In the Matter of the Compensation of
PHILLIP A. CASCIATO, Claimant
WCB Case No. 15-05354
ORDER ON REVIEW
Ronald A Fontana, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that: (1) affirmed an Order on Reconsideration that awarded 2 percent whole person impairment for a right knee condition; and (2) declined to assess a penalty and attorney fees for the SAIF Corporation's allegedly unreasonable claim processing. On review, the issue is extent of permanent disability (permanent impairment), penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation concerning penalties and attorney fees.

In declining to award penalties/attorney fees, the ALJ reasoned that SAIF's June 8, 2015 Notice of Closure (NOC)[1] was not unreasonable, that there was sufficient information for closure, and that apportionment was appropriate.

Claimant seeks penalties/attorney fees pursuant to ORS 656.268(5)(f) (as well as ORS 656.262(11)(a) and ORS 656.382(1)) for SAIF's allegedly unreasonable NOC. In particular, he contends that the NOC was incorrect in several respects, including apportionment and determination of social/ vocational factors. He further contends that neither he nor his attorney was provided with an "accurate" job description by certified mail, as required by OAR 436-030-0020(2)(c)(A).[2]

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[1] Because the Notice of Closure issued on June 8, 2015, the applicable Division 30 rules are found in WCD Admin Order 15-059 (eff. May 21, 2015), and the applicable Division 35 rules are found in WCD Admin. Order 15-052 (eff. March 1, 2015). *See* OAR 436-035-0003(1).

[2] In his appellant's brief, claimant cites to *former* OAR 436-030-0020(2)(b)(A). However, the applicable rule regarding an "accurate" job description provided by "certified mail" is OAR 436-030-0020(2)(c)(A).

For the following reasons, we conclude that penalties and attorney fees are not warranted.

ORS 656.268(5)(f) provides that if a carrier has closed a claim, the correctness of the NOC is at issue, and a finding is made at the hearing that the NOC was not reasonable, a penalty of 25 percent of all compensation determined to be then due the claimant shall be assessed against the carrier. *Cayton v. Safelight Glass Corp*., 232 Or App 454, 60 (2009). Whether the carrier's conduct was reasonable depends on whether, from a legal standpoint, it had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991); *Steven R. Holmes*, 64 Van Natta 643 (2012).

Here, claimant first contends that SAIF's NOC was unreasonable because apportionment is not allowed in the absence of acceptance and denial of a combined condition. However, that argument has previously been rejected. *See Claudia S. Stryker*, 67 Van Natta 1003 (2015). Thus, for the reasons expressed in the ALJ's order, we conclude that apportionment was appropriate under *Stryker*.

Claimant next contends that SAIF used an incorrect base functional capacity (BFC) of "medium" (instead of "heavy") when determining the "adaptability" value for purposes of calculating his work disability award. The Order on Reconsideration subsequently modified claimant's BFC in calculating his "adaptability" value and modified his work disability award accordingly. Thus, the issue is whether SAIF's use of a "medium" BFC constitutes unreasonable claim processing. After conducting our review, we agree with the ALJ's conclusion that SAIF's actions were not unreasonable. We reason as follows.

A carrier must close a claim once the worker is medically stationary and there is sufficient information to determine impairment. ORS 656.268(1)(A). For purposes of determining the extent of disability, unless there is clear and convincing evidence that an attending physician has released the worker to the job held at the time of injury (or that the worker has returned to it), "sufficient information," includes "[a]n accurate description of the physical requirements" of the job held at the time of injury, which has been provided to the worker and their representative via certified mail either before claim closure or at the time of claim closure. OAR 436-030-0020(2)(c)(A).

A worker's BFC is determined by the highest strength category of the jobs the worker successfully performed in the five years prior to the work injury. OAR 436-035-0012(9)(a). The strength classifications are located in the

Dictionary of Occupational Titles (DOT). OAR 436-035-0012(9). There are different methods for determining the strength category, including a combination of DOT codes when they describe the job more accurately, a specific job analysis, or a job description that the parties agree accurately represents the job at injury. OAR 436-035-0012(9)(a).

Here, SAIF determined that claimant's BFC was "medium" on the basis of a job description provided by the employer, indicating that he could occasionally lift up to 50 pounds and was never required to lift over 50 pounds,[3] (Ex. 81-1), and that his job duties were comparable to a "Crane Operator" (DOT 921.663-062), which has a "medium" strength requirement.

On reconsideration, the Appellate Review Unit (ARU) determined that claimant's BFC was "heavy," finding that a combination of DOT titles for a "Crane Operator" and an "Iron Worker" (DOT 801.361-014), more accurately reflected claimant's job-at -injury, as depicted in the employer's job description and claimant's affidavit. (Ex. 118-5). Notwithstanding that ultimate determination, we do not consider SAIF's evaluation to have been unreasonable. Based on the information contained in the employer's job description and the DOT code for a "Crane Operator," we are persuaded that SAIF had a legitimate basis for its use of a BFC strength value of "medium" in calculating claimant's adaptability value. *See Christina Song*, 67 Van Natta 445, 448 (2015) (the carrier's determination of "Class 1" immune system impairment when issuing a Notice of Closure was not unreasonable because impairment findings ratified by the attending physician supported that determination, even though post-closure information considered during the reconsideration proceeding established a "Class 2" permanent impairment award); *Ricky J. Brownfield*, 65 Van Natta 459, 464 (2013) (based on the information available to the carrier when it calculated the claimant's temporary disability benefits, it had a legitimate doubt about its liability to recalculate such benefits at an increased rate); *cf. James F. McClintock*, 66 Van Natta 744, 756 (2014) (penalty/attorney fees assessed for a carrier's unreasonable calculation of a claimant's residual functional capacity (RFC), which failed to consider his "restrictions").

Claimant next argues that the NOC was "incorrect" and "unreasonable" because SAIF had not provided claimant and his counsel with an *accurate* description of the physical requirements of the job at injury *by certified mail*.

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[3] OAR 436-035-0012(h) provides that: "'Medium (M)' means the worker can occasionally lift 50 pounds and can lift or carry objects weighing up to 25 pounds frequently."

See OAR 436-030-0020(2)(c)(A). According to claimant, because there is no evidence that the job description was "accurate," or that it was sent by certified mail, he is entitled to a penalty under ORS 656.268(5)(f).[4]

Here, claimant's counsel acknowledged that SAIF had provided "a regular job description" completed by the employer. (Ex. 85). Moreover, by affidavit, claimant confirmed that he had reviewed the employer's "regular job description" and responded to it, including his disagreements and additions. (Ex. 87-1). Under such circumstances, the record does not support claimant's contentions regarding the alleged inaccuracy of his job description. *See Rick Loucks*, 65 Van Natta 628, 633 (2013) (where the claimant and his counsel received, reviewed, and provided "corrections" to the employer's job description, the Board found that the claimant's contentions regarding noncompliance with *former* OAR 436-030-0020(2)(b)(A) were unsupported by the record).

In sum, based on the aforementioned reasoning, as well as those expressed in the ALJ's order, we conclude that penalties/attorney fees are not warranted. Accordingly, we affirm.

ORDER

The ALJ's order dated May 31, 2016 is affirmed.

Entered at Salem, Oregon on November 23, 2016

Member Lanning specially concurring.

For the reasons expressed in my dissent in *Claudia S. Stryker*, 67 Van Natta 1003, 1008-11 (2015) (Members Lanning and Weddell dissenting), I do not agree that permanent impairment can be apportioned unless a combined condition has been accepted and denied. However, consistent with the doctrine of *stare decisis*, I follow the holding in *Stryker* and concur with the outcome in this case.

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[4] We acknowledge that, during the reconsideration proceeding, claimant cited the aforementioned rule. But, in doing so, his argument was premised on the inaccuracy of the employer's job description, not that SAIF had neglected to send it by certified mail. (Exs. 111, 112). There is no indication that claimant raised this specific "certified mail notification" issue during the reconsideration process. Because our review authority is limited to the issues raised during the reconsideration process, we decline to address the "certified mail notification" argument. *See* ORS 656.283(6); *Crowder v. Alumaflex*, 163 Or App 143 (1999); *Floyd A. Owens*, 62 Van Natta 1001, 1011 (2010).