
In the Matter of the Compensation of
JOLENE M. BRILL, Claimant
WCB Case No. 15-04792
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson, Lanning, and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that affirmed an Order on Reconsideration that did not award work disability for a left ankle condition. On review, the issue is permanent disability (work disability). We reverse.

FINDINGS OF FACT

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

As a result of claimant's compensable April 29, 2013 injury, the SAIF Corporation accepted a non-displaced fracture of the fifth metatarsal base and a left ankle sprain. (Ex. 23). Claimant approved a job description stating that her job at injury required occasional standing and frequent walking. (Ex. 10-2).

On April 3, 2015, Dr. Johansen, the attending physician, opined that claimant's conditions were medically stationary and that based on objective medical evidence, she was not capable of performing her job at injury. (Ex. 21-2). He also stated that claimant was restricted from being on her feet for more than two hours in an eight hour day, but that this restriction was not related to her work injury. (*Id.*)

An April 29, 2015 Notice of Closure awarded 11 percent whole person impairment and 19 percent work disability. (Ex. 24-2).

SAIF requested reconsideration on May 1, 2015. (Ex. 25). The reconsideration request noted, "The only issue for which an insurer can request reconsideration is the matter of impairment findings used to determine permanent disability." (*Id.*)

On June 17, 2015, SAIF's attorney discussed claimant's work restrictions with Dr. Johansen and summarized his opinion in a concurrence letter for his signature. (Ex. 26-1). On June 18, 2015, Dr. Johansen agreed with the following statement:

“Concerning work restrictions/limitations, I advised in my 4/3/15 signed concurrence that I did not believe [claimant's] need for restrictions was due to the compensable 4/29/13 work injury or the accepted ankle sprain/5th metatarsal base fracture conditions. To clarify, my opinion on work restrictions was not based on objective findings or any insinuation that her compensable injury/accepted conditions had not healed properly; rather, I imposed the work restrictions based on [claimant's] complaints, the limitations she imposed upon herself, and what she felt she was capable of. So, in terms of medical probability, I do not believe the work restrictions in this case are related to the compensable 4/29/13 work injury or the accepted conditions.”
(Ex. 26-1-2).

SAIF submitted Dr. Johansen's June 18, 2015 opinion to the Appellate Review Unit (ARU) of the Workers' Compensation Division (WCD).

On September 15, 2015, the ARU issued an Order on Reconsideration awarding 14 percent whole person impairment, based on a medical arbiter's findings. (Ex. 28-2-4). However, reasoning that Dr. Johansen released claimant to regular work for the compensable injury on June 18, 2015, the Order on Reconsideration awarded no work disability. (Ex. 28-4). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Citing *Gilbert A. Parra*, 61 Van Natta 853 (2009), the ALJ reasoned that the ARU could address the work disability issue, although SAIF's request for reconsideration raised only the impairment issue. Accordingly, the ALJ affirmed the Order on Reconsideration.

On review, claimant contends that the ARU should not have addressed the work disability issue. We agree with claimant's contention.

ORS 656.268(5)(c) (2011) (now (5)(e)) provides, “A request for reconsideration by an insurer or self-insured employer may be based only on disagreement with the findings used to rate impairment[.]” OAR 436-030-0115(5) (WCD Admin. Order No. 15-052, eff. March 1, 2015) states:

“Only one reconsideration proceeding may be completed on each Notice of Closure and the director will review those issues raised by the parties and the requirements under ORS 656.268(1). Once the reconsideration proceeding is initiated, issues must be raised and further evidence submitted within the time frames allowed for processing the reconsideration request. When the director requires additional information to complete the record, the reconsideration proceeding may be postponed under ORS 656.268(6).”

Parra addressed the effect of a prior version of OAR 436-030-0015(5) (WCD Admin. Order No. 05-073, eff. January 1, 2006) under similar circumstances. In *Parra*, the carrier requested reconsideration of its Notice of Closure, raising the issue of permanent impairment, and the ARU reduced the claimant’s work disability award based on a conclusion that the claimant’s residual functional capacity was heavy, as determined by the medical arbiter, rather than sedentary, as stated by the attending physician. 61 Van Natta at 854. On review, we reasoned that ORS 656.268(5)(c) did not limit the ARU’s scope of review to the issues raised by the party objecting to the Notice of Closure. *Id.* at 855. To the contrary, we noted that ORS 656.268(5)(c) places no limitations on the ARU’s scope of review except that the request for reconsideration must be made within specific time periods. *Id.* at 857. We also determined that OAR 436-030-0015(5) (WCD Admin. Order No. 05-073) authorized the ARU to perform a “complete review” of each Notice of Closure, and did not restrict the ARU’s review to the issues posed by the party seeking reconsideration. *Id.* at 858.

However, we distinguish *Parra* in two respects. First, while similar, the facts of *Parra* are distinguishable because in that case, the ARU’s reduction of the work disability award was based on the report of a medical arbiter, who examined the claimant to evaluate the impairment issue. Here, by contrast, while SAIF requested reconsideration regarding the impairment issue, it subsequently solicited Dr. Johansen’s opinion regarding work disability (which was not at issue) and submitted that opinion to the ARU for consideration in the reconsideration proceeding.

Although the ARU may request any additional information deemed necessary (ORS 656.268(6)(b) and OAR 436-030-0145(3)(b)), SAIF's submission of Dr. Johansen's June 18, 2015 opinion did not respond to such a request. Further, although the parties have the opportunity to submit documents into the record regarding the worker's status at the time of claim closure (OAR 436-030-0115(3)), claimant's work disability was not at issue in the reconsideration proceeding, and Dr. Johansen's opinion regarding claimant's work release did not regard any aspect of claimant's status at the time of claim closure that was germane to the reconsideration request (which pertained solely to the impairment issue). Rather, SAIF's submission of information regarding claimant's work disability served to raise an issue in the reconsideration proceeding that SAIF was statutorily prohibited from raising in its reconsideration request.

Our interpretation of SAIF's submission of Dr. Johansen's opinion as raising the work disability issue, which SAIF was statutorily prohibited from raising, is reinforced by the ARU's statement of the "issues raised by the parties" as including "impairment and social factors." (Ex. 28-2). Social-vocational factors are used to calculate work disability, not whole person impairment. *Cf.* OAR 436-035-0011; OAR 436-035-0012. Under such circumstances, we conclude that the ARU's consideration of Dr. Johansen's opinion regarding claimant's work release was contrary to the statutory scheme.

Second, the version of OAR 436-030-0115(5) at issue in *Parra* was notably different than the version of the rule at issue in this case. *Parra* addressed OAR 436-030-0115(5) (WCD Admin. Order No. 05-073), which stated:

"Only one reconsideration proceeding may be completed on each Notice of Closure and the director will do a complete review of that notice. Once the reconsideration proceeding is initiated, any additional issues must be raised and further evidence submitted within the time frames allowed for processing the reconsideration request. When the director requires additional information to complete the record, the reconsideration proceeding may be postponed under ORS 656.268(6)."

The operative difference is that whereas *Parra* applied a rule requiring the Director to "do a complete review of that [Notice of Closure]," this case requires application of a rule requiring the Director to "review those issues raised by the

parties and the requirements under ORS 656.268(1).”¹ OAR 436-030-0115(5) (WCD Admin. Order No. 15-052). Here, claimant’s work disability award is not an issue “raised by the parties,” nor is it encompassed within “the requirements under ORS 656.268(1)” (which pertain to *when* a claim shall be closed). The version of OAR 436-030-0115(5) applicable to this case does not allow the ARU to address the work disability issue under these circumstances.² Accordingly, we reinstate the April 2015 Notice of Closure’s 19 percent work disability award.

Because our order results in increased compensation, for services rendered at the hearing level and on review, claimant’s counsel is entitled to an “out-of-compensation” attorney fee equal to 25 percent of the increased compensation created by this order (*i.e.*, the increase between the ALJ’s zero percent work disability award and our 19 percent work disability award), payable by SAIF directly to claimant’s counsel. ORS 656.386(5); OAR 438-015-0055(2). In the event that all or a portion of the substantively increased permanent disability award has already been paid to claimant, her attorney may seek recovery of the fee in the manner prescribed in *Jane A. Volk*, 46 Van Natta 681, *recons*, 46 Van Natta 1017 (1994), *aff’d on other grounds Volk v. America West Airlines*, 135 Or App 565 (1995), *rev den*, 322 Or 645 (1996).

¹ A footnote in *Parra* commented that the change in language, which appeared in OAR 436-030-0115(5) (WCD Admin. Order No. 07-059, eff. January 2, 2008), did not limit the issues that the Director would address. 61 Van Natta at 856 n 4. Because *Parra* did not apply the later version of the rule, that comment was *dicta*. After considering the significance of the change, which we must now apply, we decline to extend the *Parra* rationale to the rule’s current language.

² In distinguishing *Parra* based on OAR 436-030-0115(5) (WCD Admin. Order No. 15-052)’s restriction of the ARU’s review to “issues raised by the parties and the requirements under ORS 656.268(1),” we do not cast doubt on our earlier conclusion that ORS 656.268(5) does not statutorily limit the scope of the ARU’s review. Rather, we conclude that the WCD has, through its rulemaking authority, restricted the reconsideration process to review of such matters.

We emphasize that, in its Order on Reconsideration, the ARU (on behalf of the WCD) did not offer an interpretation of its rules to allow the review of issues beyond those raised by the parties or ORS 656.268(1) (in this case, work disability), or to consider “post-reconsideration-request” evidence submitted by the parties regarding such issues. *See SAIF v. Miguez*, 249 Or App 388, 395 (2012) (no deference given to WCD’s application of rule to facts without explanation); *cf. Landis v. Liberty Northwest Ins. Corp.*, 281 Or App 639 (2016) (deference given to plausible interpretations of administrative rules by the agency that promulgated them).

ORDER

The ALJ's order dated May 12, 2016 is reversed. In lieu of the September 15, 2015 Order on Reconsideration, the April 29, 2015 Notice of Closure's award of 19 percent work disability is reinstated and affirmed. Claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order (the 19 percent work disability increase between the ALJ's award and this award), payable directly to claimant's counsel. If all or a portion of this substantively increased permanent disability award has already been paid to claimant, her attorney may seek recovery of the fee in the manner prescribed by *Volk*.

Entered at Salem, Oregon on March 9, 2017