

In the Matter of the Compensation of  
**DONALD V. BURCH, Claimant**

WCB Case No. 14-04589

**ORDER ON REVIEW**

Johnson Johnson & Schaller, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Crummé's order that affirmed an Order on Reconsideration that awarded 14 percent whole person impairment and 16 percent work disability for a cervical strain, lumbar strain, and C6-7 herniated disc. On review, the issue is extent of permanent disability (impairment and work disability). We modify.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following supplementation and summary.

On March 12, 2013, claimant was compensably injured in a motor vehicle accident. The self-insured employer accepted a cervical strain, lumbar strain, and a C6-7 herniated disc. (Ex. 111).

At the time of injury, claimant was an "Outside Network Technician." (Ex. 113-1). In that job, he installed and repaired residential and business telephone networks. (*Id.*) He had to frequently lift up to 10 pounds, occasionally lift up to 20 pounds, and seldom lift more than 20 pounds. (Ex. 113-3). But, he sometimes lifted and carried a 90-pound ladder and up to 100 pounds of tools and equipment. (Ex. 158). When he pulled cable that he was installing up a ladder or pole, he often had to exert more than 100 pounds of pulling force, and he sometimes worked with his arms above his shoulders. (*Id.*)

In April 2013, claimant underwent a C6-7 discectomy and fusion surgery. (Ex. 115).

In August 2013, claimant returned to a permanent modified supervisor job. (Exs. 142-2, 144-13, 159).

On May 28, 2014, a Notice of Closure awarded 8 percent whole person impairment and no work disability. (Ex. 153).

Both parties requested reconsideration of the Notice of Closure and a medical arbiter panel examination. (Exs. 155, 157).

On June 26, 2014, Dr. Perez-Gil, claimant's attending physician, concurred with an April 10, 2014 Physical Work Performance Evaluation (PWPE). (Ex. 159-1). The PWPE concluded that claimant was able to exert force of up to 10 pounds constantly, 25 pounds frequently, and 50 pounds occasionally for up to eight hours a day. (Ex. 141-1). It also concluded that he could tolerate repetitive hand use, but could not tolerate working with his arms overhead while standing. (Ex. 141-4). According to the PWPE, the factors underlying claimant's functional limitations included decreased muscle strength in the neck extensors, decreased cervical ranges of motion (ROM), and posterior cervical pain. (Ex. 141-5). Dr. Perez-Gil concluded that claimant's lost cervical ROM was due primarily to the C6-7 disc herniation and fusion surgery. (Ex. 159-1).

On August 6, 2014, a medical arbiter panel examined claimant and found valid cervical ROM loss, but normal arm strength and sensation. (Ex. 160-3-4). The arbiters concluded that claimant was not significantly limited in the repetitive use of his cervical spine. (Ex. 160-5). The panel attributed 50 percent of claimant's cervical ROM loss to cervical spine arthritis from metabolic and constitutional causes and 50 percent to the accepted conditions under the 2013 accident. (Ex. 160-6).

A September 10, 2014 Order on Reconsideration increased claimant's award of whole person impairment to 14 percent (8 percent for claimant's 2013 surgery and 6 percent for his cervical ROM loss), as apportioned between his preexisting arthritis and his compensable injury. (Ex. 161). The order also awarded 16 percent work disability, which was based, in part, on a "light" base functional capacity (BFC). (Ex. 161-4). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

#### "Chronic Condition"

The ALJ concluded that claimant was not entitled to a "chronic condition" award for being significantly limited in the repetitive use of his cervical spine. The ALJ reasoned that, based on the reports of the attending physician and the medical arbiter panel, claimant was not significantly limited in the repetitive use of his cervical spine and, thus, was not entitled to a "chronic condition" impairment value.

On review, claimant seeks a “chronic condition” award based on his inability to work with his arms overhead and to exert no more than 25 pounds frequently to move objects. For the following reasons, we disagree with claimant’s contention.

On reconsideration, where 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 v. Foremans Cleaners*, 194 Or App 125, 130 (1994). 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).

Claimant contends that a significant limitation with regard to the repetitive use of his cervical spine is established by his PWPE, with which his attending physician concurred. (Exs. 141, 159). He bases this contention on an inability to work overhead and to exert no more than 25 pounds of force frequently to move objects.<sup>1</sup>

Even assuming that these impairment findings are the most accurate, we conclude that they are insufficient to establish claimant’s entitlement to a “chronic condition” impairment value for his cervical spine. We reason as follows.

In determining whether claimant is entitled to a “chronic condition” impairment value under OAR 436-035-0019(1), we must determine “whether the loss of function to a body part created a significant limitation to [his] ability

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<sup>1</sup> The employer does not dispute claimant’s contention that, based on the PWPE (with which his attending physician concurred), he is unable to work with his arms above his head or to use no more than 25 pounds of force frequently to move objects.

to use the affected body part repetitively.”<sup>2</sup> *Gonzalez v. SAIF*, 183 Or App 183, 190 (2002). Thus, claimant is entitled to a 5 percent impairment value if a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, he is significantly limited in the repetitive use of his cervical spine. OAR 436-035-0019(1)(g).

In *Angelica M. Spurger*, 67 Van Natta 1798, 1804 (2015) (on remand), a decision issued after the ALJ’s order, we concluded that “the plain and ordinary meaning of ‘significantly limited’ denotes a limitation that is meaningful or important.” In *Spurger*, we rejected the claimant’s assertion that the term “significantly limited” refers to any repetitive-use limitation that is more than a *de minimus* one. *Id.* at 1802. We explained that the history of the “chronic condition” rule (the same version as applicable in this case) shows that it was designed to establish a “higher threshold’ for receiving an award of impairment than merely a partial loss of ability to repetitively use a body part[.]” *Id.*

Turning to the record in this case, we find that the PWPE impairment findings (with which Dr. Perez-Gil concurred) do not prove that claimant has a significant limitation in the repetitive use of his cervical spine.<sup>3</sup> We reason as follows.

Relying on the PWPE, claimant contends that his inability to work overhead and to exert no more than 25 pounds of force to move objects constitute a significant limitation in the repetitive use of the cervical spine. Yet, the PWPE’s findings were “qualified” in that they referred to “overhead” work limitations. As such, we find them insufficient to establish entitlement to a “chronic condition” impairment value for the cervical spine as a whole.<sup>4</sup> See *Johnathan M. Myers*, 65 Van Natta 1174, 1178 (2013) (qualified limitation on repetitive use of shoulder

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<sup>2</sup> Because claimant’s claim was closed by a May 28, 2014 Notice of Closure, WCD Admin. Order No. 12-061 (eff. January 1, 2013) applies to the rating of his permanent disability. See OAR 436-035-0003(4).

<sup>3</sup> Dr. Perez-Gil made no additional comments regarding the extent or significance of claimant’s limitations. (Exs. 141, 159).

<sup>4</sup> OAR 436-035-0019(1) focuses on significant limitations on the repetitive use of the relevant body part, rather than on a claimant’s ability to perform work. See *Gonzalez*, 183 Or App at 190-91 (“chronic condition” rule focuses on limitations on the repetitive use of a body part and not on the worker’s ability to perform work); *Fidel Vivanco*, 59 Van Natta 1287, 1290 (2007) (work restrictions or statements about a claimant’s ability to perform particular activities are not sufficient to support a “chronic condition” limitation).

to only activities performed *above* shoulder level insufficient to establish entitlement to a “chronic condition” award); *see also Ryan T. Grassman*, 62 Van Natta 270, 273 (2010) (lifting restrictions by themselves found insufficient to establish a chronic condition significantly limiting repetitive use of the thoracic spine).

Moreover, while the PWPE stated the aforementioned limitations, the report only establishes that claimant has some limitation, without establishing that such limitation is “significant,” *i.e.*, meaningful or important. *See Spurger*, 67 Van Natta at 1804-05. Finally, although “magic words” are not required to establish a “chronic condition” limitation, such an award must be based on evidence supporting a significant limitation in claimant’s ability to repetitively use the cervical spine. *James W. McVey*, 63 Van Natta 1101, 1104 (2011); *Michael Carter*, 56 Van Natta 53, 55 (2004).

Consequently, for the reasons expressed above, we are not persuaded that claimant is entitled to a “chronic condition” impairment value.<sup>5</sup>

### Apportionment

In affirming the Order on Reconsideration, the ALJ also determined that claimant had a legally cognizable preexisting condition and that apportionment was appropriate. On review, claimant contends that, under *Schleiss v. SAIF*, 354 Or 637 (2013), apportionment is not permitted because the employer did not accept or deny a combined condition. For the following reasons, we disagree.

In *Claudia S. Stryker*, 67 Van Natta 1003, 1007 (2015), another decision reached after the ALJ’s order, we concluded that, under *Schleiss*, apportionment is appropriate where the record supports the existence of a legally cognizable “preexisting condition.” There, we apportioned the claimant’s permanent impairment between her accepted conditions and her unclaimed/unaccepted legally cognizable “preexisting conditions.” *Id.* at 1008. We also reasoned that the claimant could object to the acceptance notice or initiate a “new/omitted” medical condition at any time and, if a combined condition were subsequently accepted, the carrier would have to reopen and process that claim to closure.

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<sup>5</sup> Claimant contends that his inability to work overhead and to exert no more than 25 pounds frequently to move objects satisfies the Workers’ Compensation Division’s (WCD’s) December 22, 2014 “Industry Notice,” which indicates that the agency defines “significant limitation” as being unable to repetitively use the body part more than two-thirds of a period of time. (App. Br., p. 3). That notice, however, issued after the May 28, 2014 Notice of Closure. As such, it has no bearing on our decision in this particular case.

Here, it is undisputed that claimant's permanent impairment is due in part to "arthritis" (*i.e.*, a legally cognizable "preexisting condition") and in part to her accepted cervical strain. Accordingly, claimant's permanent impairment was appropriately apportioned.

### Base Functional Capacity

The ALJ affirmed the Order on Reconsideration's work disability award that applied a BFC of "light." The ALJ noted that the Order on Reconsideration had considered claimant's sworn affidavit, but that it relied on a specific job analysis and the strength categories found in the Dictionary of Occupational Titles (DOT) for a "Cable Splicer" in determining a BFC of "light."

Claimant contends that his job at injury was "heavy," as shown by the specific job analysis (including its adjusted physical demand to "heavy"), and his affidavit. (Exs. 113-1, 158). For the following reasons, we agree.

Claimant's BFC is determined by the highest strength category of the job(s) successfully performed by him during the five years prior to the date of injury. OAR 436-035-0012(9)(a). The strength categories are found in the DOT. (*Id.*) However, if a preponderance of evidence establishes that the requirements of a specific job differ from the DOT descriptions, a specific job analysis that includes the strength requirements may be substituted for the DOT description(s) if it most accurately describes the job. (*Id.*)

The DOT classification for "Cable Splicer" (DOT 829.361-010) has a strength category of "light." However, here, a specific job analysis for claimant's job at injury adjusted the job's physical demands to a strength category of "heavy." (Ex. 113-1). Based on these specific job analysis lifting requirements, in conjunction with claimant's affidavit (in which he averred that he often lifted/pulled more than 100 pounds), we conclude that his "BFC" is higher than the lifting requirement for a strength of "medium," but not as high as the lifting requirement for a strength of "heavy." Where the strength requirements are between strength categories, the higher strength category is used. OAR 436-035-0012(9)(a). Therefore, we find that a preponderance of the evidence establishes that claimant's BFC is "heavy." OAR 436-035-0012(8)(j).

We now determine claimant's work disability. Claimant's age at reconsideration was 38 and receives a value of 0. OAR 436-035-0012(2)(b). Regarding education, he has a high school diploma or GED, which receives a

value of 0. OAR 436-035-0012(4)(a). Claimant's highest SVP before the date of issuance was 7, which receives a value of 1. OAR 436-035-0012(5). Therefore, claimant's age/education value is 1. OAR 436-035-0012(6).

We now turn to adaptability. As noted above, claimant's BFC is "heavy." See OAR 436-035-0012(9). His RFC is "medium." OAR 436-035-0012(8)(h). Under OAR 436-035-0012(11), claimant is entitled to an adaptability value of 3. The adaptability value under OAR 436-035-0012(13) is 2. Claimant receives the higher adaptability factor, which is 3. OAR 436-035-0012(13).

Claimant's social-vocational value is the product of his age/education value of 1 multiplied by the adaptability value of 3, which equals 3. OAR 436-035-0012(15). Therefore, his social-vocational value (3 percent) is added to his whole person impairment (14 percent) for a total of 17 percent work disability. OAR 436-035-0009(6). Accordingly, we modify the Order on Reconsideration's and the ALJ's work disability award of 16 percent.

Because our decision results in increased permanent disability compensation, claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by our order (*i.e.*, 1 percent work disability) not to exceed \$6,000. ORS 656.386(4); OAR 438-015-0055(2).

### ORDER

The ALJ's order dated March 10, 2015 is modified. In addition to the 14 percent whole person impairment and 16 percent work disability granted by the Order on Reconsideration and the ALJ's order, claimant is awarded an additional 1 percent work disability, for a total award of 14 percent whole person permanent impairment and 17 percent work disability for his cervical and lumbar conditions. For services at the hearing level and on Board review, claimant's counsel is awarded 25 percent of the increased compensation created by this order (*i.e.*, 1 percent work disability), not to exceed \$6,000, payable directly to claimant's attorney.

Entered at Salem, Oregon on October 15, 2015