
In the Matter of the Compensation of
DEISY L FLORES, Claimant
WCB Case No. 13-04617
ORDER ON REVIEW
Pancic Law, Claimant Attorneys
Lyons Lederer LLP, Defense Attorneys

Reviewing Panel: Members Curey, Weddell and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Smitke's order that: (1) reduced an Order on Reconsideration's whole person permanent impairment award of 22 percent for right wrist conditions to 18 percent; and (2) declined to award an attorney fee under ORS 656.382(2) for claimant's successful defense of the Order on Reconsideration's temporary disability award. On review, the issues are permanent disability (impairment) and attorney fees. We modify in part and reverse in part.

FINDINGS OF FACT

In June 2011, claimant sustained a right hand injury. (Ex. 3). The self-insured employer accepted a right wrist laceration and a right partial scapholunate ligament tear. (Exs. 9, 32).

In January 2012, Dr. Knight performed surgery, which included a right wrist scapholunate debridement and open scapholunate capsulodesis. (Ex. 29). Dr. Knight reduced the scapholunate interval with two K-wires, one from the scaphoid into the lunate and one from the scaphoid into the capitate, in order to maintain the reduction. (Ex. 29-2). He then made a trough in the distal scaphoid and placed a Mitek anchor to tether the capsular flap down to the scaphoid with a suture. (*Id.*)

On April 17, 2013, a Notice of Closure (NOC) awarded temporary disability and 5 percent whole person impairment for the right wrist due to reduced range of motion and loss of finger sensation. (Ex. 81).

Claimant requested reconsideration and the appointment of a medical arbiter. (Ex. 82). She raised the issues of premature claim closure, medically stationary date, temporary disability dates, and the permanent disability award. (*Id.*)

In August 2013, claimant was examined by a medical arbiter panel, which made permanent impairment findings. (Ex. 84). They noted that Dr. Knight had performed a scapholunate debridement, open scapholunate capsulodesis, and a right carpal tunnel release. (Ex. 84-2).

On August 20, 2013, the Appellate Review Unit (ARU) issued its Order on Reconsideration, which increased claimant's permanent impairment award to 22 percent. (Ex. 85). That award was comprised of 5 percent impairment values for each carpal bone removed during claimant's surgery (the scaphoid, lunate and capitate carpal bones), an 11 percent impairment value for range of motion loss, and a 30 percent impairment for strength loss. (Ex. 85-2-4). The total whole person impairment converted to 22 percent. (Exs. 81-3, 85-4).

The employer requested a hearing concerning the Order on Reconsideration, contesting the temporary disability and permanent impairment awards.

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant was not entitled to permanent impairment values for each carpal bone "removal" because the surgical report did not mention removal of, or "drilling" into, a carpal bone. The ALJ reasoned that the determination of whether any of the surgical procedures involved drilling/removal of bone were matters requiring medical expertise, which the surgical report had not addressed. *See Benz v. SAIF*, 170 Or App 22, 25 (2000); *SAIF v. Calder*, 157 Or App 224, 227-28 (1998). Consequently, the ALJ decreased claimant's whole person impairment award from 22 percent to 18 percent.

Permanent Impairment

On review, claimant contends that the record establishes the removal of "any portion" of her three carpal bones. For the following reasons, we agree.

Claimant has the burden of proving the nature and extent of her disability. ORS 656.266(1). However, as the party challenging the Order on Reconsideration, the employer has the burden of establishing error in the reconsideration process. *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000).

OAR 436-035-0110(5)(b) provides that carpal bone removal (any portion) without replacement receives 5 percent maximum impairment value for each carpal bone.

Here, we acknowledge that Dr. Knight's surgical report did not expressly state that carpal bone was removed. (Ex. 29). Nonetheless, the surgical report described the procedure in the following manner:

“The scapholunate interval was reduced as best as possible and two K-wires run, one from the scaphoid into the lunate and one from the scaphoid into the capitate, in order to maintain reduction. At this point a trough was made in the distal scaphoid and a Mitek anchor was placed to tether the capsular flap down to the scaphoid.... The pins were cut short and left through the skin for later removal.” (Ex. 29-2) (Emphasis supplied).

The scaphoid, lunate, and capitate are all carpal bones. *Stedman's Medical Dictionary* 224, 225, 279 (27th ed 2000). Bone is defined as the “hard connective tissue consisting of cells embedded in a matrix of mineralized ground substance and collagen fibers.” *Id.* at 223. A trough is defined as “a long, narrow, shallow channel or depression.” *Id.* at 1880. Finally, a wire is defined as a “slender and pliable rod or thread of metal.” *Id.* at 1988.

The surgical report specifies that “wires” were run “into” the lunate and “into” the capitate. (Ex. 29-2). Because the wires were made of metal, and bone is defined as a hard substance, it is reasonable to infer that part of the lunate and capitate were removed in order to run the wires into those respective bones. In addition, the record does not contain medical evidence rebutting this reasonable inference.

Under such circumstances, the employer has not established on this record that the ARU erred in awarding 5 percent permanent impairment values for a partial removal of claimant's lunate and capitate bones. Thus, claimant is entitled to 5 percent impairment values for each bone removal.

Dr. Knight's surgical report also specifies that a trough was made in the distal scaphoid. (Ex. 29-2). Because a trough is a depression or channel and bone is a hard substance, we infer that part of the scaphoid was removed when the trough was made. In addition, the record does not contain medical evidence rebutting this reasonable inference.

Under such circumstances, the employer has not established on this record that the ARU erred in awarding a 5 percent permanent impairment value for a partial removal of claimant's scaphoid bone. Thus, claimant is entitled to a 5 percent impairment value for the partial scaphoid bone removal.

Combining the bone removal surgical impairment values with claimant's other undisputed impairment values results in a total whole person permanent impairment award of 22 percent. Consequently, in lieu of the ALJ's award, the Order on Reconsideration's 22 percent permanent impairment award for claimant's right wrist conditions is affirmed.

Attorney Fees

The ALJ did not award an employer-paid attorney fee for claimant's counsel's services at the hearing level for successfully defending the Order on Reconsideration's temporary disability award against the employer's challenge to that award. In doing so, the ALJ reasoned that the Order on Reconsideration's permanent disability award had been reduced, and, thus, no attorney fee award under ORS 656.382(2) was justified.

However, for the reasons explained above, we have reinstated the Order on Reconsideration's permanent disability award. Because claimant's award of permanent disability was ultimately not disallowed or reduced as a result of the employer's hearing request and arguments on review, the basis for the ALJ's decision not to award an attorney fee (for either the temporary or permanent disability awards) has been eliminated.

Consequently, claimant's counsel is entitled to an attorney fee for services at the hearing level (concerning the temporary and permanent disability issues), and on review concerning the permanent disability issue.¹ See ORS 656.382(2); *SAIF v. DeLeon*, 352 Or 130, 143 (2012); *Justin D. Morris*, 65 Van Natta 334, 337 (2013). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at hearing and on review regarding the aforementioned issues is \$12,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by the record at the hearing level and claimant's appellant's brief), the complexity of the issues, the values of the interests involved, the nature of the proceeding, and the risk that counsel may go uncompensated.

Finally, because our decision also results in an increased permanent impairment award from that granted by the ALJ's order, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the

¹ Claimant's temporary disability award was not contested on review.

increased permanent disability compensation created by this order (the 4 percent difference between the ALJ's 18 percent award and our 22 percent award), not to exceed \$6,000, payable directly by the employer to claimant's counsel. *See* OAR 438-015-0055(2).

ORDER

The ALJ's order dated July 31, 2015 is modified in part and reversed in part. In lieu of the ALJ's award of 18 whole person impairment award, the Order on Reconsideration's award of 22 percent whole person impairment is reinstated and affirmed. For services at the hearing level and on review concerning the temporary and permanent disability issues, claimant's counsel is awarded a reasonable attorney fee of \$12,000, to be paid by the employer. For services on review regarding the permanent disability issue, claimant's counsel is also awarded an "out-of-compensation" attorney fee, equal to 25 percent of the increased permanent impairment award granted by this order (the 4 percent difference between the ALJ's 18 percent award and our 22 percent award), not to exceed \$6,000, payable directly to claimant's counsel.

Entered at Salem, Oregon on February 26, 2016