
In the Matter of the Compensation of
LAURIE L. BOYCE, Claimant
WCB Case No. 10-05198; 10-04013
ORDER ON REVIEW
Sara L Gabin, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman. Member Langer concurs in part and dissents in part.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Spangler's order that: (1) set aside a September 10, 2010 Order on Reconsideration as null and void; (2) excluded a medical report that was received by the Appellate Review Unit (ARU) after a June 21, 2010 Order on Reconsideration; and (3) awarded claimant 9 percent whole person impairment for a bilateral knee condition, whereas the June 2010 reconsideration order had awarded 15 percent, and the September 2010 reconsideration order had awarded 16 percent. On review, the issues are jurisdiction, evidence, and permanent disability (impairment). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and provide the following summary.¹

In 2004, before her January 2008 compensable injury, claimant had a total left knee replacement surgery performed by Dr. Treible, an orthopedic surgeon. (Ex. 17). Subsequently, in January 2008, she compensably injured both knees. (Ex. 48). The insurer accepted bilateral knee contusions and left knee posterior ligamentous injury with anterior/posterior instability. (Ex. 71).

Claimant continued to treat with Dr. Treible. In May 2008, he performed a surgical procedure on claimant's left knee described as a "revision total knee arthroplasty, polyethylene component." (Exs. 54, 55).

Dr. James performed a closing examination in January 2010, finding that claimant had no permanent impairment attributable to her accepted conditions. (Ex. 73). Dr. Treible concurred with Dr. James's report. (Ex. 74).

¹ We do not adopt the ALJ's "Ultimate Findings of Fact."

A February 2010 Notice of Closure did not award permanent disability. (Ex. 76). Claimant requested reconsideration and the appointment of a medical arbiter. (Ex. 78).

Dr. Bowman, the medical arbiter, examined claimant on May 25, 2010. (Ex. 83). On June 11, 2010, the ARU sent a follow-up questionnaire to Dr. Bowman, who did not respond until June 24, 2010. (Ex. 85).

Meanwhile, on June 21, 2010, an Order on Reconsideration found 20 percent impairment for claimant's left knee surgery and 14 percent impairment for decreased range of motion (ROM) in the left knee. These numbers were combined for a final impairment value of 31 percent for the left leg, which was then converted to a whole person impairment award of 15 percent. (Ex. 84).

On July 20, 2010, the insurer requested a hearing regarding the June 21, 2010 Order on Reconsideration. (Ex. 86). That same day, the ARU issued an Order abating and withdrawing the reconsideration order. (Ex. 87).

On July 21, 2010, the ARU sought further clarification from Dr. Bowman, who responded on July 30, 2010. (Exs. 88, 90).

On September 3, 2010, the ARU issued a second Order on Reconsideration, which found a 20 percent impairment value for the left knee surgery, and a 7 percent impairment value for left knee loss of ROM, which were combined for an impairment value of 26 percent. (Ex. 93). This impairment value was converted to 12 percent whole person impairment. In addition, claimant was found to have a 5 percent "chronic condition" impairment value for the right knee, and a 4 percent value for right knee loss of ROM, which was converted to 4 percent whole person impairment for the right knee. Combined with the values for the left knee, claimant's total award was 16 percent whole person impairment.² (*Id.*) Thereafter, the employer requested a hearing concerning the reconsideration order.

CONCLUSIONS OF LAW AND OPINION

Based on the employer's July 20, 2010 hearing request from the June 21, 2010 Order on Reconsideration, the ALJ determined that the ARU's Abatement Order issued that same day was not authorized. Consequently, the ALJ reasoned

² Because claimant's claim was closed by a February 16, 2010 Notice of Closure, the applicable standards are found in WCD Admin. Order 07-060 (eff. January 1, 2008).

that the September 3, 2010 reconsideration was invalid. Furthermore, the ALJ declined to admit any “post-June 21 reconsideration order” letters/arbitrator responses that were present in the reconsideration record.

Regarding the permanent disability issue, the ALJ determined that the June 2010 reconsideration order properly granted 20 percent impairment for claimant’s May 2008 surgery because it correctly determined that the surgery qualified as partial or total knee replacement surgery under OAR 436-035-0230(5). The ALJ then converted the 20 percent value to 9 percent whole person impairment pursuant to OAR 436-035-0235(4).³

On review, the employer contests the ALJ’s evidentiary ruling and permanent disability award. Based on the following reasoning, we reverse.

To begin, we acknowledge that neither party challenges the ALJ’s determination that the employer’s hearing request from the June 21, 2010 Order on Reconsideration divested the ARU of authority to abate that order. Nonetheless, jurisdiction is a threshold issue that must be considered. *See Southwest Forest Industries v. Anders*, 299 Or 205, 208 (1985) (even if jurisdiction is not raised by the parties, the lack of jurisdiction must be raised *sua sponte*); *Modesta Gabriel*, 53 Van Natta 327 (2001) (same).

Here, the employer’s hearing request from the June 21, 2010 reconsideration order was filed on July 20, 2010.⁴ That same day, the ARU abated the order. We have previously held that where simultaneous acts affect the vesting of jurisdiction in this forum, in the interest of administrative economy and substantial justice, we will give effect to the act that results in the resolution of the controversy at the lowest possible level. *William I. Long*, 48 Van Natta 2193, 2193 (1996); *Ronald L. Ziemer*, 43 Van Natta 1650, 1650 (1991). Consistent with this principle, we conclude that the ARU’s July 20 abatement of its June 21, 2010 Order on Reconsideration takes precedence over the employer’s July 20 hearing request regarding that abated order. As a result, the September 3, 2010 reconsideration order is valid.⁵

³ The ALJ found that claimant was not entitled to a “ROM” impairment value for her left knee.

⁴ Filing was accomplished by mailing the request by certified mail on that date. *See* OAR 438-035-0046(1)(c).

⁵ In light of this determination, the three disputed exhibits (Exs. 88, 90, 92-3) were part of the reconsideration record. Consequently, they are admissible. ORS 656.283(6).

The September 3, 2010 reconsideration order awarded 16 percent whole person impairment, which consisted of values for claimant's left knee surgery, left knee and right knee loss of ROM, and a right knee "chronic condition." (Ex. 93). Finding this reconsideration order invalid, the ALJ did not comment on the award, other than to agree with the June 21, 2010 order's 20 percent impairment value for surgery (which was also awarded in the September 2010 order).

The employer argues that claimant was not entitled to an impairment value for the May 2008 left knee surgery. For the following reasons, we disagree.

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 are more accurate and should be used. OAR 436-035-0007(5). In the absence of other evidence showing a different level of impairment or that impairment was not related to the compensable injury, we are not free to reject a medical arbiter's unambiguous opinion as to the cause of impairment merely because we find the opinion unpersuasive. *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146, 149 (2004); *Maria S. Miller*, 60 Van Natta 1313, 1314 (2008).

Although claimant has the burden of proof with respect to the nature and extent of his injury, the employer, as the party challenging the reconsideration order, has the burden of establishing that the reconsideration order is not correct. ORS 656.266(1); ORS 656.283(7); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-184 (2000); *Antonio Reyes*, 58 Van Natta 2604, 2606 (2006). For the following reasons, we find that it has not met its burden.

Characterizing claimant's May 2008 "revision" as a "total knee replacement," the ARU awarded a 20 percent impairment value for the surgery under OAR 436-035-0230(5)(d), which provides such value for a partial or total knee replacement. Claimant had a total knee arthroplasty in 2004 to address her noncompensable patellofemoral degenerative arthritis.⁶ (Ex. 17-1). In April 2008, Dr. Treible, in regard to the 2004 surgery, noted that x-rays showed "total knee arthroplasty with noncemented components that appear to be in satisfactory position." (Ex. 52-2). He referred to claimant's May 2008 surgery as a "revision

⁶ In a total knee arthroplasty, both joint surfaces are replaced with artificial materials, usually composed of metal and high density plastic. See *Stedman's Medical Dictionary* 161 (28th ed 2006).

total knee arthroplasty, polyethylene component,” and as a “polyethylene revision.”⁷ (Exs. 55, 65). Dr. Bowman, the medical arbiter, described the surgery as a “revision of [claimant’s] insert.” (Ex. 56-17).

Therefore, although the medical record supports a causal relationship between claimant’s 2008 knee surgery and her accepted ligament injury, neither claimant’s attending physician (Dr. Treible) nor the medical arbiter (Dr. Bowman) explicitly described the surgery as a total or partial prosthetic knee replacement. Nevertheless, applying its administrative rules, the ARU determined that claimant’s May 2008 surgery qualified as the first total knee replacement impairment value given the worker. (Ex. 93-2).

Under these particular circumstances, we find no reason to question the ARU’s interpretation of its own rules for rating permanent disability. OAR 436-035-0230(5) provides a 20 percent impairment value for a total or partial knee replacement. Dr. Treible described the recommended surgery as a “revision total knee arthroplasty, polyethylene component.” Under such circumstances, we find that the employer has not established an error in the reconsideration proceedings. Therefore, we conclude that the May 2008 surgery qualifies for an impairment value under OAR 436-035-0230(5)(d).⁸

In the event that we find the September 2010 reconsideration order valid, the employer also contests the impairment values given in that order for bilateral loss of ROM and for a “chronic” condition in the right knee. Accordingly, we address these additional issues. Based on the following reasoning, we find those impairment values appropriate.

In his initial arbiter report, Dr. Bowman did not specifically discuss claimant’s right knee, other than to report her bilateral knee ROM findings. (Ex. 83). In response to a question concerning whether claimant had a “chronic condition” in her right or left knee, Dr. Bowman responded that she was not significantly limited in the ability to use her *left* knee repetitively. (Ex. 83-3). When asked to apportion the percentage of his findings between accepted and

⁷ Dr. Treible believed that claimant’s left knee instability was caused by stretching her posterior cruciate ligament when she fell. (Ex. 59-1). He recommended exchanging the polyethylene component in her knee with a thicker piece to add stability. (Exs. 55-2, 56-16).

⁸ As claimant notes, the operative report mentions that a small amount of claimant’s tibia was removed to facilitate the polyethylene exchange. Nonetheless, not all surgeries are entitled to impairment values under the Director’s disability standards. OAR 436-035-0007(14)(a); *Vernon W. Miller*, 59 Van Natta 1630, 1635 (2007).

unaccepted conditions, Dr. Bowman noted that the loss of ROM was due to claimant's total knee arthroplasty and could not be attributed to her accepted posterior cruciate ligament injury or her contusions. (Ex. 83-4). He further explained: "The posterior cruciate ligament was found to be intact surgically, despite the accepted condition, and the knee contusions have resolved. Therefore, I think the specific findings are based upon preexisting and unrelated conditions." (*Id.*)

The ARU requested clarification, asking Dr. Bowman for an explanation for claimant's right and left knee loss of ROM, and if she was "significantly limited in the repetitive use" of her right knee. (Ex. 85). Dr. Bowman responded that claimant's left and right knee ROM loss was due to compensable conditions, and that she did have a "chronic condition" in her right knee as a result of her accepted conditions. (*Id.*)

Arguing that Dr. Bowman had previously noted that the accepted contusions had resolved, the employer asserts that his clarification report represents an unexplained change of opinion, and should be disregarded. (Exs. 83-4, 85). We do not agree with the employer's assertion.

In reviewing Dr. Bowman's initial report, it is unclear whether he was referring only to the contusions on claimant's left knee, or to both knees. Moreover, Dr. Bowman's first report had not mentioned a right knee "chronic condition." (Ex. 83). As such, we find Dr. Bowman's later report to constitute a clarification, rather than a change of opinion. Furthermore, a preponderance of the medical evidence does not demonstrate that different findings by the attending physician are more accurate and should be used. Under these circumstances, we conclude that Dr. Bowman's findings regarding claimant's left and right knee loss of ROM and "chronic condition" values should be used to determine impairment. *See Hicks*, 194 Or App at 659.

Consequently, we are persuaded that claimant has ratable permanent impairment due to her accepted conditions as determined by the September 2010 reconsideration order. Accordingly, we affirm the reconsideration order's award of permanent impairment.⁹

⁹ The employer does not contest the ARU's calculation of claimant's permanent impairment based on Dr. Bowman's "clarified" impairment finding.

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 regarding the permanent disability issue is \$2,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated January 24, 2011 is reversed. The employer's hearing request regarding the July 20, 2010 Order on Reconsideration is dismissed. In lieu of the ALJ's permanent disability award, the September 3, 2010 Order on Reconsideration is affirmed. For services on review with regard to the permanent disability issue, claimant's attorney is awarded an assessed fee of \$2,000, payable by the employer.

Entered at Salem, Oregon on December 16, 2011

Member Langer concurring in part and dissenting in part.

I concur with the majority's conclusion that the September 2010 reconsideration order is valid. However, because I disagree with the majority's analysis of the permanent disability issue, I respectfully dissent. I reason as follows.

Claimant had a total knee arthroplasty in 2004 to address her noncompensable patellofemoral degenerative arthritis. (Ex. 17-1). In April 2008, after her compensable injury, Dr. Treible noted that x-rays showed "total knee arthroplasty with noncemented components that appear to be in satisfactory position." (Ex. 52-2). He believed at that time that claimant sustained a ligamentous injury and subsequently developed instability as a result of her work accident. To treat the instability, he recommended a "revision total knee arthroplasty, polyethylene component," also described as a "polyethylene revision," that would exchange the polyethylene component in claimant's knee with a thicker piece to add stability. (Exs. 52-2, 55, 56-16, 65). Dr. Bowman, the medical arbiter, characterized the surgery as a "revision of [claimant's] insert." (Ex. 56-17).

The Appellate Review Unit's (ARU) first Order on Reconsideration found that due to her compensable 2008 injury, claimant "underwent a total knee arthroplasty for left knee laxity." (Ex. 84-2). Reasoning that claimant had a prior, noncompensable, total left knee replacement, the ARU valued the 2008 surgery as "the first total knee replacement" and awarded her a 20 percent impairment value pursuant to OAR 436-035-0230(5). (*Id.*) In its subsequent Order on Reconsideration, the ARU corrected the prior finding to read that claimant "underwent a revision of the polyethylene total knee arthroplasty" due to the compensable injury. (Ex. 93-2). Nonetheless, "upon review of the record, including prior litigation," the ARU continued to reason that the revision surgery should be valued as the first total knee replacement pursuant to OAR 436-035-0230(5), because the attending physician "recommended revision of the total knee polyethylene due to instability, which has been accepted in this claim." (Ex. 93-2).

I find nothing in the ARU's reissued Order on Reconsideration that would involve the ARU's interpretation of its own rules to which we should defer. While I agree with the majority that the ARU has some expertise in applying the disability standards, the ARU did not employ any special disability rating expertise in this case. Rather, as noted above, the ARU examined the medical record and the law of the case and determined that a causal relationship between the compensable instability and need for the revision surgery justified the impairment value under OAR 436-035-0230(5). (Ex. 93-2). That claimant's revision surgery was a compensable medical service based on its causal relationship to the accepted claim, however, is not contested. The precise issue here is whether the surgical procedure claimant underwent in 2008 equals a total or partial prosthetic knee replacement and results in any ratable permanent impairment. The ARU offered no analysis on that issue.

The employer argues that claimant cannot receive a value under OAR 436-035-0230(5) for a procedure she did not have.¹⁰ I agree.

As the employer notes, the administrative rules do not define "total or partial prosthetic knee replacement." Neither claimant's attending physician (Dr. Treible), nor the medical arbiter (Dr. Bowman), stated the surgery was a total or partial prosthetic knee replacement. Instead, they consistently described the procedure as a revision of claimant's polyethylene prosthesis she has had in her left

¹⁰ The rule provides that total or partial prosthetic knee replacement is valued at 20 percent leg impairment, but that no additional value is allowed for multiple, partial or total, replacements.

knee since 2004. Under these circumstances, we cannot infer that claimant's revision surgery is the same as the "total or partial prosthetic knee replacement" referred to in the disability standards. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may make reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions in the absence of such evidence).

Furthermore, no medical evidence supports a finding that claimant sustained any permanent impairment as a result of her compensable surgery. Considering the context of the rule assigning impairment values to the surgery of the toes, foot and leg, it is apparent that total or partial prosthetic replacement procedures receive substantial impairment values because they significantly change the treated part of the lower extremity (removal of a meniscus, resection of a bone, removal and prosthetic replacement of a part of whole joint). *See also* Stedman's Medical Dictionary 161 (28th ed 2006) (in total knee arthroplasty, both joint surfaces are replaced with artificial materials). Claimant's compensable surgery did not alter her knee to that degree. Moreover, the procedure improved the function of her knee by treating the diagnosed instability. (Ex. 65).¹¹ In sum, claimant has no impairment caused by the surgical procedure consisting of replacing a polyethylene piece in her preexisting knee prosthesis and, accordingly, is not entitled to any impairment value due to her surgery.

Moreover, based on the following reasoning, I disagree with the majority's analysis of the other permanent impairment issues.

In his initial arbiter report, Dr. Bowman did not specifically discuss claimant's right knee, other than to report her bilateral ROM findings. (Ex. 83). In response to a question concerning whether claimant had a "chronic condition" in her right or left knee, Dr. Bowman responded that she was not significantly limited in the ability to use her *left* knee repetitively. (Ex. 83-3). When asked to apportion the percentage of his findings between accepted and unaccepted conditions, Dr. Bowman noted that the loss of ROM was due to claimant's total knee arthroplasty and could not be attributed to her accepted posterior cruciate ligament injury or to her contusions. (Ex. 83-4). He further explained: "The

¹¹ As claimant notes, the operative report mentions that a small amount of her tibia was removed to facilitate the polyethylene exchange. Nonetheless, OAR 436-035-0230(5) specifically provides that revisions of knee replacements receive no value. Moreover, not all surgeries are entitled to impairment values under the Director's disability standards, because some procedures improve the use and function of body parts. OAR 436-035-0007(13)(a). Finally, neither the attending physician nor the medical arbiter opined that the removal of a small amount of claimant's tibia resulted in any impairment.

posterior cruciate ligament was found to be intact surgically, despite the accepted condition, and the knee contusions have resolved. Therefore, I think the specific findings are based upon preexisting and unrelated conditions.” (*Id.*)

The ARU requested clarification, asking Dr. Bowman for an explanation of claimant’s right knee loss of ROM, and if she was “significantly limited in the repetitive use” of her *right* knee. (Ex. 85). Dr. Bowman responded that claimant’s right knee ROM loss was due to her contusion, and that she did have a “chronic condition” in her right knee as a result of her accepted conditions. (*Id.*)

Arguing that Dr. Bowman had previously noted that the contusions had resolved, the employer asserts that his clarification report represents an unexplained change of opinion, and should be disregarded. (Exs. 83-4, 85). I agree.

In reviewing Dr. Bowman’s initial report, it is unclear whether he was referring only to the contusions on claimant’s left knee, or to both knees. Moreover, Dr. Bowman’s first report had not mentioned a right knee “chronic condition.” (Ex. 83). As such, I would find Dr. Bowman’s reports inconsistent as to the existence of a right knee “chronic condition,” and ambiguous concerning whether the right knee contusions had resolved.¹²

Without a persuasive explanation for these inconsistencies, and due to the ambiguities raised by the reports, I conclude that Dr. Bowman’s findings regarding claimant’s right knee loss of ROM and “chronic condition” should not be used to determine impairment.

In contrast to Dr. Bowman’s opinions, Dr. James, who performed claimant’s closing examination, unambiguously noted that her bilateral knee contusions had resolved without impairment. (Ex. 73-7). Further, Dr. James opined that claimant’s accepted conditions had not resulted in a “significant limitation of repetitive use” of either knee. (*Id.*) Dr. Treible, claimant’s attending physician/surgeon, concurred with Dr. James’s findings. (Ex. 74).

¹² I further conclude that Dr. Bowman’s “check-the-box” concurrence, indicating that claimant is significantly limited in the repetitive use of her right knee, is not persuasively supported by the medical record. If Dr. Bowman’s initial report is read as stating that claimant’s right and left knee contusions had resolved, the reason for a chronic condition in the right knee is not sufficiently explained. The same analysis would hold true if the report referred only to claimant’s left knee.

Under such circumstances, I would conclude that a preponderance of the evidence establishes that Dr. James's findings of no impairment, as ratified by Dr. Treible, are more accurate than those of the medical arbiter. Consequently, I am not persuaded that claimant has any ratable permanent impairment due to her accepted conditions. Because the majority concludes otherwise, I must part company and dissent.