

In the Matter of the Compensation of  
**SANDRA OCAPAN-PANTOJA, Claimant**

WCB Case No. 17-01711

ORDER ON REVIEW

Michael B Dye, Claimant Attorneys  
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Reviewing Panel: Members Ousey and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that awarded no additional whole person permanent impairment for her left shoulder conditions, whereas an Order on Reconsideration had awarded an additional 13 percent. On review, the issue is extent of permanent disability (impairment). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

On June 4, 2015, claimant compensably injured her left shoulder. (Exs. 1, 2). On July 7, 2015, the self-insured employer accepted a left shoulder strain. (Ex. 7).

On January 20, 2016, Dr. Di Paola performed a left shoulder arthroscopic surgery, diagnosing left shoulder adhesive capsulitis and biceps tendinopathy. (Ex. 48). The employer modified its Notice of Acceptance to include left shoulder adhesive capsulitis. (Ex. 49).

On June 6, 2016, Dr. Di Paola declared claimant's conditions medically stationary and released her to full duty work without restrictions. (Exs. 85, 86).

On June 17, 2016, a Notice of Closure awarded 2 percent whole person permanent impairment for claimant's accepted left shoulder conditions. (Exs. 90, 91).

Claimant requested reconsideration, and a medical arbiter panel examination was conducted on September 15, 2016. (Ex. 92). On October 11, 2016, based on the panel's findings, an Order on Reconsideration increased claimant's whole person permanent impairment award to 3 percent. (Ex. 93).

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On November 21, 2016, the employer reopened the claim and accepted left shoulder biceps tendinopathy as a new/omitted medical condition. (Ex. 94). On December 5, 2016, a Notice of Closure awarded no additional whole person permanent impairment. (Ex. 98).

Claimant requested reconsideration, and a medical arbiter examination was conducted by Dr. Schader on March 3, 2017. (Ex. 99). Dr. Schader explained that his impairment findings were “directly related to all the accepted conditions of her left shoulder including the left shoulder biceps tendinopathy.” (Ex. 99-3).

On April 4, 2017, an Order on Reconsideration increased claimant’s whole person permanent impairment award an additional 13 percent (total of 16 percent) for her left shoulder, based on Dr. Schader’s impairment findings. (Ex. 100). The employer requested a hearing, challenging the April 2017 Order on Reconsideration’s increase of claimant’s permanent impairment award.

#### CONCLUSIONS OF LAW AND OPINION

The ALJ found that Dr. Schader’s report was ambiguous and did not clearly relate the impairment findings to claimant’s newly accepted biceps tendinopathy condition. Consequently, the ALJ reversed the Order on Reconsideration’s 13 percent increase in whole person permanent impairment.

On review, claimant asserts that Dr. Schader’s report unambiguously related the impairment findings to the newly accepted biceps tendinopathy condition. Thus, claimant contends that the April 2017 Order on Reconsideration’s 13 percent increase in her whole person permanent impairment award should be reinstated. For the following reasons, we agree.

Claimant has the burden of proving the nature and extent of her disability. ORS 656.266(1). As the party challenging the Order on Reconsideration, the employer bears the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter’s objective findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more

accurate and should be used. OAR 436-035-0007(5);<sup>1</sup> *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter's impairment findings.<sup>2</sup> *Hicks v. SAIF*, 194 Or App 655, 659-60, *modified on recons*, 196 Or App 146 (2004); *Carolyn J. Baker*, 70 Van Natta 23, 25 (2018).

In a new/omitted medical condition claim, permanent disability caused by the compensable injury includes disability caused by the newly accepted condition or its direct medical sequelae. OAR 436-035-0006(2). A worker is eligible for an impairment award if: (a) the worker suffers permanent loss of use or function of a body part or system; (b) the loss is established by a preponderance of medical evidence based on objective findings of impairment; and (c) the loss is caused in any part by the compensable injury. OAR 436-035-000(7)(1).

When a new/omitted medical condition has been accepted since the last arrangement of compensation, the extent of permanent disability must be “redetermined.” OAR 436-035-0007(3). OAR 436-035-0007(3)(b) provides that only impairment related to the newly accepted condition is evaluated for “redetermination” purposes. In such cases, impairment for any previously accepted condition is not reevaluated and is given the same impairment rating as established at the last arrangement of compensation. OAR 436-035-0007(3)(b).

Here, Dr. Schader opined that claimant's impairment findings “are directly related to all the accepted conditions of her left shoulder *including* the left shoulder biceps tendinopathy.” (Ex. 99-3) (Emphasis added). There is no indication that any unaccepted, denied, preexisting, or superimposed condition was included in the impairment rating. Therefore, we interpret Dr. Schader's report to include claimant's prior permanent impairment for her previously accepted conditions (3 percent) in his total impairment assessment, with the remaining portion (13 percent) due to the new/omitted biceps tendinopathy condition.

Under such circumstances, the record does not establish that the Appellate Review Unit's analysis of Dr. Schader's impairment findings and its determination that claimant was entitled to an additional 13 percent permanent impairment award

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<sup>1</sup> Because claimant's claim was closed by a December 5, 2016, Notice of Closure, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). See OAR 436-035-0003(4).

<sup>2</sup> Both parties refer to Dr. Schader's report in support of their respective positions regarding the April 2017 Order on Reconsideration.

were erroneous.<sup>3</sup> Because we find no error in the reconsideration process, we reverse the ALJ's order and affirm the Order on Reconsideration. *Callow*, 171 Or App at 183-84.

Because the employer requested a hearing regarding the Order on Reconsideration, and because we have ultimately found that the compensation awarded to claimant should not be disallowed or reduced, claimant's attorney is entitled to an assessed attorney fee for services at the hearing level 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 case, we find that a reasonable fee for claimant's attorney's services at the hearing level and on review is \$5,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

### ORDER

The ALJ's order dated December 5, 2017 is reversed. The April 4, 2017 Order on Reconsideration that awarded an additional 13 percent whole person permanent impairment for claimant's left shoulder conditions is reinstated and affirmed. For services at the hearing level and on review, claimant's counsel is awarded an attorney fee of \$5,500, payable by the employer.

Entered at Salem, Oregon on July 12, 2018

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<sup>3</sup> Citing *Randy D. Schollenberger*, 66 Van Natta 1792 (2014), *Manuel O. Rivera*, 61 Van Natta 928 (2009), and *Mark Holmes*, 57 Van Natta 1651 (2005), the employer contends that only impairment caused *solely* by the newly accepted condition is considered when assessing permanent impairment. Those cases, however, do not support the employer's contention. In each of those cases, the medical arbiter had expressly attributed the impairment findings to a condition other than the newly accepted condition or was unable to determine whether *any* impairment was attributable to a newly accepted condition. Here, in contrast to those cases, as explained above, we are persuaded that Dr. Schader included claimant's permanent impairment findings for her newly accepted condition in conjunction with her impairment from her previously accepted conditions.