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In the Matter of the Compensation of  
**GAYLEN J. KILTOW, Claimant**  
WCB Case No. 11-03049  
ORDER ON RECONSIDERATION  
Ronald A Fontana, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

On June 15, 2012, we affirmed those portions of an Administrative Law Judge's (ALJ's) order that: (1) reversed an Order on Reconsideration that found claimant's left foot claim prematurely closed; and (2) declined to assess penalties and attorney fees against the SAIF Corporation for allegedly unreasonable claim processing. We also modified that ALJ's order by determining the extent of claimant's permanent disability, specifically by reinstating and affirming the April 1, 2011 Notice of Closure.

Claimant seeks reconsideration of our decision, requesting that we: (1) "correct certain factual errors in the order"; (2) set aside the Notice of Closure as premature because SAIF accepted diabetes as an independently compensable condition (and that condition was not medically stationary); and (3) redetermine his "work disability" award. We address each issue, in turn.

"Factual Errors"

Claimant first notes that a sentence in our introductory paragraph of our prior order included an inadvertent "not." *See Gaylen J. Kiltow*, 64 Van Natta 1136 (June 15, 2012). Specifically, that sentence stated that the Appellate Review Unit's (ARU's) June 14, 2011 Order on Reconsideration found that his left foot claim was *not* prematurely closed, whereas the remainder of our order correctly (and repeatedly) stated that the claim *was* prematurely closed. We amend our prior order to strike the inadvertent "not" in the introductory paragraph.

Claimant next asks that we amend our factual finding that claimant was injured when he "jumped *out of* a truck." According to claimant, he "jumped *off* the truck." Our order adopted the ALJ's "Findings of Fact," which included a finding that claimant was injured when he "jumped *out of* a truck." (Opinion and Order, p. 2) (emphasis added). In his opening brief on review, claimant accepted the ALJ's "Findings of Fact," with supplementation that did not concern the manner in which he was injured. Nevertheless, consistent with claimant's request, we modify our order to state that he was injured when he "jumped off the truck."

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Scope of Acceptance

Claimant contends that we incorrectly found that SAIF's June 2, 2008 Modified Notice of Acceptance only accepted "type II diabetes mellitus" as the "preexisting condition" component of a "combined condition," rather than accepting that condition outright as independently compensable. *See Kiltow*, 64 Van Natta at 1143. We disagree.

As claimant acknowledges, the scope of an acceptance is a question of fact. *Columbia Forest Products v. Woolner*, 177 Or App 639, 643 (2001); *Lillian A. Wilkinson*, 63 Van Natta 1839, 1841 (2011). Thus, he asks that we determine, as a factual matter, that when SAIF accepted "foot ulcer, plantar, left metatarsal head area with subsequent cellulitis and abscess formation combined with type II diabetes mellitus" (Ex. 4), it was not accepting a "combined condition," but was accepting the diabetes condition as independently compensable.

According to claimant, the Notice of Acceptance did not state that the diabetes was a "preexisting condition" or that it was only accepted as part of a "combined condition." Consequently, claimant contends that SAIF's acceptance should be interpreted as accepting "type II diabetes mellitus" as independently compensable and not part of a "combined condition."

As explained in our prior order, we disagree with claimant's interpretation of SAIF's acceptance. In *Woolner*, 177 Or App at 647, the court held that a Notice of Acceptance that failed to employ the specific words "combined condition" is not, for that reason alone, insufficient as a matter of law to constitute an acceptance of a combined condition. The court explained that imposing such a requirement "reduces to the proposition that 'magic words' are necessary to signify the acceptance of a combined condition." 177 Or App at 645. The court rejected that reductionist approach and reiterated that the statute does not "prescribe[] a particular manner for acceptance of a combined condition."

On remand in *Woolner*, based on our review of the carrier's acceptance, we concluded that it had accepted a combined condition. *Bonnie J. Woolner*, 54 Van Natta 828, 829 (2002) (on remand). We reasoned that the evidence showed that the claimant had a preexisting condition of "multi-directional instability" that "combined with" the accepted injury conditions of right shoulder and cervical strains. *Id.* Because the employer expressly accepted a claim for "multi-directional instability, right shoulder and cervical strain," we concluded that the acceptance pertained to a combined condition. *Id.*

Here, SAIF's Notice of Acceptance specifically listed a number of conditions that "combined with type II diabetes mellitus." (Ex. 4). Thus, we continue to disagree with claimant's argument that the acceptance did not "allege[] or indicate[]" that SAIF accepted a "combined condition" because it did not use the express phrase "combined condition," when referring to his diabetes. (Ex. 4).<sup>1</sup> *See Roseburg Forest Products v. Lund*, 245 Or App 65, 71-72 (2011) ("in determining whether a notice of acceptance constitutes an acceptance of a combined condition, we do not mechanically read the notice for 'the specific words "combined condition"'; rather, we consider whether the notice apprises the claimant of the nature of the compensable conditions covered by the acceptance.").

### Work Disability

We previously determined that claimant's base functional capacity (BFC) was "medium." In making that determination, we substituted a specific job analysis completed by a vocational counselor for the Dictionary of Occupational Titles (DOT), finding that the job analysis most accurately described the job. *See* OAR 436-035-0012(9)(a).

Claimant contends that we "fail[ed] to take into account" a finding in the job analysis that he "may use hands or pry bar for pushing or pulling the dumpster and the pounds of force used will be anywhere from fifty pounds to one hundred plus pounds of force." (*See* Ex. 26-3). Contrary to claimant's contention, we expressly considered that finding in our prior order, and explained that it was insufficient under the Director's rules to establish a BFC of something other than "medium." *See Kiltow*, 64 Van Natta at 1144 n 7 (and citing OAR 436-035-0012(8)(h), (9)(a)).

Claimant next argues that we "fail[ed] to consider [his] affidavits" stating that he intermittently lifted 76 to 100 pounds and had to lift "recycling carts weighing up to 60-65 pounds four feet off the ground." Claimant does not contend, and we do not find, that the "specific job analysis" prepared by the vocational counselor contained such lifting requirements. (*See* Ex. 26). As set forth in our prior order, under the Director's rules, "a *specific job analysis that includes the strength requirements* may be substituted for the DOT description(s)

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<sup>1</sup> We recognize that SAIF's Notice of Acceptance stated that the "accepted condition(s) does not include a combined condition unless specifically indicated in the Notice of Acceptance." (Ex. 4). However, as explained above and in our prior order, we find that the use of the phrase "combined with type II diabetes mellitus," in this particular Notice of Acceptance, specifically indicated acceptance of a combined condition.

if it most accurately describes the job.” *See Kiltow*, 64 Van Natta at 1144 (citing OAR 436-035-0012(9)(a)) (emphasis added). Considering that the applicable administrative rule for determining a claimant’s BFC value expressly refers to a “specific job analysis,” we decline claimant’s request that we use his affidavits to make that determination. *See* OAR 436-035-0012(9)(a).<sup>2</sup>

Finally, claimant challenges that aspect of our prior order, which determined that he did not timely raise a challenge to the residual functional capacity (RFC), as determined by the April 1, 2011 Notice of Closure. *See Kiltow*, 64 Van Natta at 1144-45. Claimant does not contend that he disputed the RFC used in the Notice of Closure, either before the ARU or the ALJ.<sup>3</sup> Nevertheless, because neither the ARU nor the ALJ addressed the RFC, he requests that we do so “as a matter of fairness to the litigants.”

We continue to decline claimant’s request. The issue of claimant’s RFC was one subject of SAIF’s April 1, 2011 Notice of Closure. When reconsideration of that closure notice was requested, claimant’s RFC was subject to challenge. The ARU did not ultimately determine claimant’s RFC because it found SAIF’s closure premature. After SAIF requested a hearing, the parties agreed that, if the ALJ determined that claim was not prematurely closed, the extent of claimant’s permanent disability (which would potentially include claimant’s RFC, if challenged) would be determined. In response, claimant apparently lodged numerous objections to the Notice of Closure, including an incorrect BFC. He did not, however, express any disagreement with the RFC.<sup>4</sup> Rather, that disagreement was first announced on Board review.

Claimant asks that we depart from our precedent of not considering issues raised for the first time on review because the ALJ, in error, neglected to address the extent of his permanent disability, despite that issue being fully argued by the parties. *See Kiltow*, 64 Van Natta at 1138 n 2. Yet, notwithstanding the ALJ’s omission, it is undisputed that claimant limited his “work disability” argument to his BFC value. Under such circumstances, we decline claimant’s request to

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<sup>2</sup> In doing so, we recognize that a claimant’s affidavit may be corroborative of either a DOT description or a specific job analysis, or that such an affidavit may be relevant for determining what DOT description applies, or whether a DOT description or specific job analysis is more accurate.

<sup>3</sup> *See Kiltow*, 64 Van Natta at 1145 n 9.

<sup>4</sup> Claimant does not challenge our determination that his sole challenge at the hearing level regarding his work disability determination pertained to his BFC calculation.

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consider his challenge on review to his RFC value. Therefore, we find no adequate reason to depart from our well-established practice. *See Fister v. South Hills Health Care*, 149 Or App 214 (1997), *rev den*, 326 Or 389 (1998) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing).

Accordingly, we withdraw our June 15, 2012 order. On reconsideration, as supplemented and modified herein, we republish our June 15, 2012 order. The parties' rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on July 13, 2012