
In the Matter of the Compensation of
DUSTIN L. NUNN, Claimant
WCB Case No. 14-03856
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that affirmed Orders on Reconsideration that did not award permanent impairment for claimant's low back and neck conditions. On review, the issue is permanent disability (impairment).

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

The ALJ determined that claimant was not entitled to permanent impairment based on the medical opinions of two panels of medical arbiters,¹ as well as the attending physician, who all determined that claimant sustained no permanent impairment as result of his work injury. (Exs. 15, 19, 21, 22).

On review, claimant argues, citing *Schleiss v. SAIF*, 354 Or 637 (2013) and *Brown v. SAIF*, 262 Or App 640 (2014), that the self-insured employer has circumvented the "combined condition statutes" by way of the improper application of the "apportionment" rule. OAR 436-035-0013 (WCD Admin. Order 12-061; eff. January 1, 2013).² We disagree.

A worker is entitled to an impairment value for those findings of impairment that are permanent and caused by the accepted compensable condition and direct medical sequelae. ORS 656.268(15). Unrelated or noncompensable impairment findings are excluded and not valued under the Director's rules. OAR 436-035-0007(1). Where a worker has a superimposed or unrelated condition, only

¹ While initially accepted for a lumbar strain, the self-insured employer subsequently accepted a cervical strain and reopened the claim. (Exs. 12, 16). Two Notices of Closure did not award permanent impairment for either condition. (Exs. 14, 18). Claimant requested reconsideration of both Notices of Closure. (Exs. 17, 23).

² Claimant's claim was closed by Notices of Closure on February 28, 2014 and July 15, 2014. Thus, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). See OAR 436-035-0003(1).

disability due to the compensable condition is rated under the “apportionment” rule. OAR 436-035-0013. If impairment is entirely due to causes that are not related to the compensable injury, a permanent impairment award is not appropriate. *Paula Magana-Marquez*, 66 Van Natta 1300, 1302 (2014).

Here, we need not determine whether claimant has a statutory “preexisting condition” because, unlike in *Schleiss*, where there was impairment due to the compensable injury, here, neither the medical arbiter findings nor those of claimant’s attending physician establish any cervical or lumbar impairment due to the compensable injury.

Under such circumstances, a permanent impairment award is not appropriate. *See Eugene Walters*, 67 Van Natta 1439, 1442-43 (2015) (where the record did not establish a legally cognizable “preexisting condition” and the claimant’s impairment was due solely to causes unrelated to the compensable injury, a permanent impairment award was not appropriate); *Vicki Salvador*, 67 Van Natta 1092, 1093 (2015).

Finally, claimant additionally argues that the record does not establish “arthritis” or any other legally cognizable “preexisting condition” and, therefore, he is entitled to impairment due to his compensable injury under *Brown*. Yet, the *Brown* rationale does not extend to the rating of permanent disability. *See Stuart C. Yekel*, 67 Van Natta 1279 (2015).³

ORDER

The ALJ’s order dated May 1, 2015 is affirmed.

Entered at Salem, Oregon on September 14, 2015

³ Members Weddell and Lanning dissented.