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In the Matter of the Compensation of  
**RANDY A. CHIRRIK, Claimant**  
Own Motion No. 04-0024M  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE  
Van Ness Hammond Mooney LLC, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Kasubhai and Langer.

Claimant requests review of the SAIF Corporation's December 22, 2003 "Notice of Closure: Own Motion Claim" that: (1) awarded an additional 2 percent (2.7 degrees) scheduled permanent disability for his "post-aggravation rights" new medical condition ("subtalar degenerative changes and loose bodies, right ankle");<sup>1</sup> and (2) awarded temporary disability from February 13, 2002 through September 4, 2002 and from May 30, 2003 through November 11, 2003. ORS 656.278(1)(b) (2001). We affirm the Notice of Closure.

FINDINGS OF FACT

On December 8, 1988, claimant sustained a disabling compensable injury (fracture, right talus). (Exs. 3; 4). A June 21, 1989 Determination Order awarded 5 percent scheduled permanent disability for loss of use or function of the right foot (ankle). Claimant's aggravation rights expired on June 21, 1994.

In February 1990, the claim was reopened for surgery consisting of the removal of a portion of the lateral process, right talus. (Ex. 17). A May 14, 1990 Determination Order awarded a total award of 8 percent scheduled permanent disability for loss of use or function of the right foot.

On February 13, 2002, SAIF issued a Notice of Voluntary Reopening (Form 3501), reopening the claim for acceptance of a "post-aggravation rights" new medical condition of "subtalar degenerative changes and loose bodies, right ankle." (Ex. 27). *See* ORS 656.278(1)(b) (2001); OAR 438-012-030(1)(a).

On that same date, claimant underwent a "subtalar joint fusion, right foot," performed by Dr. Lisle, a podiatrist. (Ex. 28).

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<sup>1</sup> Claimant's total right foot (ankle) award, to date, is 10 percent (13.5 degrees) scheduled permanent disability.

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On September 1, 2002, Dr. Lisle released claimant to “full-time work without limitations.” (Ex. 35).

In February 2003, claimant was examined by Dr. Lamy, a podiatrist, on referral from Dr. Lisle. Dr. Lamy diagnosed “non union right subtalar joint fusion” and recommended further surgery. (Ex. 38).

On May 30, 2003, Dr. Lamy performed an “arthrodesis of subtalar joint, right foot, with hardware removal of right subtalar joint and distal tibial bone graft.” (Ex. 43).

Claimant was last examined by Dr. Lamy on October 23, 2003. (Exs. 54-5; 55). Dr. Lamy noted that claimant was “back at work,” and that there had been “no problems since [the] last visit.” (Ex. 54-5). Dr. Lamy advised claimant to “[r]eturn on an as needed basis” if there were any problems. (Ex. 54-6).

On November 11, 2003, Dr. Lamy responded to SAIF’s inquiry about claimant’s condition. Dr. Lamy indicated that: (1) claimant’s right foot/ankle condition was medically stationary; (2) the ranges of motion of claimant’s right ankle were “normal as that joint was not fused;” (3) claimant’s subtalar joint was “zero inversion/eversion;” (4) claimant had “no limitations” on his ability to work; and (5) claimant was able to stand and walk more than two hours [at a time]. (Ex. 55).

Dr. Lisle concurred with Dr. Lamy’s report. (Ex. 56).

On December 9, 2003, SAIF sought concurrence from Dr. Daniels (a medical doctor who had last seen claimant in January 2002) regarding Dr. Lamy’s periods of time loss authorization, medically stationary date, and impairment findings.<sup>2</sup> (Ex. 57).

SAIF informed Dr. Daniels that “Drs. Lisle and Lamy authorized time loss from February 13, 2002 (surgery date) through September 4, 2002 and May 30, 2003 (surgery date) through November 11, 2003, the date Dr. Lamy declared [claimant] medically stationary.” Dr. Daniels concurred with this period of time loss authorization. Dr. Daniels further concurred that claimant was medically

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<sup>2</sup> SAIF requested Dr. Daniel’s concurrence because both Dr. Lamy and Dr. Lisle are podiatrists, and were therefore, not qualified to be attending physicians under Oregon law. (Ex. 57). See ORS 656.005(12)(b)(A).

stationary on November 11, 2003. Finally, Dr. Daniels concurred with Dr. Lamy's "impairment findings" that claimant's "ankle joint range of motion [was] normal because that joint was not affected, [claimant's] subtalar joint [was] fused at 0 [degrees], and [claimant] [could] stand or walk without limitations." (Ex. 57).

SAIF issued a December 22, 2003 Own Motion Notice of Closure which awarded an additional 2 percent (2.7 degrees) scheduled permanent disability for the right foot, for a total award of 10 percent (13.5 degrees) scheduled permanent disability for the right foot.<sup>3</sup> (Ex. 58).

Claimant requested Board review of the December 22, 2003 closure.

### CONCLUSIONS OF LAW AND OPINION

Claimant requests review of the December 22, 2003 "Notice of Closure: Own Motion Claim." Specifically, claimant challenges "the time loss period paid, the medically stationary date, and the amount of additional PPD awarded." Based on the following reasoning, we affirm.

#### Medically Stationary Date/Temporary Disability

A claim may not be closed unless the claimant's condition is medically stationary. *See* OAR 438-012-0055(1). "Medically stationary" means that no further material improvement would reasonably be expected from medical treatment or the passage of time. ORS 656.005(17). Claimant bears the burden of proving that he was not medically stationary at claim closure. *Berliner v. Weyerhaeuser Corp.*, 54 Or App 624 (1981).

Here, claimant's treating podiatrist, Dr. Lamy, declared claimant medically stationary on November 11, 2003 regarding the "post-aggravation rights" new medical condition of "subtalar degenerative changes and loose bodies, right ankle." (Ex. 55). Dr. Daniels, claimant's qualifying attending physician, concurred with the medical stationary date. (Ex. 57).

The December 22, 2003 Notice of Closure found claimant medically stationary on November 11, 2003, awarding temporary disability from

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<sup>3</sup> Claimant's prior right foot award of 8 percent was subtracted from the calculated impairment value of 10 percent for an additional award of 2 percent scheduled permanent disability of the right foot. (Ex. 58-2).

February 13, 2002 through September 4, 2002 and from May 30, 2003 through November 11, 2003.

There is no medical evidence that either supports a conclusion that claimant was entitled to temporary disability beyond the periods to which he was awarded or that his condition was not medically stationary on November 11, 2003. Under such circumstances, we find that claimant's condition was medically stationary on November 11, 2003 and affirm the Notice of Closure's temporary disability awards.

### Scheduled Permanent Disability

Claimant contends that he is entitled to additional scheduled permanent partial disability (PPD) related to his "post-aggravation rights" new medical condition of "subtalar degenerative changes and loose bodies, right ankle." We disagree, based on the following reasoning.

Because the aggravation rights on claimant's December 8, 1988 injury claim expired on June 21, 1994, the claim is within our Own Motion jurisdiction. *Miltenberger v. Howard's Plumbing*, 93 Or App 475 (1988). The claim was reopened for the processing of a "post-aggravation rights" new medical condition. Such claims may qualify for payment of permanent disability compensation. ORS 656.278(1)(b) (2001); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recon* 54 Van Natta 1552 (2002).

In *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003), we interpreted the permanent partial disability limitation set forth in ORS 656.278(2)(d) (2001) and determined that it applies where there is (1) "additional impairment" to (2) "an injured body part" that has (3) "previously been the basis of a permanent partial disability award."<sup>4</sup> The first step is to determine whether the conditions that require application of the ORS 656.278(2)(d) (2001) limitation are satisfied. If

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<sup>4</sup> ORS 656.278(2)(d) (2001) provides:

"(2) Benefits provided under subsection (1) of this section:

" \* \* \* \* \*

"(d) May include permanent disability benefits for additional impairment to an injured body part that has previously been the basis of a permanent partial disability award, but only to the extent that the permanent partial disability rating exceeds the permanent partial disability rated by the prior award or awards."

those conditions are satisfied, the Director's standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate "post-aggravation rights" new or omitted medical condition claims.

Here, all three factors are satisfied. Dr. Lamy's November 11, 2003 closing report (concurrent with by Dr. Daniels) revealed 0 degrees of inversion and eversion, which qualifies for an impairment rating. Moreover, claimant's "post-aggravation rights" new medical condition ("subtalar degenerative changes and loose bodies, right ankle") involves the same "injured body part" that was the basis of his previous scheduled permanent disability awards for his initially accepted "fracture, right talus" condition.

Under such circumstances, the medical evidence establishes that there is additional impairment to an injured body part (right foot) that was previously the basis of a permanent disability award. Therefore, the limitation in ORS 656.278(2)(d) (2001) applies to claimant's scheduled permanent disability. However, before application of the statutory limitation, we redetermine claimant's scheduled permanent disability pursuant to the Director's standards. See OAR 436-035-0007(10) (2003); *Nielsen*, 55 Van Natta at 3207. We now proceed with that rating.

Here, the Own Motion Notice of Closure issued on December 22, 2003. Thus, the applicable standards are found in WCD Admin. Order 03-050 (eff. February 1, 2003).

Impairment findings made by a consulting physician may be used only if the attending physician concurs with those findings. OAR 436-035-0007(13). Otherwise, only the attending physician at the time of claim closure, or a medical arbiter, may make impairment findings. ORS 656.245(2)(b)(B); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994); OAR 436-035-0007(13), 14; *Edward A. Miranda Sr.*, 55 Van Natta 784, 793 (2003).

Here, claimant's treating podiatrist, Dr. Lamy, provided impairment findings. The qualifying attending physician, Dr. Daniels, concurred with Dr. Lamy's findings. Therefore, we rely on Dr. Lamy's November 11, 2003 report to rate claimant's scheduled permanent disability.

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Dr. Lamy reported that claimant had zero degrees of inversion/eversion. Therefore, claimant receives a value of 10 percent of the right foot. *See* OAR 436-035-0007(17); OAR 436-035-0190(3); OAR 436-035-0190(10)(b)(D).

There were no other ratable findings of impairment. Accordingly, claimant is entitled to an award of 10 percent (13.5 degrees) scheduled permanent disability for the right foot.

As discussed above, claimant has previously been awarded 8 percent scheduled permanent disability. Thus, applying the limitation in ORS 656.278(2)(d) (2001), claimant's additional award equals 2 percent scheduled permanent disability. The December 22, 2003 Notice of Closure awarded claimant an additional 2 percent scheduled permanent disability, for a total award of 10 percent scheduled permanent disability. Accordingly, the December 22, 2003 Notice of Closure is affirmed.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 19, 2004