
In the Matter of the Compensation of
ROY SHEPPARD, Claimant
WCB Case No. 15-03804
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that affirmed an Order on Reconsideration that awarded 3 percent whole person impairment and 15 percent work disability for claimant's thoracic spine condition. On review, the issue is permanent disability (impairment and work disability).

We adopt and affirm the ALJ's order with the following supplementation.¹

On July 31, 2014, claimant, a welder/fabricator, sustained a compensable injury, for which the insurer accepted a scalp laceration, right 6-11 rib fractures, and T5 endplate fracture. (Ex. 27).

On March 16, 2015, Dr. Krafft, claimant's attending physician, noted that claimant made good progress in a work hardening program and was working full duty. (Exs. 55-1, 56). He released claimant to "pre-injury employment without restrictions." (Ex. 55-2).

In an April 30, 2015 closing examination report, Dr. Krafft noted claimant's decreased thoracic spine range of motion findings and a "[l]ess than 10%" T5 endplate compression fracture. (Ex. 59). When asked if claimant was able to repetitively use the thoracic spine and/or chest for more than two-thirds of a period of time, Dr. Krafft responded, "He is currently at 5/8th time." (*Id.*)

A May 20, 2015 Notice of Closure awarded 3 percent whole person impairment, but no work disability award. (Ex. 63). Claimant requested reconsideration of the closure notice.

¹ On pages 3 and 4 of the ALJ's order, we change the references to "bend" to "crouch."

On July 27, 2015, Dr. Krafft responded to a clarification letter from claimant's counsel regarding claimant's work release, residual functional capacity (RFC), and a "chronic condition" limitation. (Ex. 66). Dr. Krafft indicated that he did not intend to release claimant to his "regular work" as a welder/fabricator, which required lifting up to 100 pounds occasionally, but rather to his work in March 2015. (Ex. 66-2). Dr. Krafft responded "Yes" and "No" to whether he concurred with a Rehabilitation Staffing Report that claimant was able to lift and carry 25 to 30 pounds on an occasional basis. (*Id.*) In doing so, Dr. Krafft crossed out "an occasional," and wrote that claimant could carry 25 to 30 pounds "on a repetitive or frequent basis which would allow him to lift up to 50 lbs occasionally based on his performance in work hardening." (*Id.*)

Regarding claimant's RFC, claimant's counsel noted that claimant's "regular job" required him to stand, walk, bend and twist frequently, and asked Dr. Krafft to check the box for positional activities that claimant could not perform on a frequent basis due to his compensable work injury. (*Id.*) Dr. Krafft checked the boxes for "stooping/bending" and "crouching," but crossed out "bending." (*Id.*)

Regarding a "chronic condition" limitation, claimant's counsel provided Dr. Krafft with the following explanation:

"The workers' compensation rules provide a worker is entitled to a chronic condition impairment award when the medical evidence establishes that, due to a chronic and permanent medical condition, the worker is significantly limited in the repetitive use of a specific body part due to the compensable work injury. 'Significant' is 'having or likely to have influence or effect'; 'deserving to be considered,' and 'important, weighty, notable.' Webster's Third New Int'l Dictionary 2116, (unabridged ed. 1993)." (Ex. 66-3) (emphasis in original).

Noting that the record indicated that claimant had permanent impairment and repetitive use restrictions, Dr. Krafft was asked if claimant was significantly limited in the repetitive use of his thoracic spine due to the accepted conditions or any direct medical sequelae from the compensable work injury. (*Id.*) Dr. Krafft checked the box "No," and added, "his injury was minimal and healed." (*Id.*)

An August 10, 2015 Order on Reconsideration affirmed the closure notice's 3 percent whole person impairment award and awarded 15 percent work disability. (Ex. 67). Citing *Spurger v. SAIF*, 266 Or App 183 (2014), and the Workers' Compensation Division's (WCD's) interpretation of OAR 436-035-0019(1),² the reconsideration order noted that Dr. Krafft found that claimant was not significantly limited in the repetitive use of the chest or spine because he had no limitation that prevented the repetitive use of those areas for more than two-thirds of a period of time. (Ex. 67-3). Claimant requested a hearing, seeking an impairment value for a "chronic condition" limitation for the thoracic spine.

In affirming the Order on Reconsideration, the ALJ found that, although Dr. Krafft indicated that claimant could not frequently stoop or crouch,³ he also indicated that claimant was not significantly limited in the repetitive use of his thoracic spine due to the accepted conditions or direct medical sequelae from the compensable injury. Thus, the ALJ concluded that the record did not establish that claimant was unable to use his thoracic spine for more than two-thirds of a period of time, or that his inability to frequently stoop or crouch (as well as his lifting restrictions) caused a meaningful or important limitation in the ability to repetitively use his thoracic spine.

On review, claimant seeks a "chronic condition" impairment value based on Dr. Krafft's opinions that he was limited to lifting 25 to 30 pounds on a repetitive and frequent basis, was unable to frequently stoop or crouch, and was able to repetitively use his thoracic spine and/or chest for "5/8th time."⁴ In doing so, he asserts that such limitations are "significant." For the following reasons, we affirm the ALJ's order.

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). As the party challenging the Order on Reconsideration, he also has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Based on the following reasoning, we are not persuaded that claimant has satisfied his statutory burden.

² Because the Notice of Closure issued on May 20, 2015, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). OAR 436-035-0003(1).

³ As previously noted, we change the ALJ's references to "bend" to "crouch." (*See* Ex. 66-2).

⁴ "5/8th time" translates to 62.5 percent.

For the purpose of rating claimant's permanent impairment, only the opinion of the attending physician at the time of claim closure, or any findings with which he or she concurred, or a medical arbiter's findings may be considered. *See* ORS 656.245(2)(b)(C); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). Where, as here, no medical arbiter was used, impairment is established based on objective findings of the attending physician, or findings with which the attending physician concurred. OAR 436-035-0007(5). Only findings of impairment that are permanent and caused by the accepted compensable conditions may be used to rate impairment. OAR 436-035-0007(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994).

A worker is entitled to a 5 percent "chronic condition" impairment value when a preponderance of the medical opinion establishes that, due to a chronic and permanent medical condition, the worker is significantly limited in the repetitive use of a body part. OAR 436-035-0019(1). The "chronic condition" rule 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 v. SAIF*, 183 Or App 183, 190-91 (2002); *Cody L. Ervin*, 68 Van Natta 22 (2016). "Significantly limited" denotes a limitation that is "meaningful" or "important." *See Angelica M. Spurger*, 67 Van Natta 1798, 1803-1804 (2015) (on remand).

"Magic words" are not required to establish a "chronic condition" limitation nor do they necessarily establish such a limitation. *See Buss v. SAIF*, 182 Or App 590, 594-95 (2002) ("magic words" not required for "chronic condition" rating). Instead, the relevant inquiry is whether the record contains a medical opinion from which it can be found that the claimant is significantly limited in the ability to repetitively use a body part due to a chronic and permanent medical condition. *See Spurger*, 266 Or App at 192 (the relevant inquiry is whether the limitations described in the medical opinion show that the claimant is significantly limited, not whether a physician described the limitation as "significant" according to the physician's understanding of that term).

Moreover, in its December 22, 2014 "Industry Notice," the WCD stated that it "interprets the relevant inquiry under OAR 436-035-0019(1) as follows: Because of a permanent and chronic condition caused by the compensable injury, is the worker unable to repetitively use the body part for more than two-thirds of a period of time?"⁵ That notice further provides that "[a]ny frequency is permissible

⁵ WCD's notice applies to any Notice of Closure received starting December 23, 2014.

as long as usage is repeated. * * * However, the confinement or restriction must be caused in part by a permanent and chronic condition resulting from the compensable injury.”

We are required to apply the Director’s standards for the evaluation of disability. ORS 656.295(5). Accordingly, in determining whether claimant is “significantly limited in the repetitive use” of his thoracic spine under OAR 436-035-0019(1), we apply the Director’s standards, including and considering the WCD’s interpretation of that rule as explained in its December 22, 2014 “Industry Notice.” *See, e.g., William E. Hannah*, 68 Van Natta 55, 62-63 (2016).⁶

In Dr. Krafft’s April 30, 2015 report, when asked if claimant was able to repetitively use the thoracic spine and/or chest for more than two-thirds of a period of time, he responded that claimant “is currently at 5/8th time.” (Ex. 59). Such a statement might support a conclusion that claimant was unable to repetitively use those body parts for more than two-thirds of a period of time, as interpreted by the WCD’s “Industry Notice.” However, in a July 2015 letter (shortly before the August 2015 Order on Reconsideration), claimant’s counsel sought specific clarification from Dr. Krafft regarding claimant’s work release, his RFC, and the “chronic condition” limitation. (Ex. 66-2-3). Asked whether claimant was significantly limited in the repetitive use of his thoracic spine due to the accepted conditions or any direct medical sequelae from the compensable work injury, Dr. Krafft checked the box for “No,” and expressly commented that “[claimant’s] injury was minimal and healed.” (Ex. 66-3).

Citing *Russell W. Wayne*, 68 Van Natta 148 (2016), claimant argues that Dr. Krafft’s “No” response still establishes a “chronic condition” limitation based on his limitation of lifting/carrying 25 to 30 pounds on a repetitive or frequent basis, as well as his inability to perform stooping and crouching on a frequent basis. (Ex. 66-2). However, for the following reasons, *Wayne* is distinguishable.

In *Wayne*, the attending physician concurred with a medical opinion that expressly stated that the claimant was not able to perform repetitive cervical range of motion. 68 Van Natta at 152. We considered that inability to repetitively move

⁶ Although the WCD’s “Industry Notice” is not a “standard,” it explains the “WCD’s interpretation of when a worker is ‘significantly limited in the repetitive use’ of a body part under OAR 436-035-0019(1).” Deference is given to an agency’s plausible interpretation of its rule, including an interpretation made in the course of applying the rule. *See Godinez v. SAIF*, 269 Or App 578, 583 (2015); *Spurger*, 67 Van Natta at 1802.

one's neck to be a "significant" (*i.e.*, "meaningful/important") limitation under OAR 436-035-0019(1). *Id.* We further reasoned that, although the attending physician checked the "No" box in response to the Appellate Review Unit's (ARU's) inquiry as to whether the claimant had "a chronic and permanent medical condition that significantly limits the repetitive use of the cervical spine due to the accepted condition or direct medical sequelae[.]" neither the ARU nor the attending physician explained why the claimant's inability to perform repetitive cervical range of motion would be insufficient to satisfy the requirement for a "significant limitation in repetitive use" determination. *Id.* at 152-53.

Here, unlike in *Wayne*, Dr. Krafft expressly commented that "[claimant's] injury was minimal and healed." (Ex. 66-3). We find that his statement provides a sufficient explanation as to why he did not consider claimant to be "significantly limited in the repetitive use" of the thoracic spine due to the accepted conditions or any direct medical sequelae. Moreover, Dr. Krafft's comment was made in response to the question that was posed *after* he had already described claimant's RFC and *after* claimant's counsel had specifically noted that the record indicated that claimant had permanent impairment and *repetitive use limitations*, and was particularly asked to consider the "chronic condition" rule and definition of "significant." (Ex. 66-2-3). Based on this particular record, we are not persuaded that Dr. Krafft's opinion supports a conclusion that claimant had a meaningful and important limitation in the repetitive use of his thoracic spine due to a chronic and permanent medical condition. OAR 436-035-0019(1); *Spurger*, 266 Or App at 192; *see SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency).

We acknowledge that Dr. Krafft noted that claimant was limited to lifting 25 to 30 pounds on a repetitive or frequent basis, and restricted from frequently stooping and crouching (and not bending). (Ex. 66-2). Nonetheless, even if we considered such lifting, stooping, and crouching restrictions relevant to a determination of a "chronic condition" impairment value, the record does not establish that these restrictions constitute a significant limitation in the *repetitive use* of the thoracic spine as a whole. *Gonzalez*, 183 Or App at 190-91; *Ervin*, 68 Van Natta at 28 (attending physician's permanent work restrictions did not constitute a significant limitation in the repetitive use of the claimant's left knee as a whole); *Fidal Vivanco*, 59 Van Natta 1287, 1290 (2007) (work restrictions or statements about a claimant's ability to perform particular activities insufficient to support a "chronic condition" limitation).

Based on the foregoing reasons, we find that claimant is not entitled to an impairment value for a “chronic condition” limitation in his thoracic spine and/or chest. ORS 656.266(1); OAR 436-035-0019(1); *Spurger*, 266 Or App at 192; *Spurger*, 67 Van Natta at 1803-1804. Accordingly, claimant has not met his burden of establishing error in the reconsideration process. *Callow*, 171 Or App at 183-84. Consequently, we affirm.

ORDER

The ALJ’s order dated February 24, 2016 is affirmed.

Entered at Salem, Oregon on September 12, 2016