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In the Matter of the Compensation of  
**DAWN E. PETERSON, Claimant**  
WCB Case No. 15-00719  
ORDER ON REVIEW  
Johnson Johnson & Schaller, Claimant Attorneys  
Kenneth R Searce, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell. Member Weddell specially concurs.

Claimant requests review of Administrative Law Judge (ALJ) Smith's order that affirmed an Order on Reconsideration's award of 4 percent whole person impairment for a left leg condition. On review, the issue is permanent disability (permanent impairment).

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

On August 14, 2013, claimant injured her left knee when she slipped on a wet floor at work. (Ex. 3). The insurer accepted a left knee sprain. (Ex. 6).

On December 3, 2013, Dr. Knudsen, claimant's attending surgeon, performed a left knee surgery to address claimant's anterior cruciate ligament (ACL) tear, lateral meniscus tear, and tricompartmental arthritis. (Ex. 10-10).

On April 28, 2014, Dr. James, an orthopedic surgeon, performed an examination at the insurer's request. Dr. James attributed the ACL tear and lateral meniscus tear to the work injury. (Ex. 23-8). He also diagnosed a combined condition, composed of preexisting tricompartmental arthritis and the ACL tear, lateral meniscus tear, and left ACL reconstruction with retained hardware and metal fragments. (Ex. 23-10). Dr. Knudsen agreed with Dr. James's opinion. (Ex. 28).

On May 12, 2014, the insurer amended the acceptance to include the ACL tear, left lateral meniscus tear, and ACL reconstruction with retained hardware and metal fragments. (Ex. 25). On that same day, the insurer denied a new/omitted medical condition claim for left tricompartmental arthritis. (Ex. 24).

On October 30, 2014, Dr. Knudsen opined that claimant's left knee condition was medically stationary. (Ex. 34).

A November 12, 2014 Notice of Closure awarded 2 percent permanent impairment for claimant's left knee conditions. (Ex. 36). Claimant requested reconsideration.

On January 10, 2015, a medical arbiter panel attributed 10 percent of claimant's decreased left knee range of motion to the accepted conditions and 90 percent to preexisting arthritis and body habitus. (Ex. 44-5). The panel attributed 25 percent of claimant's reduced left quadriceps strength to the accepted ACL and left meniscus tears and 75 percent to preexisting arthritis. (*Id.*)

The Appellate Review Unit (ARU) requested additional information concerning the percentage of range-of-motion impairment due to preexisting arthritis and the percentage of range-of-motion impairment due to body habitus. (Ex. 45). In response, Dr. Natarajan, a panel member, attributed 50 percent (of 90 percent) to preexisting arthritis and 50 percent (of 90 percent) to body habitus. (Ex. 45).

Citing *Schleiss v. SAIF*, 354 Or 637 (2013), the February 4, 2015 Order on Reconsideration used the arbiter panel's reports to apportion claimant's reduced range of motion between her accepted and non-legally cognizable preexisting conditions (body habitus) and her legally cognizable preexisting condition (arthritis) and to apportion her strength loss between her accepted condition and her legally cognizable preexisting condition (arthritis), resulting in an increased award of 4 percent whole person impairment for her compensable left knee conditions. (Ex. 46-2). Claimant requested a hearing.

At the hearing, claimant argued that, under *Schleiss*, she is entitled to an "unapportioned" permanent impairment value for her left knee findings because the insurer had not accepted and denied a combined condition. Citing *Claudia S. Stryker*, 67 Van Natta 1003 (2015), the ALJ concluded that the apportionment was proper.

On review, claimant disagrees with our decision in *Stryker* and asks us to "follow" *Schleiss*. After considering her arguments, we decline her invitation to overrule *Stryker*.

Moreover, we have concluded that, under *Schleiss*, a denied condition is a legally cognizable condition to which the "apportionment" rule applies. See *Marisela Johnson*, 67 Van Natta 1458, 1462, *recons*, 67 Van Natta 1666, 1669 (2015). There, we apportioned the claimant's permanent impairment between her accepted condition and her denied condition.

Here, it is undisputed that claimant's left knee impairment is due in part to the denied arthritis condition and in part to the accepted conditions. (Ex. 17-2). Accordingly, consistent with the *Stryker* and *Johnson* rationale, claimant's impairment was appropriately apportioned. See OAR 436-035-0013 (WCD Admin. Order 12-061; eff. January 1, 2013).

In conclusion, for the reasons expressed above, claimant has not established error in the reconsideration process. See *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Consequently, we affirm the ALJ's order affirming the Order on Reconsideration.<sup>1</sup>

### ORDER

The ALJ's order dated June 25, 2015 is affirmed.

Entered at Salem, Oregon on November 30, 2015

Member Weddell specially concurring.

Under the principles of the doctrine of *stare decisis*, I follow the holding in *Claudia S. Stryker*, 67 Van Natta 1003 (2015) and join with Member Johnson to determine that the insurer was not required to accept and process a combined condition prior to apportioning her permanent impairment award. However, consistent with the dissent in *Stryker*, I continue to disagree with the *Stryker* reasoning. 67 Van Natta at 1008-1011.

I write separately to address my concern that the analysis dictated by *Stryker* conflates independently compensable preexisting conditions with preexisting conditions which are compensable as components of combined conditions. While the insurer contends that the instant case is distinguishable from *Schleiss* by reason of its denial of the left knee tricompartmental arthritis condition, (Ex. 24), such a denial does not preclude the compensability of the condition as the preexisting component of a combined condition. See *Karen S. Carmen*, 49 Van Natta 637 (1997) (carrier's acceptance of preexisting condition as part of a combined condition could coexist with its prior denial of the preexisting condition as independently compensable).

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<sup>1</sup> 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 the claim to 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.

Moreover, in support of its apportionment of claimant's permanent impairment, the insurer concedes that the preexisting tricompartmental arthritis combined with the work injury to cause her disability. ORS 656.005(7)(a)(B). While the majority in *Stryker* concluded that the insurer is not obligated to accept and deny a combined condition before applying apportionment under ORS 656.268(1)(b), I disagree. Such an interpretation neglects full implementation of the statutory framework to the detriment of claimant's right to either: (1) receive a full impairment award in claims where the work injury remains the major contributing cause of the injury; or (2) have an opportunity to fully develop the medical record and present evidence in claims where the insurer concludes that the work injury is no longer the major contributing cause of the disability and apportionment is applied.

The *Stryker* majority notes that claimants can initiate a new/omitted medical condition claim under ORS 656.262(6)(d) and 656.267(1) for a combined condition claim, which, if accepted, will oblige the insurer to reopen and process any additional permanent impairment. Nevertheless, I remain concerned that this interpretation inappropriately places the burden of obtaining appropriate permanent disability compensation on the claimant while necessitating multiple closures and reconsideration proceedings. Instead, I would place the burden of determining the appropriate amount of permanent impairment on the insurer in the first instance in order to avoid inadequate and delayed compensation, as well as multiple claim closures and reconsideration proceedings.

I submit that the insurer is statutorily mandated to process the claim, which includes modifying the acceptance notice as medical or other information changes and updating the notice at claim closure to specify the compensable conditions. ORS 656.262(6)(b)(F); ORS 656.262(7)(c). Placing such a burden on claimant in order to obtain appropriate permanent impairment compensation is inconsistent with the most cohesive and comprehensive interpretation of the statutory scheme, in addition to being inconsistent with the policy goals which inform such an interpretation. *See* ORS 174.010 (in construction of a statute where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all).<sup>2</sup>

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<sup>2</sup> I have previously expressed my policy concerns with such an overreliance on a claimant's new/omitted medical condition claim rights in the context of *Brown v. SAIF*, 262 Or App 640 (2014). *See Stuart C. Yekel*, 67 Van Natta 1279, 1287-88 (2015).

Where, as here, the insurer seeks the benefit of a combined condition (apportionment), but has not fulfilled its statutory mandate to modify/update the acceptance notice upon receiving information that establishes the existence of a combined condition, claimant is deprived of a properly processed claim. Instead, in accordance with the *Stryker* rationale, claimant must pursue a new/omitted medical condition claim, claim re-opening, claim closure, and reconsideration proceedings in order to be appropriately compensated for her compensable left knee condition. For the reasons expressed above, I consider such reasoning to be inconsistent with the statutory scheme.

Accordingly, I offer this special concurring opinion.