

In the Matter of the Compensation of
CAROL GOMEZ, Claimant

WCB Case No. 15-01841

ORDER ON REVIEW

Bennett Hartman Morris & Kaplan, Claimant Attorneys
Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Fisher's order that awarded 16 percent whole person impairment for her left hip, whereas an Order on Reconsideration had awarded 24 percent. On review, the issue is extent of permanent disability (impairment). We modify.

FINDINGS OF FACT

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

On February 10, 2014, claimant sustained a compensable left hip injury, which the self-insured employer accepted for a displaced subcapital fracture of the left hip. (Exs. 18, 30). She underwent a left total hip arthroplasty. (Ex. 10).

A November 26, 2014 Notice of Closure awarded 16 percent whole person impairment, based on the findings of Dr. Balme, claimant's attending physician. (Ex. 46).¹ Claimant requested reconsideration.

An April 3, 2015 Order on Reconsideration increased claimant's whole person impairment award to 26 percent. (Ex. 48). That award was based on a 3 percent impairment value for left hip range of motion (ROM) and a 13 percent impairment value for a left total hip arthroplasty under OAR 436-035-0340(15). (Ex. 48-2). Additionally, noting that Dr. Balme found mild left hip instability, the Appellate Review Unit (ARU) (on behalf of the Workers' Compensation Division (WCD) and the Director) found that the hip instability finding was not addressed in the disability standards. (*Id.*) Therefore, the ARU concluded that a special determination under ORS 656.726(4)(f) was warranted. (*Id.*) See OAR 436-035-

¹ Because the Notice of Closure issued on November 26, 2014, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). See OAR 436-035-0003(1).

0500. Noting that “hip instability is comparable to knee instability under OAR 436-035-0230[,]” the ARU granted a 10 percent impairment value for claimant’s left hip instability. (Ex. 48-2).

The employer requested a hearing, challenging the impairment award for hip instability.

Finding that the ARU’s reasoning was “unclear” because it did not discuss whether a hip joint replacement was comparable to a knee joint replacement, the ALJ remanded the claim to the ARU for further clarification of its “special determination.”² Thereafter, the ARU questioned whether remand was appropriate, but clarified its reasoning for the “special determination.” The ARU explained that, because claimant’s disability from her hip joint replacement was addressed by the standards pursuant to OAR 436-035-0340(15) and was awarded a value accordingly, it was not necessary to compare hip joint replacement with knee joint replacement or consider OAR 436-035-0230(3)(d) in arriving at its “special determination” regarding claimant’s disability from left hip instability. Reiterating that claimant’s disability from left hip instability was not addressed by the standards, the ARU re-affirmed its “special determination” regarding the hip instability, as well as the impairment value awarded for claimant’s disability. (Hearing File).

CONCLUSIONS OF LAW

After considering the ARU’s response, the ALJ reinstated the Notice of Closure’s 16 percent whole person impairment award. The ALJ reasoned that the ARU’s “special determination” (*i.e.*, the 10 percent impairment value for mild hip instability) was inconsistent with its determination that hip instability was comparable to knee instability. Finding that the ARU did not explain why, if hip instability was comparable to knee instability, claimant was entitled to a 10 percent impairment value for mild (Grade 1) hip instability when she had a prosthetic hip replacement in light of OAR 436-035-0230(3)(d) (which does not award an impairment value for mild knee instability when there is a prosthetic knee replacement), the ALJ concluded that the ARU’s “special determination” award for left hip instability was inconsistent and unsupported.

² OAR 436-035-0230(3)(d) provides, “When there is a prosthetic knee replacement, instability of the knee is not rated unless the severity of the instability is equivalent to Grade 2 or greater.” “Mild” knee instability is “Grade 1.” OAR 436-035-0230(3)(b).

On review, claimant argues that the Order on Reconsideration should be reinstated. In doing so, she contests the ALJ's rejection of the ARU's "special determination." For the following reasons, we reinstate the reconsideration order's award.

ORS 656.726(4)(f)(D) provides:

"When, upon reconsideration of a notice of closure pursuant to ORS 656.268, it is found that the worker's disability is not addressed by the standards adopted pursuant to this paragraph, notwithstanding ORS 656.268, the director shall, in the order on reconsideration, determine the extent of permanent disability that addresses the worker's impairment."

In accordance with ORS 656.726(4)(f), the Director determines the rating standard in individual cases where the Director finds that the worker's impairment is not addressed in the standards. *See* OAR 436-035-0500(1). The rating standards determined under that statute will be written into the Director's Order on Reconsideration and will apply solely to the rating of that claim. OAR 436-035-0500(2).

Here, the ARU's finding (on behalf of the Director) that claimant's mild left hip instability (as described by Dr. Balme) was not addressed in the standards is supported by the record. (Exs. 47-1, 48-2). Thus, the promulgation of a "special determination," as written into the reconsideration order, is consistent with the ARU's/Director's statutory authority. ORS 656.726(4)(f)(D); OAR 436-035-0500.

Citing *Valerie D. Stafford*, 66 Van Natta 2014 (2014), the ALJ found the ARU's reasoning for its "special determination" to be unclear and remanded to the ARU/Director. Based on the following reasoning, we disagree with the ALJ's decision.

In *Stafford*, we explained that, if a determination is made by the ALJ or the Board that the Director's reasoning regarding a "special determination" is unclear or absent or not legally supportable, remand to the Director is appropriate. 66 Van Natta at 2018. Reasoning that the ARU found that the claimant's disability was addressed by the standards, but that the record did not support such a conclusion, we remanded the claim to the ARU for further consideration. *Id.* at 2018-19.

Here, as noted above, the ARU's reasoning regarding its "special determination" (*i.e.*, that claimant's left hip *instability*, which her attending physician described as "mild," was not addressed in the Director's rating standards) is clear and legally supportable. (Ex. 48-2). Although noting that "hip instability is *comparable* to knee instability under OAR 436-035-0230," the ARU (on behalf of the Director) determined that a 10 percent impairment value for the "mild" left hip instability was the appropriate rating standard for claimant's individual case. (*Id.*) (Emphasis added). The fact that OAR 436-035-0230(3)(d) does not allow for an impairment value for "mild" *knee* instability where there has been a prosthetic *knee* replacement does not render the ARU's reasoning regarding its "special determination" concerning claimant's *hip* instability in this particular case "unclear or absent or not legally supportable."

Consequently, under these particular circumstances, the *Stafford* grounds for remanding to the ARU for further explanation of its "special determination" were not satisfied. Thus, we disagree with the ALJ's initial decision to remand to the ARU/Director for further clarification.

In any event, the ARU (on behalf of the WCD and the Director), while disagreeing with the ALJ that remand was appropriate in this matter, provided further explanation for its "special determination." Specifically, the ARU clarified that, because claimant's disability for the left hip joint replacement *was* addressed by the standards, it was not necessary to compare the "hip joint replacement with knee joint replacement," or to consider OAR 436-035-0230(3)(d), in reaching its "special determination." Furthermore, the ARU had expressly found that claimant's disability from the left "hip instability" *was not* addressed by the standards, and made a "special determination" for that particular impairment and awarded a value accordingly.

Under these particular circumstances, we conclude that the ARU's "special determination," as explained in both the Order on Reconsideration and its "clarification" letter, was legally supportable and within the ARU's statutory authority (on behalf of the Director). Therefore, in lieu of the ALJ's award, we reinstate the reconsideration order's award of 24 percent whole person impairment.³

³ The remaining impairment values are unchallenged.

In reaching this conclusion, we wish to clarify that the *Stafford* “remand” analysis should not be conflated with the analysis concerning the Director’s (*i.e.*, the ARU’s, on behalf of the WCD and the Director) determination of “the extent of permanent disability that addresses the worker’s impairment” under ORS 656.726(4)(f)(D).

In *Shubert v. Blue Chips*, 330 Or 554 (2000), the Supreme Court addressed the Director’s duty for promulgating a “temporary rule.”⁴ The court explained that “disability is a legal conclusion that arises out of the medical fact of impairment in combination with pertinent legal criteria.” 330 Or at 559. The court noted that (although not required under the applicable law) the Director “might wish to explain his or her thinking” regarding the promulgation of the temporary rule in a way that “would be announcing a legal conclusion that he or she must make to determine his or her obligations” under the *former* version of ORS 656.726(4)(f)(D). *Id.* at 560. That way, “the courts then could review the conclusion for legal error.” *Id.*

Here, for the reasons expressed above, we find the ARU’s “special determination” (on behalf of the WCD and the Director) that found a 10 percent impairment value appropriately addressed the extent of claimant’s permanent disability for left hip instability to be legally supportable. Additionally, the ARU’s “special determination” addressed claimant’s particular circumstances (based on her attending physician’s finding of “mild” left hip instability), observed that hip instability is “comparable” to knee instability under OAR 436-035-0230, and determined that a 10 percent impairment value was appropriate in claimant’s individual case. (Ex. 48-2). Applying the *Shubert* court’s analysis, we find no legal error in the ARU’s/Director’s determination of the extent of claimant’s disability.

In sum, based on the aforementioned reasoning, the Order on Reconsideration’s 24 percent whole person impairment award is reinstated. Consequently, we modify the ALJ’s permanent impairment award.

Because the employer requested a hearing regarding the Order on Reconsideration, and because we have found that the compensation awarded to claimant should not be disallowed or reduced, claimant’s attorney is entitled to

⁴ As amended, ORS 656.726(4)(f)(D) no longer provides for the Director’s promulgation of a “temporary rule.” Although the language in the statute has changed, the essential principle is the same, as we explained in *Stafford*.

an assessed attorney fee for services at hearing and on review. ORS 656.382(2); *SAIF v. DeLeon*, 352 Or 130, 143 (2012); *Justin D. Morris*, 65 Van Natta 334, 337-40 (2013).

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable fee for claimant's attorney's services at the hearing level and on Board review is \$8,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

ORDER

The ALJ's order dated October 13, 2015 is modified. In lieu of the ALJ's 16 percent permanent impairment award, the Order on Reconsideration's award of 24 percent whole person impairment is reinstated and affirmed. For services at the hearing level and on Board review, claimant's counsel is awarded an assessed fee of \$8,000, payable by the employer.

Entered at Salem, Oregon on April 15, 2016