
In the Matter of the Compensation of
STUART C. YEKEL, Claimant
WCB Case No. 14-00431
ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: *En Banc*. Members Curey, Weddell, Johnson, Lanning, and Somers. Members Weddell and Lanning dissent.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Otto's order that awarded 15 percent whole person permanent impairment for claimant's left shoulder condition, whereas an Order on Reconsideration had awarded no permanent impairment. On review, the issue is permanent disability (impairment). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

In May 2012, claimant sustained a compensable left shoulder injury, which was initially accepted as a left shoulder strain. In November 2012, Dr. Bollom performed left shoulder surgery and, in July 2013, performed a closing examination. In a subsequent report, Dr. Bollom explained that claimant had "some limitation" in the repetitive use of his left shoulder. (Ex. 5). He noted that the November 27, 2012 surgery (resection of the acromion and clavicle) was necessitated by claimant's "left subacromial impingement with a. c. joint arthritis." (Ex. 5-2). He apportioned 85 percent of claimant's impairment to the accepted conditions. *Id.* Finally, Dr. Bollom concluded that claimant was released to perform his regular job duties. (Ex. 8).

In September 2013, SAIF modified its acceptance to include a high grade long head biceps tear. Thereafter, SAIF issued a Notice of Closure that did not award any permanent disability. Claimant requested reconsideration and appointment of a medical arbiter.

In November 2013, Dr. Bollom concluded that claimant developed an impingement syndrome as a direct consequence of his industrial injury, which was the major cause of the need to perform the distal clavicle and acromion resections.

Dr. Bollom also concluded that claimant had a chronic condition as a consequence of the accepted injury that significantly limited his ability to repetitively use the left shoulder. (Ex. 16).

In January 2014, the arbiter, Dr. Brenneke, opined that claimant was not significantly limited in the repetitive use of the left shoulder due to the accepted conditions or medical sequelae, and that the loss of the distal portion of claimant's clavicle and the acromion in surgery was due to unrelated subacromial impingement and degenerative joint disease of the acromioclavicular joint. (Ex. 17-9).

In January 2014, an Order on Reconsideration affirmed the Notice of Closure. The arbiter's report, however, was not received in time to be considered. (Ex. 18-1). Thus, the reconsideration order rated claimant's permanent disability based on the attending physician's (Dr. Bollom's) impairment findings.¹ The order explained that no permanent disability was awarded for "chronic condition" impairment because Dr. Bollom opined that claimant was not significantly restricted in repetitive activities performed by the left shoulder due to the accepted conditions. The order also declined to award an impairment value for claimant's surgery because it was not due to the accepted conditions. Claimant requested a hearing.

In awarding permanent impairment, the ALJ applied *Brown v. SAIF*, 262 Or App 640 (2014), *rev allowed*, 356 Or 397 (2014), to the rating of claimant's permanent disability attributable to his compensable left shoulder injury (which SAIF had accepted as a strain and long head biceps tear). Noting that Dr. Brenneke had opined that claimant was not "significantly limited" in the repetitive use of his left shoulder "due to the accepted condition or direct medical sequelae," the ALJ reasoned that the arbiter had not applied the proper analysis. Because Dr. Bollom eventually opined that claimant's "accepted injury" significantly limited claimant's ability to repetitively use his left shoulder, the ALJ relied on that finding and awarded 5 percent chronic condition impairment.

Turning to claimant's "surgery" impairment, the ALJ applied similar reasoning. Because the arbiter referred to claimant's accepted conditions, rather than his compensable injury, the ALJ discounted the arbiter's findings (which

¹ Although Dr. Bollom's November 2013 report was added to the reconsideration record, the reconsideration order rated claimant's permanent impairment on Dr. Bollom's August 2013 report detailing the impairment findings at claim closure. (Exs. 5, 18-2).

attributed claimant's "surgery" impairment to unrelated subacromial impingement and degenerative joint disease at the acromioclavicular joint) and instead relied on Dr. Bollom's findings. Because Dr. Bollom had found that claimant developed impingement syndrome as a direct consequence of his injury and opined that the major cause of the resection surgery was the work injury, the ALJ found that the attending physician addressed the proper standard and was in the best position to rate claimant's permanent impairment.

The ALJ reasoned that, unlike the situation in *Schleiss v. SAIF*, 354 Or 637 (2013), legally cognizable conditions had been identified. The ALJ also acknowledged that Dr. Bollom had apportioned claimant's impairment between his preexisting conditions (AC joint arthritis, rotator cuff tendinitis, degenerative slap tear and rotator cuff disease/subacromial impingement) and his "accepted condition"; *i.e.*, 85 percent due to "accepted conditions" and 15 percent to the preexisting conditions.

Nonetheless, noting that Dr. Bollom had subsequently opined that claimant developed an impingement syndrome as a direct consequence of the work injury and attributed the major cause of claimant's surgery to his work injury (and further observing that the references to "accepted conditions" were contrary to the *Brown* rationale), the ALJ determined that claimant was entitled to the full impairment value. Accordingly, the ALJ awarded 15 percent whole person impairment for the left shoulder.

On review, SAIF contends that *Brown* is limited to the phrase of "otherwise compensable injury" as used in ORS 656.262(6)(c), ORS 656.266(2)(a), and ORS 656.005(7)(a)(B). Because the present dispute involves an evaluation of permanent disability, not compensability, SAIF asserts that impairment is based on findings caused by the "accepted compensable condition and direct medical sequelae." *See* OAR 436-035-0007(1).² Consequently, SAIF argues that *Brown* does not apply.

² That rule provides:

"Except for OAR 436-035-0014, a worker is entitled to a value under these rules only for those findings of impairment that are permanent and were caused by the accepted compensable condition and direct medical sequelae. Unrelated or noncompensable impairment findings are excluded and are not valued under these rules. Permanent total disability is determined under OAR 436-030-0055."

Claimant responds that “impairment” refers to the loss of use or function of a body part/system “due to the compensable industrial injury.” ORS 656.214(5). Based on the *Brown* rationale, he contends that “compensable injury” is not limited to accepted conditions, but rather extends to the work-related injury incident. Asserting that the arbiter’s findings are contrary to the *Brown* holding, claimant reasons that the “attending physician” findings (which refer to the “industrial injury” and “accepted injury”) are more accurate and must be applied. Having considered the parties’ arguments, we proceed with our analysis.

With respect to rating impairment, pre- and-post *Brown*, there is administrative and statutory support, as well as case precedent, for the proposition that accepted “conditions” determine what is ratable. *See* ORS 656.268(15); OAR 436-035-0007(1). We have previously determined that an evaluation of permanent disability is limited to the accepted conditions and direct medical sequelae of those conditions. *See Percy W. Brigham*, 63 Van Natta 1519, 1520 (2011) (citing *Kruhl v. Foreman Cleaners*, 194 Or App 125, 130-31 (2004) (“Implicit in OAR 436-035-0007(14) (1999), however, is the requirement that the rated impairment is compensable; *i.e.*, caused by the accepted condition”) for the proposition that impairment must be caused by the accepted condition). We have further held that unaccepted conditions that merely arise from the same injury as the accepted conditions, but are not “direct medical sequelae” of those accepted conditions, do not entitle a claimant to permanent disability. *See Khamphouk Thanasouk*, 60 Van Natta 20, 22 (2008) (medical evidence attributing the claimant’s impairment directly to the work injury or to unaccepted conditions did not entitle the claimant to permanent disability). Finally, we have held that conditions denied before the closure (that are found compensable after claim closure) should not be evaluated in the proceeding regarding the claim closure to determine the extent of permanent disability arising from that closure; rather, the appropriate time to address permanent disability from “post-closure” compensable conditions is after the carrier has reopened and reclosed the claim. *See Jonathan E. Ayers*, 56 Van Natta 1103 (2004), *recons*, 56 Van Natta 1470, 1471 (2004) (when a combined condition was accepted and denied before claim closure, only impairment findings related to the claimant’s accepted right shoulder strain and its direct medical sequela were considered; under ORS 656.262(7)(c), the appropriate time to address permanent disability from the “post-closure” compensable condition is after the carrier has reopened and reclosed the claim); *see also Jonathan M. Humphrey*, 61 Van Natta 357, 358 (2009) (where the carrier issued a “ceases” denial before claim closure, the closure was not premature because the statutory framework contemplates that objections to closure are evaluated separately from questions of compensability).

Since *Brown*, we have continued to evaluate permanent disability based on the accepted condition when the claim was closed. Accordingly, in *Minkyu Yi*, 67 Van Natta 296 (2015), we did not rate the claimant's entire permanent impairment where a "pre-closure" denial of the claimant's "current condition" was set aside as "invalid" after the closure. Instead, we determined that issues arising out of that closure were controlled by *Ayers* and its progeny. Moreover, the court's "post-*Brown*" analysis of the statutory scheme supports our approach. See *Jeld Wen, Inc. v. Cooper*, 270 Or App 186, 191 (2015) (the Workers' Compensation Division (WCD)/Director 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)).

The issue in this case is whether the *Brown* rationale should be applied in the context of rating permanent disability. For the following reasons, we decline to do so.

In *Brown*, the court held that in analyzing a "ceases" denial under ORS 656.262(6)(c), a carrier must prove that the "otherwise compensable injury" (*i.e.*, the work-related injury incident, not the accepted condition), is no longer the major contributing cause of the disability or need for treatment of the combined condition. Therefore, under ORS 656.262(6)(c), a carrier may deny an accepted combined condition if the "otherwise compensable injury" (*i.e.*, the work-related injury incident) ceases to be the major contributing cause of the disability or need for treatment of the combined condition.

At the outset, we observe that the *Brown* court addressed the phrase "otherwise compensable injury" in ORS 656.262(6)(c), ORS 656.266(2)(a), and ORS 656.005(7)(a)(B). This claim, on the other hand, concerns claim closure and permanent disability rating under ORS 656.262(7)(c) and ORS 656.268(15).

ORS 656.262(7)(c) requires that an updated Notice of Acceptance be issued at claim closure that specifies which "conditions" are compensable. The statute further references ORS 656.262(6)(d), stating that the procedures specified in that subsection, which concern, among other things, objections to acceptance notices where a "condition" has been incorrectly omitted, apply to an acceptance notice. ORS 656.262(7)(c) provides that any objection to the updated notice or the appeal of "denied conditions" shall not delay claim closure and that if a "condition" is found compensable after claim closure, the carrier shall reopen the claim for processing of that "condition."

Furthermore, ORS 656.268(15) provides: “[c]onditions that are direct medical sequelae to the original *accepted condition* shall be included in rating permanent disability of the claim unless they have been specifically denied.” (Emphasis supplied). In addition, OAR 436-035-0007(1) provides that a worker is entitled to a value for findings of impairment that are permanent and caused by the “*accepted compensable condition* and direct medical sequela.” (Emphasis supplied). ORS 656.726(4)(f) specifically grants the Director authority to provide standards for the evaluation of disabilities. Both the Board and ALJs are required to apply those standards. ORS 656.283(6); ORS 656.295(5). Because the applicable Director’s disability standard expressly confines the rating of claimant’s permanent impairment to his accepted condition and because such a directive is not directly contrary to the *Brown* rationale, we are obliged to comply with the Director’s rule. See *Godinez v. SAIF*, 269 Or App 578, 582 (2015) (deferring to the Appellate Review Unit’s (ARU) interpretation of a rating rule where the interpretation was not inconsistent with the wording of the rule or any other source of law).

The above statutory and administrative authority make clear that impairment is awarded based on the accepted conditions and the direct medical sequelae of the accepted conditions and provides a process for addressing disputes over the scope of the accepted conditions when a claim is closed. Were we to apply the *Brown* rationale, with its emphasis on the “work-related injury incident,” in the context of rating permanent disability, it would require us to disregard the “accepted condition-based” focus of the preceding statutes.³ Moreover, it would be inconsistent with the aforementioned statutes that require application of the disability standards. Under these circumstances, we decline to extend the *Brown* holding⁴ outside its context of compensability disputes arising under ORS 656.262(6)(c), ORS 656.266(2)(a), and ORS 656.005(7)(a)(B).⁵

³ We acknowledge that ORS 656.214(1) and ORS 656.726(4)(f)(A) refer to rating impairment due to the “compensable industrial injury.” Yet, those statutes do not expressly mandate how that impairment is determined. For the reasons expressed above, we are persuaded that the overall statutory scheme involving claim closure and the rating of permanent disability, with its emphasis on the acceptance and processing of “conditions,” provides for a determination of permanent disability due to the compensable industrial injury that focuses on impairment due to accepted conditions and their sequelae. Because *Brown* concerned different statutes in the context of a compensability dispute, that case is distinguishable.

⁴ The Court of Appeals has also held that the *Brown* standard applies in the context of consequential conditions under ORS 656.005(7)(a)(A). *English v. Liberty Northwest*, 271 Or App 211 (2015). However, like *Brown*, *English* concerned a compensability issue involving a statute not applicable to the rating of permanent disability. Thus, we likewise conclude that *English* does not apply in this case.

We now proceed with our analysis of the permanent disability issue, which focuses on permanent impairment due to the accepted conditions.

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Only findings of impairment that are permanent and caused by the accepted compensable condition may be used to rate impairment. OAR 436-035-0007(1); *Khrul*, 194 Or App at 130.

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's permanent impairment to the compensable condition, "the medical arbiter's report provides the default determination of a claimant's impairment." *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146, 152 (2004). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012); *Joan Beaver*, 65 Van Natta 1804, 1808-09 (2013) (attending physician's findings used to rate permanent impairment where those findings were found to be more accurate than a medical arbiter's ambiguous findings).

Here, the medical arbiter, Dr. Brenneke, opined that claimant was not significantly limited in the repetitive use of the left shoulder due to a chronic or permanent medical condition. Further, Dr. Brenneke did not attribute claimant's need for shoulder surgery (partial resections of the acromion and clavicle) to the accepted conditions. (Ex. 17).

⁵ A claimant who contends that the compensable conditions to be rated extend beyond those reflected in the Notice of Acceptance may object to the acceptance notice or initiate claims for new/omitted medical conditions at any time. See ORS 656.262(6)(d); ORS 656.267(1). If new/omitted conditions are found compensable, the claim must be reopened and processed to closure, at which time the record will be further developed for the rating of impairment for those subsequently claimed/accepted conditions. See ORS 656.262(7)(c); *Ayers*, 56 Van Natta at 1471 ("because of this statutory procedure for reopening the claim for processing, our decision in this case does not deprive claimant of an opportunity to obtain compensation for the 'post-closure' compensable condition").

We do not find that the impairment findings of Dr. Bollom, the attending physician, are more accurate than those of the medical arbiter. Dr. Bollom ultimately stated that claimant had a “chronic condition,” but opined that it was a consequence of the “accepted injury,” rather than the accepted shoulder strain and biceps tear. (Ex. 16). Such a conclusion does not satisfy the requirements for a direct medical sequela. ORS 656.268(15); OAR 436-035-0005(6); *Thanasouk*, 60 Van Natta at 22 (medical evidence attributing the claimant’s impairment directly to the work injury or to unaccepted conditions did not entitle the claimant to permanent disability); *Julio C. Garcia-Caro*, 50 Van Natta 160, 163 (1998) (absent evidence that unaccepted conditions were “direct medical sequelae” of the accepted condition, as opposed to the injury from which the accepted condition arose, the claimant was not entitled to permanent disability based on unaccepted conditions). Similarly, Dr. Bollom attributed claimant’s shoulder surgery to the “industrial injury,” not to the accepted conditions.⁶ Given our conclusion that impairment must be due to the accepted conditions or their medical sequelae, we conclude that Dr. Bollom’s impairment findings are not more accurate than those of Dr. Brenneke, the medical arbiter.

Accordingly, based on the medical arbiter’s findings, we reverse the ALJ’s order and reinstate and affirm the Order on Reconsideration in its entirety.

ORDER

The ALJ’s order dated June 17, 2014 is reversed. The January 13, 2014 Order on Reconsideration is reinstated and affirmed in its entirety. The ALJ’s “out-of-compensation” attorney fee award is also reversed.

Entered at Salem, Oregon on July 15, 2015

Members Weddell and Lanning dissenting.

The majority’s decision to limit the application of *Brown v. SAIF*, 262 Or App 640 (2014) gives the term “compensable injury” multiple and conflicting definitions within the workers’ compensation statutes. Because we disagree with the majority’s interpretation of *Brown* as it applies to the statutes defining and directing compensation for “impairment,” we respectfully dissent.

⁶ As previously noted, claimant may initiate a new/omitted medical condition at any time. Thus, should he do so and if such a condition is subsequently found compensable, SAIF would be required to reopen the claim and process it to closure, at which time any impairment attributable to that condition would be rated (including impairment, if any, related to his surgery).

The majority finds that *Brown's* definition of “compensable injury” is limited to statutes governing the compensability of combined conditions, namely, ORS 656.262(6)(c), 656.266(2)(a), and 656.005(7)(a)(B). As an initial matter, the court has not so limited the applicability of its definition of “compensable injury,” finding it additionally applicable to the compensability of medical services under ORS 656.245(1)(a), as well as to consequential conditions pursuant to ORS 656.005(7)(a)(A). *See English v. Liberty Northwest*, 271 Or App 211, 214 (2015); *Carlos-Macias v. SAIF*, 262 Or App 629, 637 (2014).

The relevant statutes and definitions regarding permanent partial disability consistently refer to the “compensable industrial injury” rather than to the accepted injury or conditions. ORS 656.268(1) provides that the carrier must determine the extent of the worker’s “permanent disability” at the time of closure. “Permanent partial disability” is specifically defined in ORS 656.214(1)(c)(A) and (B) as permanent impairment resulting from the “*compensable industrial injury* or occupational disease” (emphasis added). Additionally, ORS 656.214(1)(a) defines “[i]mpairment” as loss of use or function of a body part or system due to the “*compensable industrial injury* or occupational disease * * *” (emphasis added). ORS 656.726(f)(A) provides that the “criterion for evaluation of permanent impairment under ORS 656.214 is the loss of use or function of a body part or system due to the *compensable industrial injury* or occupational disease” (emphasis added). The plain language of the statute should, therefore, require a carrier to compensate claimant’s compensable injury, rather than only the accepted conditions.

The majority explains that application of the *Brown* definition of “compensable injury” would ignore the “condition based focus” of the permanent partial disability (PPD) and claim closure statutes. It reasons that the PPD statutes (specifically, ORS 656.214 and 656.726(4)(f)(A)) do not “necessarily limit how that impairment is determined,” ostensibly implying that it is appropriate to rely on the claimant to pursue new/omitted medical condition claims and multiple closures, re-openings and reconsideration proceedings in order to be appropriately compensated for a single compensable injury. We would not find such a procedure for compensating permanent disability to be desirable or consistent with the overall statutory scheme for the following reasons.

The majority’s position will allow notices of acceptance to limit compensation for PPD to less than what the claimant is entitled for a compensable injury. This result is inconsistent with the court’s observation that a notice of acceptance was not meant to have negative consequences for the claimant. *Brown*, 262 Or App at 650.

The majority's opinion relieves the carrier of its obligation to properly compensate the claimant for PPD, and instead puts the burden on the claimant to either obtain representation or otherwise decipher legal issues including, but not limited to, the scope of the accepted injury and the extent of the claimant's compensable permanent impairment. In turn, the carrier will be relieved of its obligation to first determine the extent of the claimant's compensable impairment; rather, that burden will be placed on the claimant in the first instance. We would submit that placing such a burden on the claimant in the first instance is not consistent with the workers' compensation statutes, and codifies a practical guarantee of under-compensation for PPD determinations.

Even in the majority's "best case" scenario, where the claimant obtains the necessary representation or knowledge to assess the adequacy of the PPD award, relying on multiple claim closures in order to make an appropriate award will result in delayed compensation and an inefficient use of resources to resolve disputes regarding claim closure and PPD evaluation. Such a process is inconsistent with the objectives of the worker's compensation system. *See* ORS 656.012(2)(b), (c) (objectives of the workers' compensation system include providing a fair and just administrative system for delivery of financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings to the greatest extent practicable and restoring the injured worker economically to a self-sufficient status in an expeditious manner). Moreover, because application of the *Brown* standard to PPD compensation renders a consistent application of the plain language of the statute, and because such a reading would be more consistent with providing appropriate compensation for PPD in a timely and efficient manner, we would affirm the ALJ's order.

In sum, we would conclude that impairment must be due to the compensable injury, which, as consistent with the *Brown* holding, is the work-related injury event or incident. Therefore, because the medical arbiter's report focused incorrectly on the accepted conditions, rather than the injury event, we conclude that the impairment findings of the attending physician, Dr. Bollom, are more accurate and should be used in rating claimant's permanent impairment. When those impairment findings are used, the record conclusively establishes that claimant has ratable permanent impairment due to the compensable injury.

Therefore, we would affirm the ALJ's 15 percent permanent impairment award. Because the majority reaches a different conclusion, we must respectfully dissent.