
In the Matter of the Compensation of
CLAUDIA S. STRYKER, Claimant
WCB Case No. 14-02859
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Crummé's order that affirmed an Order on Reconsideration's award of 6 percent whole person permanent impairment for right shoulder and low back conditions. On review, the issue is extent of permanent disability (impairment).

We adopt and affirm the ALJ's order with the following supplementation to address claimant's argument regarding *Schleiss v. SAIF*, 354 Or 637 (2013).

Claimant contends that, under *Schleiss*, she is entitled to a rating for her "attending physician-ratified" permanent impairment findings, without apportionment, because her claim was not accepted and denied as a combined condition before closure. Based on the following reasoning, we do not agree.

On January 31, 2013, claimant, a caregiver, injured her right shoulder and back at work. The SAIF Corporation accepted a right shoulder sprain, lumbar sprain, cervical sprain/strain, thoracic sprain/strain, right rotator cuff tendinopathy with partial thickness tear, and right supraspinatus tear. (Exs. 8, 15, 23).

Dr. Kitchel, an orthopedic surgeon who examined claimant at SAIF's request, reported that claimant's work injury combined with preexisting arthritis in her right acromioclavicular joint and thoracolumbar spine to cause and prolong disability. (Exs. 10-7, -9; 19-7).

On November 25, 2013, Dr. Kitchel opined that claimant's work injury continued to be the major contributing cause of her right shoulder disability, but, as of June 24, 2013, had ceased to be the major contributing cause of her back disability and need for treatment. (Ex. 19-7). Dr. Kitchel found reduced right shoulder and lumbar range of motion. (Ex. 19-4, -5). He apportioned 60 percent of the shoulder findings to the work injury and 40 percent to the preexisting condition. (Ex. 19-8). Regarding the lumbar findings, he apportioned 20 percent

to the work injury and 80 percent to the preexisting condition. (*Id.*) Dr. Knudson, claimant's attending physician, concurred with Dr. Kitchel's impairment findings and apportionment. (Ex. 20-2).

A January 17, 2014 Notice of Closure apportioned the right shoulder and lumbar impairment as outlined above. (Ex. 22). Claimant requested reconsideration, asserting that her claim was not accepted and denied as a combined condition and, therefore, all her permanent impairment must be rated, without apportionment. *See Schleiss*, 354 Or at 637. (Ex. 26).

On May 13, 2014, a reconsideration order affirmed the Notice of Closure. (Ex. 28-3). In doing so, the Appellate Review Unit (ARU) of the Workers' Compensation Division (WCD) relied on Dr. Kitchel's impairment findings (as ratified by Dr. Knudson) and the "apportionment" rule in OAR 436-035-0013 (WCD Admin. Order 12-061; eff. January 1, 2013).¹ Claimant requested a hearing.

The ALJ concluded that WCD did not err in apportioning claimant's permanent impairment findings. The ALJ reasoned that claimant's right shoulder acromioclavicular osteoarthritis and thoracolumbar degenerative disc qualified as "preexisting conditions" under ORS 656.005(24)(a)(A) and, therefore, *Schleiss* did not prohibit "apportionment."

¹ Claimant's claim was closed by a January 17, 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. 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."

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.

On review, claimant argues that, in order to apply the “apportionment” rule in evaluating her permanent impairment, SAIF was required to accept and deny a “combined condition” before claim closure. Because SAIF did not do so, claimant contends that the “apportionment” rule does not apply. Based on the following reasoning, we disagree with claimant’s analysis.

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

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). Because there was no evidence of a legally cognizable preexisting condition that would allow the apportionment of a claimant’s impairment, the court found it unnecessary to resolve the parties’ disagreement concerning the burdens of asserting and proving a combined condition claim.² 354 Or at 651.

Here, claimant does not dispute that there was preexisting “arthritis or an arthritic condition” that combined with her compensable right shoulder and low back injury to cause or prolong her disability or need for treatment. *See* ORS 656.005(7)(a)(B); ORS 656.005(24). Instead, she argues that apportionment is not allowed unless a “combined condition” was accepted and denied. SAIF disagrees with claimant’s contention. Thus, this case presents the competing interpretations of OAR 436-035-0013(1) that were framed (but not resolved) in *Schleiss*. 354 Or at 650-51. For the following reasons, we conclude that neither the statutory scheme nor the *Schleiss* rationale support claimant’s position.

² In *Schleiss*, the claimant argued that the “apportionment” rule circumvented the “combined condition process” and reduced impairment that otherwise would have been awarded without apportionment. The carrier responded that if the claimant wished to have an impairment caused in part by a preexisting condition included in his permanent disability award, he should have attempted to establish that his compensable injury was the major contributing cause of his impairment in a combined condition claim. In the carrier’s view, the claimant had the burden of asserting and proving such a claim. *See* ORS 656.266(1).

In *Schleiss*, the court reasoned that only the contributions of the component parts of the “combined condition” (*i.e.*, the “otherwise compensable injury” and the “preexisting condition”) should be compared in identifying the major cause of any disability (including impairment) of the combined condition. *Id.* at 653-54. For injury claims, ORS 656.005(24)(a)(A) and (B)(i) define a “preexisting condition” to include an injury or disease that contributes to disability or need for treatment, provided that (except for claims in which the preexisting condition is arthritis or an arthritic condition) the diagnosis or treatment precedes the initial injury.³ Therefore, if a condition meets the statutory definition of a “preexisting condition,” it is “legally cognizable.” The statutory scheme does not premise the existence of a legally cognizable “preexisting condition” on its acceptance. To the contrary, in analyzing whether the purported “preexisting conditions” were legally cognizable, the *Schleiss* court did not base its decision on whether or not the conditions had or had not been accepted.

A carrier is authorized to accept a “combined condition” before claim closure. *See* ORS 656.005(7)(a)(B); ORS 656.262(6)(b)(f), (7)(a). If a carrier does so, and the accepted injury is no longer the major contributing cause of the combined condition, it must issue a “pre-closure” denial of the accepted combined condition or the entire combined condition is rated. 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).

Thus, consistent with the aforementioned rationale, 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

³ ORS 656.005(24)(a) provides, in part:

“Preexisting condition” means, for all industrial injury claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment, provided that:

(A) Except for claims in which a preexisting condition is arthritis or an arthritic condition, the worker has been diagnosed with such condition, or has obtained medical services for the symptoms of the condition regardless of diagnosis;

(B)(i) In claims for an initial injury or omitted condition, the diagnosis or treatment precedes the initial injury[.]”

preexisting condition. As such, 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).

However, “apportionment” is also appropriate where the record supports the existence of a legally cognizable “preexisting condition.”⁴ *Schleiss*, 354 Or at 649-650 (“impairment attributable to a legally cognizable preexisting condition now must be apportioned in a [permanent disability] award where a combined condition has been established, and the compensable injury is no longer the major contributing cause of the impairment or the need for treatment”).

Here, in applying the “apportionment” rule to claimant’s claim, the ARU implicitly interpreted the rule as not dependent on the “pre-closure” acceptance/denial of a “preexisting condition” as a component of a combined condition. This plausible interpretation of the rule is not inconsistent with the wording of the rule or any other source of law. Accordingly, the ARU’s interpretation of its rule 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). Likewise, we are cognizant of the ALJ’s and our obligations to apply the Director’s standards in determining permanent disability. *See* ORS 656.283(6); ORS 656.295(5).⁵

⁴ Claimant argues that the “apportionment” rule only applies to claims closed pursuant to ORS 656.268(1)(b); *i.e.*, when the accepted injury is no longer the major contributing cause of a worker’s combined or consequential condition. We agree that such a scenario would satisfy the prerequisites for an apportionment of a claimant’s permanent impairment findings pursuant to OAR 436-035-0013(1). Nonetheless, the “apportionment” rule does not limit its application to such claim closures. Instead, the rule specifically apportions the rating of a claimant’s permanent impairment to that portion of the findings that are due to the compensable condition. *See Jeld Wen, Inc. v. Cooper*, 270 Or App 186, 191 (2015) (on behalf of the Workers’ Compensation Division (WCD)/Director, 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, 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.

⁵ Our reasoning is also consistent with the current version of the “apportionment” rule. *See* OAR 436-035-0007(1)(b); OAR 436-035-0013(2).

Therefore, consistent with the former “apportionment” rule and the *Schleiss* rationale, claimant’s permanent impairment must be apportioned between her compensable right shoulder/low back conditions and her unclaimed/nonaccepted legally cognizable “preexisting conditions.” See *Tony L. Clark*, 67 Van Natta 424, 431 (2015) (in rating permanent impairment for a “post-aggravation rights” new/omitted medical condition, the claimant’s cervical range of motion was apportioned because the record established that his unclaimed/nonaccepted preexisting cervical degenerative disc disease was “arthritis”). Accordingly, we affirm.⁶

ORDER

The ALJ’s order dated November 10, 2014 is affirmed.

Entered at Salem, Oregon on June 4, 2015

Members Lanning and Weddell dissenting.

Citing *Godinez v. SAIF*, 269 Or App 578, 582 (2015), the majority concludes that claimant’s permanent impairment must be apportioned consistent with the former “apportionment” rule. Because a “combined condition” has not been claimed, accepted, or denied, we would not apportion claimant’s permanent impairment.⁷ Therefore, we respectfully dissent.

The ALJ reasoned that claimant’s right shoulder acromioclavicular osteoarthritis and thoracolumbar degenerative disc qualified as “preexisting conditions” under ORS 656.005(24)(a)(A) and, therefore, *Schleiss* did not prohibit “apportionment.” On review, claimant argues that the *Schleiss* holding requires the acceptance and denial of a combined condition in order to apportion impairment. Based on the following reasoning, we agree with claimant’s contention.

⁶ 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.

⁷ We generally agree with the majority’s deference to the WCD’s interpretation of its rules. However, we find nothing in the Order on Reconsideration that would involve the WCD’s interpretation of its former “apportionment” rule to which we should defer. (Ex. 28-3).

In *Schleiss*, the court held that in order “to qualify for the apportionment of impairment, a cause must be legally cognizable.” 354 Or at 655. There, because there was no evidence of a legally cognizable preexisting condition, all of the claimant’s impairment was considered to be “due to” the compensable injury for purposes of making a permanent disability award. *Id.*; *Jon M. Schleiss*, 66 Van Natta 413 (2014) (on remand). The court concluded that it was unnecessary to resolve the parties’ disagreement concerning the burdens of asserting and proving a combined condition claim.⁸

Here, claimant argues that apportionment is not allowed unless a “combined condition” was accepted and denied. SAIF disagrees with claimant’s contentions. Thus, this case presents the competing interpretations of OAR 436-035-0013(1) that were framed in *Schleiss*. 354 Or at 650-51. For the following reasons, we would conclude that the *Schleiss* rationale supports claimant’s position.

First, regarding claimant’s right shoulder condition, Dr. Kitchel opined that claimant’s work injury combined with preexisting arthritis in her right acromioclavicular joint to cause/prolong her disability/need for treatment. (Ex. 10-9). Dr. Kitchel also concluded that claimant’s work injury continued to be the major contributing cause of her right shoulder disability at the time of claim closure. (Ex. 19-7). Dr. Knudson, claimant’s attending physician, concurred with Dr. Kitchel’s impairment findings. (Ex. 20-2).

In *Schleiss*, the court stated that where, under ORS 656.268(1)(a), a claimant’s combined condition has become medically stationary and the accepted injury remains the major contributing cause of the claimant’s combined condition, the entire condition is rated for impairment at claim closure. 354 Or at 648. Accordingly, we would rate all of claimant’s right shoulder findings for impairment, without apportionment.

Turning to claimant’s low back condition, Dr. Kitchel opined that the work injury combined with degenerative disc disease, an arthritic condition, to cause and prolong her disability and need for treatment. (Ex. 10-9). Dr. Kitchel also

⁸ In *Schleiss*, the claimant argued that the “apportionment” rule circumvented the “combined condition process” and reduced impairment that otherwise would have been awarded without apportionment. The carrier responded that if the claimant wished to have an impairment caused in part by a preexisting condition included in his PPD award, he should have attempted to establish that his compensable injury was the major contributing cause of his impairment in a combined condition claim. In the carrier’s view, the claimant had the burden of asserting and proving such a claim. *See* ORS 656.266(1).

concluded that the work injury had ceased being the major contributing cause of claimant's disability and need for treatment before the time of claim closure. (Ex. 19-7). Dr. Knudsen, the attending physician, concurred. (Ex. 20-2).

In *Schleiss*, the court stated that apportionment applies when a claim is closed under ORS 656.268(1)(b). 354 Or at 648 (“where ORS 656.268(1)(b) applies, the legislature has implicitly provided for an apportionment of causes contributing to a worker’s impairment, so that the impairment ‘due to’ the compensable injury is limited to the percentage of the total impairment to which the injury contributed”). Furthermore, “impairment attributable to a legally cognizable preexisting condition now must be apportioned in a PPD award where a combined condition has been established, and the compensable injury is no longer the major contributing cause of the impairment or the need for medical treatment.” 354 Or at 649-50 (emphasis added).⁹

Here, SAIF’s acceptance notices stated that the “accepted condition(s) does not include a combined condition unless specifically indicated.” (Exs. 8, 15, 23). The notices of acceptance did not indicate a combined condition. (*Id.*) On review, SAIF confirms that it did not accept a combined condition. SAIF also confirms that it did not close the claim under ORS 656.268(1)(b).

The *Schleiss* court stated that under the “post-*Barrett*” statutory changes, impairment attributable to a legally cognizable preexisting condition now must be apportioned in a PPD award *where a combined condition has been established*, and the compensable injury is no longer the major contributing cause of the impairment or the need for medical treatment. 354 Or at 649-50 (emphasis added). Thus, under the statutory analysis delineated in *Schleiss*, apportionment only becomes applicable where a combined condition has been “established.”

⁹ ORS 656.005(24)(a) provides, in part:

“Preexisting condition” means, for all industrial injury claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment, provided that:

“(A) Except for claims in which a preexisting condition is arthritis or an arthritic condition, the worker has been diagnosed with such condition, or has obtained medical services for the symptoms of the condition regardless of diagnosis;

“(B)(i) In claims for an initial injury or omitted condition, the diagnosis or treatment precedes the initial injury[.]”

Here, as previously discussed, a “combined condition” has not been claimed, accepted, or denied. In the absence of an accepted combined condition that was closed under ORS 656.268(1)(b), we would conclude that claimant’s impairment should not have been apportioned. Therefore, we respectfully dissent.