In the Matter of the Compensation of
MAURICE MCDERMOTT, Claimant
WCB Case No. 14-03683
ORDER ON REVIEW
Di Bartolomeo Law Office PC, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Curey. Member Lanning specially concurs.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that affirmed an Order on Reconsideration that awarded 5 percent whole person impairment and 25 percent work disability for a right knee condition. On review, the issue is extent of permanent disability (impairment and work disability).

We adopt and affirm the ALJ's order with the following supplementation.

On January 14, 2013, claimant, a log truck driver, slipped while getting into his truck and injured his right knee. (Ex. 1).

On January 31, 2013, Dr. Hamilton performed a right knee surgical debridement. (Ex. 13). During the surgery, Dr. Hamilton observed severe degenerative changes of the femoral condyles and patella (diagnosed as grade 4 chondromalacia), cartilage fragments, a tear of the posterior horn of the medial meniscus, and a partial tear of the anterior cruciate ligament (ACL). (*Id.*) Dr. Hamilton opined that the cartilage fragments and partial ACL tear indicated an acute injury, whereas the severe chondromalacia and small posterior horn tear were probably chronic. (Ex. 17). Dr. Hamilton also opined that claimant had severe osteoarthritis. (Ex. 20).

SAIF accepted a right knee ACL strain and traumatic injury to the articular surface of the knee joint. (Ex. 19).

On August 13, 2013, Dr. Hamilton performed a closing examination. (Ex. 23). He released claimant to full activity without restrictions. (*Id.*) He also opined that the articular cartilage injury combined with preexisting arthritis in the right knee to cause a "combined condition." (Ex. 27-2). He apportioned 40 percent of claimant's impairment to the accepted conditions and 60 percent to preexisting degenerative joint disease. (Exs. 27-3, 28-2).

SAIF's updated acceptance at closure did not include a "combined" condition. (Ex. 29). A March 20, 2014 Notice of Closure awarded 4 percent whole person impairment, apportioning claimant's right knee impairment as outlined by Dr. Hamilton. (Ex. 30). The Notice of Closure did not award any work disability. (*Id.*) Claimant requested reconsideration. (Ex. 31).

On June 4, 2014, Dr. Bowman, an orthopedic surgeon, performed a medical arbiter examination. Dr. Bowman apportioned 60 percent of claimant's impairment to preexisting conditions and 40 percent to accepted conditions. (Ex. 39-4). In asking Dr. Bowman about apportionment, the Appellate Review Unit (ARU) provided him with the definition of "arthritis" ("the inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change"). In responding to ARU's question, Dr. Bowman confirmed that claimant had significant preexisting arthritis in his knee and identified his preexisting conditions as "tricompartmental chondromalacia." (*Id.*)

A July 3, 2014 Order on Reconsideration increased claimant's permanent impairment award to 5 percent permanent impairment and awarded 25 percent work disability. (Ex. 41-4). In calculating these awards, ARU determined that claimant had "arthritis" as defined under ORS 656.005(24) and apportioned 40 percent of the impairment findings to the accepted conditions under *Schleiss v. SAIF*, 354 Or 637 (2013). (Ex. 41-3). Claimant requested a hearing.

The ALJ affirmed the reconsideration order. In doing so, the ALJ interpreted the medical arbiter's opinion to be that claimant's tricompartmental chondromalacia constituted "arthritis" and concluded that apportionment under OAR 436-035-0013(1) was not precluded by *Schleiss*.[1]

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[1] Claimant's claim was closed by a March 20, 2014 Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). *See* OAR 436-035-0003(1).

Former OAR 436-035-0013 provided in part:

> "Except as provided in subsection (5) of this rule, where a worker has a superimposed or unrelated condition, only disability due to the compensable condition is rated, provided the compensable condition is medically stationary. Then, apportionment is appropriate. Disability is determined as follows:
>
> (1) 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.*,

On review, claimant contends that under *Schleiss*, SAIF was required to accept a "combined condition." Because SAIF did not do so, claimant argues that his permanent impairment findings cannot be "apportioned."

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). As the party challenging the Order on Reconsideration, claimant also has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Based on the following reasoning, we are not persuaded that claimant has satisfied his statutory burden.

In *Claudia S. Stryker*, 67 Van Natta 1003 (2015), we concluded that, under *Schleiss*, the "apportionment" rule applied where the record supported the existence of a legally cognizable "preexisting condition" and did not depend on a carrier's "pre-closure" acceptance/denial of a combined condition. *Id.* at 1007.

Claimant argues that the record does not support the existence of a legally cognizable preexisting condition. We disagree.

As noted above, in asking Dr. Bowman about apportionment, ARU provided a definition of "arthritis" set forth in *Schleiss*. 354 Or at 652-53. (Ex. 39-4). Dr. Bowman responded that claimant had significant preexisting arthritis in his right knee, 60 percent of his impairment was due to preexisting conditions, and the preexisting conditions were tricompartmental chondromalacia. (*Id.*) When Dr. Bowman's response is read in the context of ARU's question, we consider it sufficient to establish the existence of a legally cognizable preexisting condition; *i.e.*, arthritis. *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole); *Tony L. Clark*, 67 Van Natta 424, 430 (2015) ("attending-physician-ratified" findings, which were submitted after the physician had received definitions of "arthritis" and "arthritic condition" as set forth in *Schleiss* and *Hopkins* decisions, persuasively established that the claimant's cervical degenerative disc disease constituted a legally cognizable preexisting condition and, as such, application of the "apportionment" rule was appropriate).

> 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 superimposed or unrelated conditions."

Following the *Schleiss* court's decision, OAR 436-035-0013 was amended by WCD Admin. Order 15-053 (eff. March 1, 2015), which applies to claim closures on and after March 1, 2015.

Accordingly, consistent with the *Stryker* holding, the ARU's "apportionment" of claimant's permanent impairment was appropriate.[2] Moreover, ARU's implied interpretation of the "apportionment" rule (as not dependent on the "pre-closure" acceptance/denial of a "preexisting condition" as a component of a combined condition) is entitled to deference. *See Godinez v. SAIF*, 269 Or App 578, 582 (2015) (deferring to the ARU's interpretation of a rating rule where the interpretation was not inconsistent with the wording of the rule or any other source of law); *Stryker*, 67 Van Natta at 1007. Finally, we are also cognizant of our obligation to apply the Director's standards in determining permanent disability. *See* ORS 656.283(6); ORS 656.295(5); *Stryker*, 67 Van Natta at 1007.

In conclusion, consistent with the former "apportionment" rule and the *Schleiss* rationale, as applied in *Stryker*, claimant's permanent impairment must be apportioned between his compensable right knee conditions and his legally cognizable "preexisting condition." Accordingly, we affirm.[3]

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[2] Considering claimant's argument that apportionment of impairment in a claim that has not been accepted for a combined condition would lead to inconsistent results, the ALJ reasoned that claimant could avoid apportionment of his impairment by making a new/omitted medical condition claim for a combined condition. We concur with such an analysis.

Certainly, if a carrier accepts a "combined condition" and does not issue a "pre-closure" denial of the combined condition, the entire combined condition would be rated for permanent disability purposes. *See* ORS 656.262(7)(b); *SAIF v. Belden*, 155 Or App 568, 576-77 (1998), *rev den*, 328 Or 330 (1999) (where the carrier accepted a combined condition, but did not issue a denial of the combined condition before claim closure, the entire combined condition was properly rated for permanent disability purposes). On the other hand, if a carrier issues a "pre-closure" combined condition denial, the evaluation of a claimant's permanent impairment would not extend to the denied legally cognizable preexisting condition. Rather, the "apportionment" rule would apply to such an evaluation. *See Jonathan E. Ayers*, 56 Van Natta 1103, 1104 (2004), *recons*, 56 Van Natta 1470 (2004) (when a combined condition was accepted and denied before claim closure, impairment related to the combined condition was not considered). Additionally, if impairment is due solely to causes unrelated to the compensable injury, a permanent impairment award for "non-legally cognizable preexisting conditions" would not be appropriate. *See Paula Magana-Marquez*, 66 Van Natta 1300, 1302 n 2 (2014) (where the claimant's impairment was due solely to causes unrelated to the compensable injury, a permanent impairment award for non-legally cognizable preexisting conditions was not appropriate, distinguishing *Schleiss*).

[3] A claimant may object to the "notice of acceptance" or initiate a "new/omitted" medical condition claim at any time. ORS 656.262(6)(d); ORS 656.267(1). If a combined condition is subsequently accepted, the carrier must reopen the claim under ORS 656.262(7)(c), process that claim to claim closure, and (barring a "pre-closure" denial under ORS 656.262(7)(b)) evaluate the accepted combined condition for permanent disability purposes at that time.

ORDER

The ALJ's order dated January 16, 2015 is affirmed.

Entered at Salem, Oregon on July 10, 2015

Member Lanning specially concurring.

For the reasons expressed in my dissent in *Claudia S. Stryker*, 67 Van Natta 1003, 1008-1011 (2015) (Members Lanning and Weddell dissenting), I do not agree that permanent impairment can be apportioned unless a combined condition has been accepted and denied. However, because I am required by the doctrine of *stare decisis* to follow the holding in *Stryker*, I concur with the outcome in this case.