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In the Matter of the Compensation of  
**GARY S. LAZOFF, Claimant**  
Own Motion No. 05-0252M  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE  
Unrepresented Claimant  
VavRosky MacColl Olson et al, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

Claimant, *pro se*, requests review of that portion of the July 1, 2005 “Notice of Closure: Own Motion Claim” that awarded 9 percent (28.8 degrees) unscheduled permanent partial disability (PPD) for his “post-aggravation rights” new medical condition (“L4-5 disc protrusion”).<sup>1</sup> Claimant asserts that he is entitled to increased unscheduled PPD benefits.<sup>2</sup>

We modify the Own Motion Notice of Closure to award an additional 9 percent (28.8 degrees) unscheduled PPD for the low back. With this modification, claimant’s total unscheduled PPD award to date is 18 percent (57.6 degrees).

#### FINDINGS OF FACT

On February 10, 1995, claimant sustained a compensable low back injury. The insurer accepted a disabling claim for “low back strain.” (Ex. 12).

The claim was first closed by a July 25, 1995 Notice of Closure that awarded temporary disability benefits and no award of unscheduled PPD. (Ex. 18). Claimant’s aggravation rights expired on July 25, 2000.

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<sup>1</sup> Claimant’s February 10, 1995 claim was accepted as a disabling claim and was first closed on July 25, 1995. Thus, claimant’s aggravation rights expired on July 25, 2000. Therefore, when claimant sought claim reopening in December 2004, the claim was within our Own Motion jurisdiction. ORS 656.278(1) (2001). On June 21, 2005, the insurer voluntarily reopened the claim for the “post-aggravation rights” new medical condition of “L4-5 disc protrusion.” On July 1, 2005, the insurer issued its Notice of Closure.

<sup>2</sup> On review, claimant also raises the issue of reimbursement for medical services and mileage. (Ex. 66). Pursuant to ORS 656.245, reimbursement issues pertaining to mileage, prescriptions and medical bills are within the Director’s jurisdiction. *See Susan Laughlin*, 52 Van Natta 362 (2000). If claimant continues to dispute the carrier’s claims processing regarding these medical reimbursement issues, he may wish to refer his dispute to the Director for resolution.

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On February 21, 2003, the insurer voluntarily reopened the February 10, 1995 low back strain claim for a “worsened condition” under ORS 656.278(1)(a) (2001). (Ex. 36).

A November 7, 2004 MRI revealed progression of a paracentral disc protrusion at L4-5. (Ex. 53). Claimant’s treating neurosurgeon, Dr. Brett, recommended L4-5 surgery on December 23, 2004. (Exs. 54; 55). On January 5, 2005, Dr. Brett performed a bilateral L4-5 lumbar laminectomy, left L4-5 discectomy. (Ex. 58).

On January 18, 2005, the insurer voluntarily reopened the low back strain claim for a “worsened condition” pursuant to ORS 656.278(1)(a) (2001). (Ex. 59).

On May 26, 2005, Dr. Brett determined that claimant’s low back condition was medically stationary and performed a closing examination. Dr. Brett reported:

“[claimant] is objectively neurologically intact with preserved strength, sensation and myotatic reflexes, and no wasting or fasciculations. He is able to heel and toe walk and repetitively toe stand without difficulty. Lumbar range of motion is unimpaired without pain or muscle spasm (inclinometer confirmed), and his wound has healed well.

“He was given a permanent common sense lifting restriction of 50 [pounds], but he is otherwise released for all activities.” (Ex. 62).

On June 21, 2005, the insurer voluntarily reopened the February 10, 1995 claim for a “post-aggravation rights” new medical condition (“L4-5 disc protrusion”). ORS 656.278(1)(b) (2001); ORS 656.278(5) (2001); OAR 438-012-0030. (Ex. 63).

On July 1, 2005, the insurer issued an Own Motion Notice of Closure that awarded 9 percent (28.8 degrees) unscheduled PPD for the “post-aggravation rights” new medical condition. (Ex. 65). Thereafter, claimant requested Board review of the Own Motion Notice of Closure seeking an increased award of unscheduled PPD. (Ex. 66).

Claimant was 48 years old at the time of issuance of the July 1, 2005 Notice of Closure. (Exs. 3; 7). He has a high school diploma. (Ex. 26-2). Claimant's February 10, 1995 "job-at-injury" was "Tire Service Supervisor" (automotive ser.) (DOT# 915.134-010) and "Tire Repairer" (automotive ser.), alternate title "Tire Servicer" (DOT# 915.684-010). (See Exs. 7; 9; 23-1; 26-1-2; 37-1-2; 43-1; 45; 55-1).

At the time of issuance of the July 1, 2005 Notice of Closure of the "post-aggravation rights" new medical condition, claimant's highest SVP in the previous 5 years was an SVP of 6 for his job as a "Tire Service Supervisor" (automotive ser.) (DOT# 915.134-010).

Claimant's highest strength in the five years prior to the date-of-injury was "heavy" for his job as "Tire Repairer" (automotive ser.), alternate title "Tire Servicer" (DOT# 915.684-010). Therefore, claimant's Base Functional Capacity (BFC) is "heavy."

Per Dr. Brett's May 26, 2005 closing examination report, claimant is permanently restricted from lifting more than 50 pounds. (Ex. 62). Thus, claimant's Residual Functional Capacity (RFC) is "medium." See OAR 436-035-0012(8)(h) (2005). At the time of claim closure, claimant had not been released to, nor had he returned to his regular work without restrictions.

### CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of a "post-aggravation rights" new medical condition ("L4-5 disc protrusion").<sup>3</sup> Such claims may qualify for payment of permanent disability compensation. ORS 656.278(1)(b) (2001); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recon* 54 Van Natta 1552 (2002), *aff'd* *Dougan v. SAIF*, 193 Or App 767 (2004), *vacated* 339 Or 1 (July 8, 2005).<sup>4</sup>

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<sup>3</sup> To the extent that this claim closure pertains to claimant's "worsened condition" claim that was reopened in February 2003 and January 2005, there is no entitlement to permanent disability for that previously accepted condition (low back strain). See *Arvin D. Lal*, 55 Van Natta 816, 824 (2003); *Jimmy O. Dougan*, 54 Van Natta at 1231.

<sup>4</sup> On review, the *Dougan* Court vacated the Court of Appeals decision and dismissed the claimant's petition for review, finding that, pursuant to ORS 656.278(4), a claimant is not entitled to judicial review of an Own Motion order that does not diminish or terminate a former award.

The PPD limitation set forth in ORS 656.278(2)(d) (2001) applies where there is (1) “additional impairment” to (2) “an injured body part” that has (3) “previously been the basis of a [PPD] award.”<sup>5</sup> *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003). The first step is to determine whether the conditions that require application of the ORS 656.278(2)(d) (2001) limitation are satisfied. If 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, the limitation in ORS 656.278(2)(d) (2001) does not apply to claimant’s unscheduled PPD because he has not previously received an award of unscheduled PPD.

Claimant’s claim was closed by an Own Motion Notice of Closure dated July 1, 2005. Thus, the applicable standards are found in WCD Admin. Order 04-063 (eff. January 1, 2005). *See* OAR 436-035-0003(1) (2005).

We rely on the attending physician’s, Dr. Brett’s, May 26, 2005 closing examination report to rate claimant’s impairment. 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).

On January 5, 2005, claimant underwent surgery (bilateral L4-5 laminectomy, left L4-5 discectomy). (Ex. 58). Claimant receives a value of 9 percent for this surgery. OAR 436-035-0350(2) (2005).

Per Dr. Brett, claimant was “neurologically intact” with no loss of strength or sensation. Additionally, Dr. Brett found claimant’s lumbar range of motion “unimpaired” as confirmed by inclinometer. (Ex. 62). Consequently, claimant receives no values for loss of strength, sensory loss, or decreased lumbar range of motion.

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<sup>5</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.”

As there were no other ratable findings of impairment due to the accepted condition, claimant receives a total impairment value of 9 percent (surgery).

Pursuant to ORS 656.726(4)(f)(D), impairment is the only factor to be considered in evaluation of the worker's disability under ORS 656.214(5) if:

“(i) The worker returns to regular work at the job held at the time of injury;

“(ii) The attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 releases the worker to regular work at the job held at the time of injury and the job is available but the worker fails or refuses to return to that job; or

“(iii) The attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 releases the worker to regular work at the job held at the time of injury but the worker's employment is terminated for cause unrelated to the injury.”

“Regular work” means the job the worker held at the time of injury. OAR 436-035-0005(15) (2005). Here, the record establishes that claimant's job-at-injury is best described by a combination of DOT codes. Although the 801 form lists claimant's job-at-injury as a “service manager” in an auto service center, he was injured when he caught a falling car transmission while assisting a co-worker; *i.e.*, a “technician.” (Exs. 2; 3; 7; 8; 26-1; 43-1). Furthermore, the record reflects that, as a service manager, claimant was required to “fill in for absentee workers, handling tires, etc.” (Ex. 37-2). Therefore, we conclude that claimant's job-at-injury is best described by a combination of DOT codes for “Tire Service Supervisor” (automotive ser.) (DOT# 915.134-010) and “Tire Repairer” (automotive ser.), alternate title “Tire Servicer” (DOT# 915.684-010). “Tire Service Supervisor” (DOT# 915.134-010) has a strength of “light” and “Tire Servicer” (DOT# 915.684-010) has a strength of “heavy.”

Dr. Brett has placed a permanent lifting restriction on claimant of no more than 50 pounds. (Ex. 62). This restriction places claimant in the “medium” RFC category. *See* OAR 436-035-0012(8)(h) (2005). Claimant's combined “regular

job” required lifting in the “heavy” category (occasionally lifting 100 pounds). *See* OAR 436-035-0012(8)(j) (2005). Consequently, we conclude that claimant has not been released by the attending physician to return to his job-at-injury (Tire Service Supervisor/Tire Servicer). *See Gary W. Rogers*, 57 Van Natta 1880, 1887 (2005) (the claimant found entitled to the social/vocational factors where the attending physician released him to work with a 50 pound lifting restriction and claimant’s job-at-injury was a combination of DOT codes); *Rory L. Sandusky*, 57 Van Natta 329, 331 (2005) (the claimant found entitled to the social/vocational factors where the attending physician released the claimant to a job that was not the job-at-injury and had agreed that the claimant had restrictions on the use of his right shoulder in performing overhead work).

Furthermore, claimant had not returned to all aspects of his regular work at the time of claim closure. (*See* Ex. 66). Consequently, he is entitled to the social/vocational factors. Therefore, we now assemble those values under OAR 436-035-0012 (2005).

Claimant was 48 years old at the time of closure which receives a value of 1. OAR 436-035-0012(2)(a) (2005). Claimant has a high school diploma which receives a value of 0. OAR 436-035-0012(4)(a) (2005). At the time of the July 1, 2005 Notice of Closure of the “post-aggravation rights” new medical condition, claimant’s highest SVP in the previous 5 years was an SVP of 6 for his job as a “Tire Service Supervisor”(automotive ser.) (DOT# 915.134-010). OAR 436-035-0012(5). An SVP of 6 receives a value of 2. OAR 436-035-0012(5). The age/education values are added for a total of 3. OAR 436-035-0012(15)(c) (2005).

We now determine claimant’s adaptability factor. “Base Functional Capacity” (BFC) means an individual’s demonstrated physical capacity before the injury or disease. OAR 436-035-0012(8)(a) (2005). Claimant’s BFC is “heavy” based on his job as “Tire Servicer” (DOT# 915.684-010). OAR 436-035-0012(9)(a) (2005).

As discussed above, Dr. Brett placed a permanent lifting restriction of no lifting more than 50 pounds. (Ex. 62). This places claimant in the “medium” weight category. OAR 436-035-0012(8)(h) (2005). Consequently, claimant’s RFC is “medium.” OAR 436-035-0012(8)(h) (2005). “Heavy” (BFC) to “medium” (RFC) receives an adaptability value of 3. OAR 436-035-0012(11) (2005).

Therefore, claimant's age/educational value of 3 times the adaptability value of 3 equals 9. OAR 436-035-0012(15)(e) (2005). Adding the impairment value of 9 percent to the social/vocational factor of 9 results in a total unscheduled PPD of 18 percent (57.6 degrees) for the low back. OAR 436-035-0008(2)(b)(B) (2005).

The July 1, 2005 Notice of Closure awarded claimant 9 percent (22.8 degrees) unscheduled PPD. Accordingly, the July 1, 2005 Notice of Closure is modified to award claimant an additional 9 percent (22.8 degrees) unscheduled permanent disability for claimant's "post-aggravation rights' new medical condition of "L4-5 disc protrusion."<sup>6 7</sup>

IT IS SO ORDERED.

Entered at Salem, Oregon on August 17, 2005

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<sup>6</sup> Claimant's total unscheduled PPD award, to date, for his February 1995 injury equals 18 percent (57.6 degrees).

<sup>7</sup> Inasmuch as claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. He may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN  
DEPT OF CONSUMER & BUSINESS SERVICES  
PO Box 14480  
SALEM, OR 97309-0405