that both Dr. DiPaola and Dr. Rabie attributed the right wrist ROM loss to the accepted conditions.¹ For the following reasons, we conclude that claimant is entitled to an "unapportioned" permanent impairment value for his right wrist ROM loss.

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); *Stuart C. Yekel*, 57 Van Natta 1279, 1284 (2015) (finding that "statutory and administrative authority make clear that impairment is awarded based on the accepted conditions and the direct medical sequelae of the accepted conditions").

Evaluation of a worker's disability is as of the date of issuance of the reconsideration order. ORS 656.283(6). On reconsideration, where 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).²

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's permanent impairment to the compensable condition, "the medical arbiter's report provides the default determination of a claimant's

¹ In the alternative, claimant argues that, under *Schleiss v. SAIF*, 354 Or 637 (2013), he is entitled to an "unapportioned" permanent impairment value for his right wrist range of motion loss, because SAIF did not accept or deny a combined condition. Regarding that argument, claimant's interpretation of the *Schleiss* rationale (as supporting the proposition that all permanent disability is rated unless there is an accepted and denied combined condition) was rejected in *Claudia S. Stryker*, 67 Van Natta 1003 (2015) (Members Lanning and Weddell dissented). There, we concluded that the "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. *Id.* at 1007.

² Because the Notice of Closure issued on November 21, 2014, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). (Ex. 7-1). OAR 436-035-0003(1).

impairment.” *Hicks v. SAIF*, 194 Or App 655, *adh’d to as modified on recons*, 196 Or App 146, 152 (2004). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician’s impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, on March 9, 2015, Dr. Rabie performed a medical arbiter’s exam. (Ex. 9). Dr. Rabie concluded that claimant had “significantly restricted range of mobility” in his right wrist. (Ex. 9-3). Dr. Rabie’s impairment findings would support a right wrist ROM loss of 16 percent. (Ex. 10-2). Alternatively, Dr. DiPaola’s impairment findings would support a right wrist ROM loss of 25 percent. (Ex. 7-2).

A preponderance of the medical evidence does not persuade us that Dr. DiPaola’s impairment findings are more accurate than Dr. Rabie’s. Dr. DiPaola concluded, “There are objective findings of restriction of range of motion on physical examination today that is one hundred percent (100%) to his work-related right wrist *arthritis* and carpal tunnel syndrome as it relates to the injury of October 11, 2013.” (Ex. 5-2) (emphasis supplied). Because right wrist “arthritis” is not an accepted condition (or direct medical sequelae of an accepted condition), Dr. DiPaola essentially rated impairment for a noncompensable condition. Thus, we find that Dr. DiPaola’s impairment findings are not more accurate. *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 Dr. Rabie’s findings to rate claimant’s permanent impairment. OAR 436-035-0007(5); *Young K. Tunguyen*, 65 Van Natta 1427, 1429 (2013) (medical arbiter’s unambiguous impairment findings followed).

We turn to the apportionment issue. We disagree with the ARU’s conclusion that “Dr. Rabie opined that 50% of the findings were due to the accepted condition[.]” (Ex. 10-2). Dr. Rabie’s express statement was that “both pre-existing conditions (scapholunate laxity and degenerative arthritis) in combination with the long-standing heavy duty work, contributed equally (50% each), to the development of both the right wrist sprain and right carpal tunnel syndrome conditions.” (Ex. 9-4). Thus, Dr. Rabie’s statement concerned the causation of claimant’s accepted wrist sprain and CTS condition, rather than an apportionment of his permanent impairment findings for those conditions.

While acknowledging that Dr. Rabie's statement was phrased in terms of causation of the accepted conditions, SAIF contends that he also addressed the cause of the impairment for those conditions. According to SAIF, Dr. Rabie's opinion can be reasonably read to address the subject of the examination: the extent of impairment due to the accepted conditions. Based on the following reasoning, we disagree with such an interpretation of Dr. Rabie's findings.

Dr. Rabie considered the development of claimant's right wrist sprain and CTS attributable to preexisting conditions (scapholunate laxity and degenerative arthritis) and longstanding heavy duty work. But, Dr. Rabie's impairment findings (reduced ROM) were unequivocally for the sprain and CTS (which are the accepted conditions). After considering Dr. Rabie's report in context, we do not interpret his opinion to attribute his impairment findings to any condition other than to the accepted conditions. *See Kruhl v. Foremans Cleaners*, 194 Or App 125, 131 (2004) (although in the absence of other medical opinion, the Board is required to use a medical arbiter's rating of impairment, it must nonetheless be satisfied that the report rates impairment caused by the compensable condition). Consequently, apportionment of claimant's permanent impairment findings is not appropriate.

Dr. Rabie's impairment findings for claimant's right wrist ROM establish a 16 percent right wrist value,³ which is converted to 8 percent whole person impairment. OAR 436-035-0115(4). That represents an increase from the 4 percent whole person impairment awarded in the Order on Reconsideration. Thus, the Order on Reconsideration is modified accordingly.

Because our decision results in increased compensation, claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order (the additional 4 percent whole person permanent impairment), not to exceed \$6,000, payable by SAIF directly to claimant's counsel. ORS 656.386(5); OAR 438-015-0055(2).

³ Because we have concluded that Dr. Rabie's impairment findings should be used to calculate claimant's permanent impairment, and the parties do not otherwise challenge the ARU's calculation of claimant's right wrist value, we rate claimant's 16 percent right wrist impairment value, as set forth in the Order on Reconsideration. (*See Ex. 10-2*).

ORDER

The ALJ's order dated January 14, 2016 is modified. In addition to the Order on Reconsideration's and the ALJ's 4 percent permanent whole person impairment award, claimant is awarded an additional 4 percent, for a total award of 8 percent whole person permanent impairment for his right wrist condition. Claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased permanent disability compensation created by this order, not to exceed \$6,000, payable by SAIF directly to claimant's counsel.

Entered at Salem, Oregon on July 27, 2016