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

Reviewing Panel: Members Lanning and Curey.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) increased claimant's whole person permanent impairment award for left hand conditions from 7 percent, as granted by an Order on Reconsideration, to 9 percent; and (2) awarded a \$2,000 attorney fee award. On review, the issues are permanent disability (impairment) and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and summarize the pertinent facts as follows.

On July 22, 2011, claimant, a housekeeper, was compensably injured when her left hand was caught under a closing elevator door. (Exs. 1, 4). SAIF accepted contusions to the distal left third, fourth, and fifth fingers, and an abrasion to the distal left middle finger. (Exs. 5, 27).

In August 2011, claimant sought treatment for left forearm, shoulder, and upper back pain, which she related to pulling her hand out of the closing elevator door. (Ex. 6). An MRI revealed a partial thickness tear of the supraspinatus tendon. (Ex. 10).

Claimant continued to seek treatment for her left shoulder, left arm, neck, and upper back pain. (*See* Exs. 6 through 9, 12 through 17, 20 through 38, 40 through 49, 52 through 67, 70 through 76, 79, 80, 82 through 86). She was diagnosed with a left trapezius muscle strain, partial-thickness rotator cuff tear, left shoulder sprain, left upper arm sprain, cervical disc disorder, left elbow sprain, left forearm sprain, and cervical sprain/strain. (*See id.*)

On October 28, 2011, Dr. Chang, her attending physician, examined claimant's left hand and found no edema, ecchymosis, tenderness, or loss of sensation. (Ex. 35-2). She did not document any range of motion (ROM)

measurements of the fingers or hand. (*Id.*) Dr. Chang reported that claimant's left hand conditions had resolved. (*Id.*) In a subsequent "check-the-box" concurrence letter, Dr. Chang confirmed that claimant's accepted left finger conditions were medically stationary as of October 28, 2011, and those conditions had resolved without any ratable permanent impairment. (Ex. 39).

A November 22, 2011 Notice of Closure did not award permanent impairment for claimant's accepted left finger conditions. (Ex. 50). Claimant requested reconsideration and the appointment of a medical arbiter. (*See* Ex. 93).

On January 23, 2012, SAIF modified its acceptance to include a left shoulder sprain and left trapezius muscle strain. (Ex. 77). That same day, it 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).

On March 5, 2012, Dr. Balkovich performed a medical arbiter examination to determine claimant's permanent impairment related to her accepted left middle finger contusion/abrasion, left ring finger contusion, and left little finger contusion. (Ex. 87). He listed his "Impression" of claimant's conditions as:  
“(1) Crush injuries left index, long, ring, and possibly little fingers left hand.  
(2) Claimed rotator cuff, partial tear or aggravation, left shoulder.” (Ex. 87-4).  
Dr. Balkovich documented decreased ROM, 4/5 grip strength, cold intolerance, and loss of sensation in the left middle and ring fingers, and decreased ROM, 4/5 grip strength, and cold intolerance in the left little finger. (Ex. 87-3-5). He attributed 100 percent of the loss of ROM and cold intolerance to the accepted conditions. (Ex. 87-5).

Dr. Balkovich described claimant's loss of grip strength as “a combined condition related to her shoulder, her hand, and to disuse,” and attributed “50% due to her shoulder and 50% due to her hand.” (Ex. 87-5). He also expressed uncertainty about the validity of the sensory findings in claimant's left fingers but stated, if valid, that the findings were 100 percent due to the accepted left hand injury. (*Id.*) In doing so, Dr. Balkovich agreed with a previous medical examiner that claimant exhibited nonphysiologic responses or behavior during examination, which he suspected was multifaceted, but stated that he was “not qualified to unravel this issue.” (Ex. 87-5-6).

On April 5, 2012, an Order on Reconsideration modified the November 2011 closure notice. (Ex. 93). The reconsideration order stated that SAIF had denied a left rotator cuff tear, left upper arm sprain, left elbow sprain, left forearm

sprain, and cervical disc disorder. (Ex. 93-1). The reconsideration order further noted that SAIF had accepted, “post-closure,” a left shoulder sprain and left trapezius muscle sprain, none of which were subject to the reconsideration proceeding. (*Id.*) The Order on Reconsideration stated that the proceeding was limited to the accepted contusions to the distal left third, fourth and fifth fingers, and abrasion to the left middle finger. (*Id.*)

Based on Dr. Balkovich’s medical arbiter findings, the reconsideration order awarded a left hand impairment value of 7 percent for loss of ROM for the left fingers. (Ex. 93-2-3). The order also found 14 percent whole person impairment for 4/5 grip strength in the left hand, which it apportioned by 50 percent based on Dr. Balkovich’s report, for a total of 7 percent impairment of loss of strength in the hand. (Ex. 93-3).<sup>1</sup> The left hand impairment values were combined for a total of 14 percent, which was converted to 7 percent whole person impairment. (Ex. 93-4).

SAIF requested a hearing, contending that the Appellate Review Unit (ARU) erred in determining that the medical arbiter’s findings were valid and ratable, and sought a reduction of claimant’s permanent impairment award to zero. Claimant cross-requested a hearing, arguing that the ARU erred in apportioning the impairment value for her strength loss findings.

### CONCLUSIONS OF LAW AND OPINION

The ALJ determined that a preponderance of the medical evidence did not establish that the findings of Dr. Chang, claimant’s attending physician, were more accurate than those of Dr. Balkovich, the medical arbiter. Citing *Schleiss v. SAIF*, 354 Or 637 (2013), the ALJ also determined that apportionment of claimant’s strength loss findings was inappropriate because there was no evidence to establish that claimant’s left shoulder condition was a legally cognizable preexisting condition under ORS 656.005(24)(a).<sup>2</sup> Accordingly, the ALJ increased the 7 percent whole person impairment award, as granted by the reconsideration order, to 9 percent. Because SAIF had challenged the reconsideration order’s permanent impairment award, and because the ALJ found that the compensation awarded by the reconsideration order should not be reduced or disallowed, the ALJ awarded a \$2,000 assessed attorney fee under ORS 656.382(2).

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<sup>1</sup> No impairment values were given for sensory loss or cold intolerance. (Ex. 93-3). That portion of the reconsideration order was not contested.

<sup>2</sup> The ALJ stated that the left shoulder condition “presumably is the rotator cuff condition that was diagnosed by [Dr.] Balkovich[.]” (Opinion and Order at 8).

On review, SAIF argues that claimant is not entitled to any permanent impairment award because the findings of Dr. Chang were more accurate than those of Dr. Balkovich. Thus, it continues to challenge the reconsideration order's award and seeks reinstatement of its Notice of Closure. Alternatively, SAIF contends that, if Dr. Balkovich's medical arbiter findings are used, claimant's impairment value for strength loss should have been apportioned. Consequently, it also challenges the ALJ's increased permanent impairment award.

We adopt that portion of the ALJ's order that determined that a preponderance of the medical evidence did not establish that the findings of the attending physician were more accurate than those of the medical arbiter. However, we conclude that, based on Dr. Balkovich's report, the impairment value for strength loss in claimant's left fingers/hand should be apportioned. We reason as follows.

Claimant has the burden of proving the nature and extent of her disability. ORS 656.266(1). However, as the party challenging the Order on Reconsideration, SAIF has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000).

Evaluation of claimant's disability shall be as of the date of the issuance of the reconsideration order; *i.e.*, April 5, 2012. ORS 656.283(6). 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). 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).<sup>3</sup> Unrelated or noncompensable impairment findings are excluded and are not valued under these rules. *Id.*

In *Schleiss*, the court held that "to qualify for the apportionment of impairment, a cause must be legally cognizable." 354 Or at 655. There, 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. There was no evidence in the record that either cause was a legally cognizable preexisting condition. *Id.* at 651-52. Therefore, because the "apportionment" requirement was not satisfied, 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).

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<sup>3</sup> Because claimant's claim was closed by a November 22, 2011 Notice of Closure, the applicable standards are found in WCD Admin. Order 10-051 (effective June 1, 2010). *See* OAR 436-035-0003(1).

Here, in apportioning claimant's left hand loss of grip strength, Dr. Balkovich opined that "50% [was] due to her shoulder and 50% due to her hand." (Ex. 87-5). Dr. Balkovich referred to claimant's left shoulder condition as a partial rotator cuff tear. (Ex. 87-1-2, -4). If the *Schleiss* rationale was applicable to this claim, because Dr. Balkovich did not identify any legally cognizable "preexisting conditions," apportionment would not be appropriate. However, the *Schleiss* holding is distinguishable.

Unlike in *Schleiss*, claimant's left shoulder rotator cuff tear condition was in denied status as of the date of issuance of the April 5, 2012 reconsideration order. (See Exs. 78, 93). As such, the reconsideration proceeding was limited to the accepted left finger/hand conditions. (Ex. 93-1). Therefore, to the extent that Dr. Balkovich apportioned claimant's left hand loss of strength to the denied left shoulder rotator cuff tear, she is not entitled to impairment related to that condition. ORS 656.268(15); OAR 436-035-0007(1); *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). Consequently, apportionment of claimant's permanent impairment under OAR 436-035-0013 is appropriate. *Talbot D. Christensen*, 64 Van Natta 1247, 1249 (2012) (apportionment of permanent impairment appropriate where the medical arbiter specifically attributed a portion of the claimant's impairment findings to a denied condition).

Furthermore, 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). Here, SAIF accepted a left shoulder sprain and left trapezius muscle strain on January 23, 2012, *after* the November 2011 Notice of Closure issued. (See Exs. 50, 77). As previously noted, the reconsideration proceeding was limited to the accepted left finger/hand conditions. (Ex. 93-1). Thus, claimant's accepted left shoulder conditions will be rated in a separate claim closure proceeding. 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).

Citing *Leonard L. Seeger*, 67 Van Natta 263 (2015), claimant argues that apportionment is inappropriate. Based on the following reasons, *Seeger* is inapposite.

In *Seeger*, the attending physician concurred with a medical examiner's opinion, which attributed 50 percent of the claimant's impairment findings to the work injury and subsequent surgeries, and 50 percent to his preexisting degenerative disc disease, the natural degenerative process, and his 45-pack-per-year history of cigarette smoking. 67 Van Natta at 268. We acknowledged that the claimant had legally cognizable "preexisting conditions" (*i.e.*, cervical spondylosis and osteoarthritis). *Id.* at 275-76. In addition, we found that two of the alleged preexisting conditions (the natural degenerative process and the history of cigarette smoking) were not legally cognizable "preexisting conditions" under ORS 656.005(24)(a)(A). *Id.* at 274-75.

Given such circumstances, we reasoned that, in the absence of ratable impairment findings that apportioned only legally cognizable "preexisting conditions," we were unable to make such a determination. *Id.* at 275-76 (citing *Benz v. SAIF*, 170 Or App 22, 25 (2000), and *SAIF v. Calder*, 157 Or App 224, 227 (1998)). Therefore, we held that the claimant's permanent impairment was not subject to apportionment. *Id.* at 276.

*Seeger* is distinguishable from the present claim. There, the physician's findings assigned a single percentage for impairment that *could* be apportioned (impairment due to legally cognizable "preexisting conditions") and impairment that could *not* be apportioned (impairment due to nonlegally cognizable "preexisting conditions"). As such, we were unable to discern "apportionable" impairment from "unapportionable" impairment findings.

Here, in contrast to *Seeger*, Dr. Balkovich'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 "post-closure" accepted left shoulder conditions). Therefore, for the reasons explained above, we find that claimant's left hand loss of strength findings should be apportioned.

Because we conclude that claimant's impairment value for left hand strength loss should be apportioned, and because the Order on Reconsideration's 7 percent whole person impairment award was based on apportionment of that impairment value and the parties do not dispute the ARU's calculation, claimant is entitled to 7 percent whole person impairment as awarded in the reconsideration order. (Ex. 93-3-4).

Based on the foregoing reasons, we reverse that portion of the ALJ's order that modified the April 5, 2012 Order on Reconsideration to award an additional 2 percent whole person impairment for claimant's accepted left finger/hand conditions. The Order on Reconsideration is reinstated and affirmed.

Additionally, because we find that the 7 percent whole person impairment award granted by the Order on Reconsideration should not be disallowed or reduced, as explained above, we affirm the ALJ's \$2,000 assessed attorney fee award for services at hearing regarding SAIF's challenge to the reconsideration order's compensation award under ORS 656.382(2). Also, on review, SAIF contested the Order on Reconsideration's 7 percent whole person impairment award and attempted to reduce claimant's award to zero. Because that attempt was unsuccessful, it is appropriate to award claimant's counsel a carrier-paid attorney fee for services expended on Board review regarding that issue. ORS 656.382(2); *Roger R. Powers*, 49 Van Natta 1388, 1390-91 (1997); *Vincent D. Drennen*, 48 Van Natta 819, 820 (1996).

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable fee for claimant's attorney's services on Board review regarding claimant's successful defense of the Order on Reconsideration award is \$2,750, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant's appellant's brief, and his counsel's fee submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.<sup>4</sup>

### ORDER

The ALJ's order dated February 12, 2015 is reversed in part and affirmed in part. That portion of the ALJ's order that increased claimant's whole person impairment award for her accepted left fingers/hand conditions to 9 percent is reversed. The Order on Reconsideration's award of 7 percent whole person impairment is reinstated and affirmed. The ALJ's "out-of-compensation" attorney fee award is reversed. For services on review, claimant's counsel is awarded an assessed fee of \$2,750, payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 12, 2015

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<sup>4</sup> Claimant's counsel is not entitled to an attorney fee award for services devoted to the unsuccessful defense of the ALJ's increased permanent impairment award.