

---

In the Matter of the Compensation of  
**MARISELA JOHNSON, Claimant**  
WCB Case Nos. 12-02168, 12-01864  
**ORDER ON RECONSIDERATION**  
Hooton Wold & Okrent LLP, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

On August 12, 2015, we reversed that portion of an Administrative Law Judge's (ALJ's) order that had increased claimant's whole person impairment award for her accepted left fingers/hand conditions from 7 percent (as granted by an Order on Reconsideration) to 9 percent. Because the SAIF Corporation had also unsuccessfully contested the reconsideration order's 7 percent award, we awarded an attorney fee under ORS 656.382(2). Contending that claimant's counsel is not entitled to an attorney fee award for services on Board review, SAIF requests reconsideration of that portion of our order. In response, claimant asserts that our attorney fee award was appropriate and also seeks reinstatement of the ALJ's permanent impairment award.

On reconsideration, SAIF contends that claimant is not entitled to an insurer-paid attorney fee award for services on review under ORS 656.382(2). Citing *Scott A. Benson*, 63 Van Natta 1437 (2001), SAIF contends that, because we reduced the ALJ's whole person impairment award from 9 percent to 7 percent (as awarded by the April 2012 reconsideration order), claimant's compensation award was reduced. Therefore, SAIF asserts that an attorney fee award under ORS 656.382(2) is not warranted. For the following reasons, we disagree.

On review, SAIF continued to contest the April 5, 2012 Order on Reconsideration's 7 percent whole person impairment award and attempted to reduce that award to zero. Although we reversed that portion of the ALJ's order that awarded an additional 2 percent whole person impairment for claimant's accepted left finger/hand conditions, we also found that the 7 percent whole person impairment award granted by that reconsideration order should not be disallowed or reduced. Under such circumstances, we granted an insurer-paid attorney fee for claimant's counsel's services on review for successfully defending the reconsideration order's permanent impairment award. ORS 656.382(2); *Roger R. Powers*, 49 Van Natta 1388, 1390-91 (1997); *Vincent D. Drennen*, 48 Van Natta 819, 820 (1996).

Consideration of the *Benson* rationale does not alter our prior determination. In *Benson*, the carrier requested a hearing, challenging a reconsideration order that awarded whole person impairment and work disability. The ALJ reduced the whole person impairment and work disability compensation awarded by the reconsideration order. Despite that reduction in the claimant's compensation awarded by the reconsideration order, the ALJ granted an assessed attorney fee under ORS 656.382(2). The carrier requested review, challenging the ALJ's permanent disability award and the assessed attorney fee award under ORS 656.382(2). *Benson*, 63 Van Natta at 1437.

On review, we reversed the ALJ's assessed attorney fee award under ORS 656.382(2), finding that, because the ALJ had determined that the compensation awarded by the reconsideration order should be reduced, an assessed attorney fee under ORS 656.382(2) was unavailable for services at the hearing level. *Benson*, 63 Van Natta at 1441.

Thus, in *Benson*, we reversed the ALJ's assessed attorney fee award under ORS 656.382(2) based on the ALJ's reduction of the reconsideration order's award. Here, unlike *Benson*, the compensation awarded by the April 2012 reconsideration order was *not* reduced or disallowed. Because SAIF continued to challenge the reconsideration order's award on Board review and was unsuccessful in that pursuit, claimant is entitled to an assessed attorney fee under ORS 656.382(2). *Powers*, 49 Van Natta at 1390-91; *Drennen*, 48 Van Natta at 820.

We next address claimant's cross-request for reconsideration regarding our apportionment of her left hand loss of strength impairment findings. On reconsideration, claimant argues that *Schleiss v. SAIF*, 354 Or 637 (2013), prohibits the apportionment of her impairment findings. She contends that the court's rationale that "to qualify for the apportionment of impairment, a cause must be legally cognizable" extends to denied conditions. *Schleiss*, 354 Or at 655. Thus, claimant reasons that, because her "denied" left shoulder condition is not a legally cognizable "preexisting condition," apportionment of her impairment is not appropriate.

In other words, claimant essentially argues that *Schleiss* *comprehensively* defined the "legally cognizable conditions" that could qualify for apportionment of impairment and determined that such "legally cognizable conditions" were limited to "legally cognizable *preexisting conditions*." We disagree with claimant's interpretation of the *Schleiss* rationale. Instead, we consider the holding in *Schleiss* to pertain to the issue before the court; *i.e.*, the application of the "apportionment"

rule regarding “preexisting conditions.” In contrast, here, the issue concerns the application of the “apportionment” rule regarding both a denied condition and conditions that were accepted after closure of this claim. Thus, the question before us is whether those conditions present “legally cognizable conditions” that qualify for apportionment of impairment under OAR 436-035-0013.<sup>1</sup> As explained below, they do.

In *Schleiss*, the medical arbiter attributed a portion of the claimant's impairment findings to “pre-existing mild DJD and long history of smoking.” *Id.* at 640. The record did not establish that either cause was a legally cognizable preexisting condition. *Id.* at 651-52. Therefore, reasoning that the “apportionment” requirement was not satisfied, the court ruled that all of the claimant's impairment was considered to be “due to” the compensable injury for purposes of making a permanent disability award. *Id.* at 655; *Jon M. Schleiss*, 66 Van Natta 413 (2014) (on remand).

As we explained in our initial order, *Schleiss* is distinguishable. In *Schleiss*, there was no denied claim.<sup>2</sup> Therefore, the court did not address the effect a denied claim would have on its analysis. Nevertheless, the court’s reasoning focused on benefits available *after* an injury is determined to be compensable.

In this regard, the court conducted an extensive overview of the statutory scheme, which provided the “necessary context for [its] consideration of the administrative rule at issue here.”<sup>3</sup> *Id.* at 650. In presenting that overview, the

---

<sup>1</sup> The relevant language of this apportionment rule is presented in footnote 3 below.

<sup>2</sup> In contrast, here, in January 2012, SAIF denied claimant’s new/omitted medical condition claim for a left rotator cuff tear, left upper arm sprain, left elbow sprain, left forearm sprain, and cervical disc disorder. (Ex. 78).

<sup>3</sup> The language of the apportionment rule, OAR 436-035-0013(1), interpreted by the court provides:

“The physician describes the current total overall findings of impairment, then describes those findings that are due to the compensable condition. In cases where a physician determines a specific finding (e.g. range of motion, strength, instability, etc.) is partially attributable to the accepted condition, only the portion of those impairment findings that is due to the compensable condition receives a value. When apportioning impairment findings, the physician must identify any applicable superimposed or unrelated conditions.”

Here, because claimant's claim was closed by a March 3, 2009 Notice of Closure, the applicable standards are found in WCD Admin. Order 07-060 (eff. Jan. 1, 2008). OAR 436-035-0003(1). Thus, the same language interpreted by the court in *Schleiss* applies here.

court explained: “*After an injury is determined to be compensable*, benefits are payable under specific statutes, including temporary disability to replace lost wages (ORS 656.210), medical services (ORS 656.245), permanent disability to compensate for permanent loss of earning capacity (ORS 656.214), and vocational services for retraining (ORS 656.340).” *Schleiss*, 354 Or at 645 (emphasis added).

Thus, the *Schleiss* decision is premised on a compensability determination, without consideration of a denial of a new/omitted medical condition or other claim. As such, the *Schleiss* rationale does not support the proposition that apportionment of impairment is prohibited in the presence of a denied “impairment-related” condition.

Furthermore, given the focus of the *Schleiss* decision, its holding does not mean that “legally cognizable” *preexisting conditions* are the only “legally cognizable conditions” to which the apportionment rule may apply.<sup>4</sup> In other words, a “denied condition” is another “legally cognizable condition” to which the “apportionment” rule applies. We reason as follows.

As we previously explained, conditions that are the direct medical sequelae to the original accepted condition shall be included in rating permanent disability of the claim, unless they have been specifically denied. ORS 656.268(15). Furthermore, a worker is entitled to a value under the Director's rules only for those findings of impairment that are permanent and were caused by the accepted compensable condition and direct medical sequela. OAR 436-035-0007(1); *see Stuart C. Yekel*, 67 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”); *Jonathan E. Ayers*, 56 Van Natta 1103, *recons*, 56 Van Natta 1470, 1472 (2004) (a condition that was in denied status as of the date of the issuance of the reconsideration order, which is the time a claimant's disability is evaluated under ORS 656.283(6), cannot be considered in rating permanent disability due to the compensable injury). Finally, unrelated or noncompensable impairment findings are excluded and are not valued under these rules. OAR 436-035-0007(1).

---

<sup>4</sup> In this regard, the court stated that “if a preexisting contributing cause would not qualify to reduce the impairment that is “due to” a compensable combined condition under ORS 656.268(1)(b), it makes no sense to conclude that such a cause would qualify to reduce the impairment that is “due to” a claimant's compensable injury under ORS 656.214.” *Schleiss*, 354 Or at 654. The court added a footnote explaining that: “We deliberately refer to a preexisting contributing cause in making this point. This case does not present an occasion to decide whether – or under what circumstances – contributing cause arising after a compensable injury would be legally cognizable for purposes of apportioning impairment under ORS 656.214.” *Id.* at 654 n 6. Thus, the court emphasized that it was referring to a “preexisting contributing cause.”

Thus, based on the aforementioned points and authorities, the inclusion of impairment from a denied condition in the evaluation of permanent disability for an accepted claim would be inappropriate. Those same points and authorities also support the proposition that a “denied condition” is a “legally cognizable condition” under the statutory scheme for purposes of application of the apportionment rule.<sup>5</sup>

In addition, as we previously explained, if a condition is found compensable after claim closure, the carrier shall reopen the claim for processing regarding that condition. ORS 656.262(7)(c); *see Ayers*, 56 Van Natta at 1470-71 (the appropriate time to address permanent disability from a “post-closure” compensable condition is after the carrier has reopened and reclosed the claim). Thus, these points and authorities support the proposition that a “post-closure” accepted condition is another “legally cognizable condition” under the statutory scheme for purposes of application of the apportionment rule.<sup>6</sup>

Furthermore, here, SAIF accepted a left shoulder sprain and left trapezius muscle strain *after* the November 2011 Notice of Closure issued. (Exs. 50, 77). Therefore, as we previously found, claimant’s accepted left shoulder conditions will be rated in a separate claim closure proceeding. ORS 656.262(7)(c); *Ayers*, 56 Van Natta at 1470-71. Thus, in addition to the denied left shoulder conditions (which included a left rotator cuff tear), there were also “post-closure” accepted left shoulder conditions, both of which qualify as “legally cognizable conditions” for purposes of application of the apportionment rule.

---

<sup>5</sup> In addition, the statutory scheme provides for the denial of new/omitted medical condition claims and requests for hearing under ORS 656.283 regarding such denied claims. *See* ORS 656.262(6)(c); ORS 656.267(2)(b). Furthermore, again consistent with the statutory scheme, should such denials be overturned, a carrier must reopen the claim and process it to closure. *See* ORS 656.262(7)(c).

<sup>6</sup> Moreover, the “apportionment” rule specifically apportions the rating of a claimant’s permanent impairment to that portion of the findings that are due to the compensable condition. This rule is consistent with the intent of the statutory scheme to vest original jurisdiction of impairment/disability evaluations with the Workers’ Compensation Division (WCD)/Director and compensability determinations with the Board. *See Jeld Wen, Inc. v. Cooper*, 270 Or App 186, 191 (2015) (on behalf of the WCD/Director, the Appellate Review Unit (ARU) is authorized to evaluate impairment/disability due to the compensable injury on closure of the accepted claim, whereas a compensability determination is not within its statutory authority under ORS 656.704(3)(a)). Consistent with the *Cooper* court’s analysis of the statutory scheme, consideration of impairment from denied or “post-closure” accepted conditions would “short-circuit” the evaluation process for a closed claim. *See Claudia S. Stryker*, 67 Van Natta 1003, 1007 n 4 (2015) (application of the “apportionment” rule excludes permanent impairment from the “preexisting condition” component of an unclaimed/unaccepted combined condition as ratable impairment under the accepted claim).

Finally, claimant contends that the medical arbiter attributed 50 percent of her permanent impairment to the shoulder, without identifying any specific condition within the shoulder.<sup>7</sup> She asserts that, therefore, it is impossible to determine whether the arbiter was referring to a “legally cognizable condition.” We disagree.

As we previously explained, the medical arbiter’s opinion apportioning 50 percent of claimant's left hand loss of strength findings to her “shoulder” referred entirely to conditions that cannot be considered in rating her current permanent impairment for her accepted left fingers/hand conditions (*i.e.*, either impairment due to the denied left shoulder rotator cuff tear, or impairment due to the left shoulder conditions that were accepted after the current claim closure, which will be rated in a separate claim closure proceeding pursuant to ORS 656.262(7)(c)). Therefore, for the reasons explained in our prior order, as supplemented herein, we continue to find that claimant's left hand loss of strength findings should be apportioned.

Accordingly, our August 12, 2015 order is withdrawn. On reconsideration, as supplemented herein, we republish our August 12, 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 September 11, 2015

---

<sup>7</sup> In support of this argument, claimant contends that the medical arbiter did not attribute impairment to the denied left shoulder condition and that his impression was that there was a claimed partial tear or, in the alternative, that there had been an aggravation of the left shoulder. She also contends that the alleged partial rotator cuff tear did not exist at the time of closure, asserting that a December 1, 2011 MR arthrogram did not show any pathology consistent with a tear of the rotator cuff. Yet, we note that the December 1, 2011 report regarding the MR arthrogram of the left shoulder listed the following result/impression: “1. No labral tear is identified of the left shoulder. 2. No *complete, full-thickness* rotator cuff tear is seen.” (Ex. 55) (Emphasis added).