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In the Matter of the Compensation of  
**PAULA MAGANA-MARQUEZ, Claimant**

WCB Case No. 13-05471

ORDER ON REVIEW

Gary Borden, Claimant Attorneys

James B Northrop, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that affirmed an Order on Reconsideration that awarded no permanent disability for her low back injury. On review, the issue is extent of permanent disability (permanent impairment).

We adopt and affirm the ALJ's order with the following supplementation.<sup>1</sup>

Claimant sustained a compensable low back injury in February 2013, which the SAIF Corporation accepted as a lumbar strain. In July 2013, Dr. Vantilburg, claimant's attending physician, performed a closing examination in which he concluded that claimant did not have any impairment related to the compensable injury.

SAIF issued a Notice of Closure on July 15, 2013, which awarded no permanent disability. Claimant requested reconsideration.

A medical arbiter panel examined claimant as part of the reconsideration proceeding and concluded that, while claimant had some restrictions in range of motion, those findings were related to body habitus and spondylosis, not to the compensable injury.

An Order on Reconsideration was issued in October 2013, awarding no permanent disability. Claimant requested a hearing.

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<sup>1</sup> Claimant contends that she is entitled to an impairment value for loss of plantar sensation. We are not inclined to consider that issue because it was not raised at hearing. *See Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing); *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). Nonetheless, even if we considered the issue, claimant would not be entitled to permanent impairment because this record does not establish that any impairment attributable to lost plantar sensation is due to the compensable injury.

Applying *Schleiss v. SAIF*, 354 Or 367 (2013), the ALJ declined to award permanent disability. The ALJ reasoned that where claimant's permanent impairment was wholly unrelated to the compensable injury, there was no basis to apportion disability.

On review, claimant contends that, under *Schleiss*, where permanent impairment is due to non-legally cognizable preexisting conditions, the impairment is deemed due to the compensable injury. Because the preexisting conditions in this case are not legally cognizable, claimant asserts that he is entitled to an award for any permanent impairment due to those conditions. For the following reasons, we disagree.

In *Schleiss*, the court analyzed the Director's "apportionment" rule (OAR 436-035-0013(1)) and determined that the rule was inconsistent with the statutory scheme in that it excluded non-legally cognizable conditions (*i.e.*, conditions that were not "preexisting conditions" under ORS 656.005(24)) from being rated for permanent disability purposes. In reaching its conclusion, the court reasoned that only the contributions of the component parts of a combined condition (*i.e.*, the otherwise compensable injury and the preexisting condition) should be compared in identifying the major cause of any disability (including impairment) of the combined condition. The court further determined that other contributing causes that are neither encompassed within the compensable injury nor are legally cognizable preexisting conditions do not play any role in the impairment calculus of a combined condition claim.

Applying its analysis to the case at hand, the *Schleiss* court concluded that the two "non-compensable injury-related" conditions (advanced aging from smoking and mild low back degeneration) did not constitute "preexisting conditions" under ORS 656.005(24)(a) and, as such, were not legally cognizable contributing causes. Consequently, the court found that all of the claimant's impairment was "due to" the compensable injury for purposes of granting a permanent disability award under ORS 656.214. Accordingly, the court held that we had erred in treating the claimant's "aging and degenerative changes" as contributing causes for purposes of apportioning his permanent impairment. *Id.* at 655.

This case is similar to *Schleiss* in that claimant's alleged preexisting conditions (body habitus and spondylosis) are not legally cognizable "preexisting conditions." Specifically, the record does not contain medical records before the compensable injury indicating that claimant had previously been diagnosed with

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these conditions or received treatment for symptoms of these conditions. ORS 656.005(24)(a)(A). Moreover, the record does not establish the presence of “arthritis or an arthritic condition.”

Unlike *Schleiss*, however, where there was impairment due to the compensable injury, 354 Or at 640, here, the medical evidence establishes that claimant’s impairment is wholly due to unrelated causes. Under such circumstances, the apportionment rule, OAR 436-035-0013, does not apply.

Accordingly, we conclude that where, as here, a claimant’s impairment is solely due to causes unrelated to the compensable injury, a permanent impairment award is not appropriate.<sup>2</sup> Thus, we affirm.

### ORDER

The ALJ’s order dated February 27, 2014 is affirmed.

Entered at Salem, Oregon on July 25, 2014

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<sup>2</sup> In reaching this conclusion, we distinguish *Joseph Wagner*, 66 Van Natta 485, 486 (2014), where we held that, in the absence of a legally cognizable preexisting condition, the claimant’s range of motion impairment should not have been apportioned. In *Wagner*, as in *Schleiss*, there was at least some impairment due to the compensable injuries. Here, in contrast to those cases, the medical evidence establishes that none of claimant’s impairment was due to the compensable injury. Under such circumstances, we decline to award impairment for the non-legally cognizable preexisting conditions.