

In the Matter of the Compensation of
JAMES L. WILLIAMS, Claimant
WCB Case No. 13-05123
ORDER ON RECONSIDERATION
Julene M Quinn, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers. Member Curey specially concurs. Member Weddell dissents in part.

On May 5, 2015, we abated our April 17, 2015 order that: (1) modified an Administrative Law Judge's (ALJ's) penalty and attorney awards under ORS 656.268(5)(d) and ORS 656.382(1); and (2) affirmed the ALJ's awards of 20 percent whole person impairment and 44 percent work disability for a right knee condition. In reaching these latter conclusions, we agreed with the ALJ's reasoning that claimant did not have a legally cognizable preexisting condition and that apportionment of his permanent impairment under *former* OAR 436-035-0013 was not appropriate. We abated our decision to consider the SAIF Corporation's challenge to our determinations regarding the preexisting condition and apportionment issues. Having received claimant's response, we proceed with our reconsideration. For the following reasons, we adhere to our previous decision.

Based on the opinion of claimant's attending physician, Dr. North, an October 9, 2013 Order on Reconsideration apportioned 50 percent of claimant's impairment findings to the accepted conditions (right knee posterior horn medial meniscus tear and recurrent tear of the right knee posterior horn medial meniscus) and 50 percent to preexisting osteoarthritis under OAR 436-035-0007(1). The reconsideration order ultimately awarded 12 percent whole person impairment and 18 percent work disability. Claimant requested a hearing, disputing those awards.

Finding that the medical evidence did not establish a legally cognizable "preexisting condition," the ALJ concluded that claimant's impairment should not be apportioned. *See Schleiss v. SAIF*, 354 Or 637 (2013); *Joseph Wagner*, 66 Van Natta 485 (2014). Based on that finding, and for other reasons not at issue here, the ALJ ultimately increased claimant's awards to 20 percent whole person impairment and 44 percent work disability. We adopted and affirmed that portion of the ALJ's order. *James L. Williams*, 67 Van Natta 664 (2015). On reconsideration, SAIF contests the aforementioned findings.

For purposes of determining a “preexisting condition” under ORS 656.005(24)(a)(A), the Supreme Court has concluded that the legislature intended the term “arthritis” to mean the “inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change.” *Schleiss*, 354 Or at 652-53; *Hopkins v. SAIF*, 349 Or 348, 364 (2010); *Daniel B. Slater*, 66 Van Natta 335, 337 (2014). To establish the existence of preexisting arthritis, a carrier must adduce expert testimony that the claimant suffers from “inflammation of whatever joint or joints it contends are affected by the arthritic condition.” *Schleiss*, 354 Or at 653; *Hopkins*, 349 Or at 363; see *Staffing Services, Inc. v. Kalaveras*, 241 Or App 130, 137-38, *rev den*, 350 Or 423 (2011) (“despite the existence of medical opinions in the record that [the] claimant’s condition is arthritis or arthritic, the board was required to determine in the first instance whether the record was sufficient to establish that [the] claimant suffers from that condition as legally defined”); *Michael Kelson*, 65 Van Natta 32 (2013) (interpreting *Kalaveras* to mean that there is no “arthritis” or “arthritic condition” without evidence of joint inflammation); *Paul D. Beer*, 63 Van Natta 975, *recons*, 63 Van Natta 1191 (2011) (same).

Here, the record does not indicate that claimant was diagnosed with, or received treatment for, a right knee condition before the work injury. See ORS 656.005(24)(a)(A) (except for claims in which a preexisting condition is “arthritis or an arthritic condition,” for there to be a preexisting condition, the worker must have been diagnosed with such condition or obtained medical services for symptoms of the condition, regardless of diagnosis). Therefore, the issue is whether claimant had “arthritis or an arthritic condition.”

SAIF contends that the medical evidence establishes “breakdown, degeneration, or structural change” resulting from the inflammation in claimant’s knee joint. In support of its contention, SAIF relies on a statement from Dr. Baldwin, an orthopedic surgeon who examined claimant at its request, that claimant’s “major impairment is his patellofemoral arthritis where he has lost about 75% of his joint space on x-ray and was bone-on-bone in arthroscopy.” (Ex. 33-22). SAIF also cites Dr. Baldwin’s statement that claimant had “severe patellofemoral arthritis with grade 4 changes on the patella” as support for a structural change. According to SAIF, these comments are sufficient to establish the necessary “breakdown, degeneration, or structural change” to meet the definition of “arthritis.”

SAIF also asserts that the opinion of Dr. Coletti, another examining orthopedic surgeon, supports a finding that the arthritic condition resulted in breakdown, degeneration, or structural change. SAIF notes that Dr. Coletti interpreted an x-ray as showing “medial joint space narrowing of the right knee” and “lateral patellar tilt with joint space narrowing in the patellofemoral joint of the right knee,” and refers to his statement that there were “advanced degenerative changes” in the medial facet of the patella “where essentially there was no residual cartilage left.” (Ex. 24-5, -10).

For the reasons expressed in the ALJ’s order, we are not persuaded that the medical record supports the existence of arthritis or an arthritic condition. In any event, because neither Drs. Baldwin nor Coletti were the attending physician at claim closure or the medical arbiter, and Dr. North (claimant’s attending physician) did not ratify their findings, we may not consider their opinions for impairment purposes. (Exs. 37, 46-5). *SAIF v. Owens*, 247 Or App 402 (2011), *adh’d to and clarified on recons*, 248 Or App 746 (2012);¹ *Libbett v. Roseburg Forest Prods.*, 130 Or App 50, 52 (1994); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666, 670 (1994). Therefore, the relevant record for the purpose of evaluating claimant’s impairment is limited to Dr. North’s findings, and those he ratified. *Tektronix, Inc. v. Watson*, 132 Or App 483, 486 (1995). Dr. North’s findings do not support the existence of arthritis or an arthritic condition.

In sum, the record does not persuasively establish that claimant had a legally cognizable preexisting condition. As such, apportionment of his permanent impairment was not appropriate. *See Schleiss*, 354 Or at 652-53. Consequently, we adhere to our affirmance of the ALJ’s decision awarding 20 percent whole person impairment and 44 percent work disability for claimant’s right knee condition.

Finally, because SAIF requested reconsideration of our prior order and sought further reduction in the “compensation awarded” by our order, and because we adhere to our initial determination, claimant is entitled to an attorney fee for services expended on reconsideration in response to SAIF’s request. ORS

¹ In *Owens*, the court held that, in applying the “preponderance of the medical evidence” standard of ORS 656.726(4)(f)(B) to determine a claimant’s impairment rating, “the entire universe of medical evidence that may be considered consists of the medical arbiter’s report, * * * the opinion of the attending physician, * * * and any physicians’ report in which the attending physician concurs.” 247 Or App at 415; 248 Or App at 747. In reaching its conclusion, the court explicitly rejected the carrier’s contention that the pertinent statutes merely limit the physicians who may provide impairment findings, but do not otherwise limit the medical evidence that may be considered in determining a claimant’s impairment. *Id.*

656.382(2); *Antonio L. Martinez*, 61 Van Natta 1892, 1903-04 (2009). 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 reconsideration is \$1,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the permanent impairment issue on reconsideration (as represented by claimant's response and his counsel's uncontested submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Accordingly, on reconsideration, as supplemented and modified herein, we adhere to and republish our April 17, 2015 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 August 5, 2015

Member Curey specially concurring in part.

I continue to agree with the lead opinion's decisions regarding claimant's permanent disability awards, as well as its determinations that SAIF unreasonably calculated claimant's range of motion value, and that the assessment of a penalty should be based solely on the amount then due as a result of that unreasonable ROM calculation. I continue to acknowledge being bound by *stare decisis* and incorporate herein my previous discussion of *Kerry Hagen*, 64 Van Natta 316, *recons*, 64 Van Natta 359 (2012).

Member Weddell dissenting in part.

For the reasons expressed in my previous opinion, I continue to agree with the majority's finding regarding claimant's permanent disability awards, and that claimant is entitled to a penalty under ORS 656.268(5)(d) for SAIF's unreasonable August 26, 2013 Notice of Closure. However, because I continue to disagree with the majority's conclusion regarding the amount of compensation upon which to base the penalty, I respectfully dissent. In addition, I continue to offer my own assessment of ORS 656.268(5)(d) and *Kerry Hagen*, 64 Van Natta 316, *recons*, 64 Van Natta 359 (2012), as outlined in my prior dissent.