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In the Matter of the Compensation of  
**STEVEN R. EDMINSTON, Claimant**  
Own Motion No. 05-0102M  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE ON  
RECONSIDERATION  
Cary et al, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The SAIF Corporation requests reconsideration of our October 21, 2005 Own Motion order that modified the February 7, 2005 Own Motion Notice of Closure to award an additional 13.5 percent (43.2 degrees) unscheduled permanent partial disability (PPD), for a total award of 26 percent (83.2 degrees) unscheduled PPD for his 1986 low back injury claim. Specifically, SAIF disagrees with our analysis of the medical evidence and application of the Director's rules regarding "offset" of prior awards and our determination that "apportionment" was not warranted. Having received claimant's response, we proceed with our reconsideration.<sup>1</sup>

In *Lloyd E. Garoutte*, 56 Van Natta 416 (2004), we determined that an "offset" of a prior award on a separate workers' compensation injury is available when rating permanent disability compensation for a "post-aggravation rights" new or omitted medical condition claim under ORS 656.278(1)(b) (2001) and ORS 656.278(2)(d) (2001), provided that the elements required to qualify for the offset are satisfied pursuant to *former* OAR 436-035-0007(6),<sup>2</sup> the "offset" rule. *Garoutte*, 56 Van Natta at 429. In *Garoutte*, we reasoned that "an offset would apply only if a preponderance of the medical evidence or opinion establishes that disability from the claim *prior to* the 'post-aggravation rights' new or omitted medical condition claim was still present on the date of onset of the 'post-aggravation rights' new or omitted medical condition claim being rated." *Garoutte* at 432; *See* OAR 436-035-0015(1) (2005).

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<sup>1</sup> SAIF's November 2, 2005 Motion for Reconsideration was received by the Board on November 5, 2005. Because the motion was "filed" within 30 days from our October 21, 2005 order, we are authorized to proceed with our reconsideration. OAR 438-005-0046(1); OAR 438-012-0065(2); *Gladys Biggs*, 54 Van Natta 1094 (2002).

<sup>2</sup> The current "offset" rule is OAR 436-035-0015 (2005).

In our prior order on this claim, rather than applying the “apportionment” rule, we determined that the “offset” rule applied in determining claimant’s permanent disability resulting from his 1986 injury claim and the effect, if any, from claimant’s prior 1979 injury claim. *See* OAR 436-035-0007(4).<sup>3</sup> After reviewing the record, we concluded that an “offset” of claimant’s prior 20 percent unscheduled PPD award (under his August 27, 1979 low back injury claim) was not appropriate. We based our conclusion on several factors.

First, neither the attending physician, Dr. Levine, nor the medical arbiter, Dr. Ballard, addressed whether claimant had “existing disability” at the time of onset of the “post-aggravation rights” new/omitted medical condition (“L5-S1 disc herniation and S1 radiculopathy”).<sup>4</sup> Instead, they addressed the “apportionment” of claimant’s permanent impairment.<sup>5</sup> Under such circumstances, the medical evidence did not establish the Director’s requirement for the application of an “offset” under OAR 436-035-0015 (2005).

Second, following the 1979 low back injury, claimant had been released to, and had returned to, his regular work. In fact, claimant was performing his regular work for the same employer at the time of his September 5, 1986 low back injury. Thus, the record established that at the time of *onset* of the “post-aggravation rights” new/omitted medical condition in October 1986, claimant had sustained no loss of earning capacity from his earlier 1979 injury. Consequently, there was no “existing disability” on the date of onset of the new medical condition (October 21, 1986). (Ex. 7-3).

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<sup>3</sup> This rule states:

“[w]here a worker has a prior award of permanent disability under Oregon workers’ compensation law, disability is determined under OAR 436-035-0015 (offset), rather than OAR 436-035-0013, for purposes of determining disability only as it pertains to multiple Oregon workers’ compensation claims.”

<sup>4</sup> We determined that the date of onset of claimant’s “post-aggravation rights” new/omitted medical condition was in October 1986, when Dr. Tsai diagnosed “right S1 radicular compression due to herniated nucleus pulposus L5-S1 on the right.” (Ex. 7-3). Claimant underwent surgery for this condition on October 27, 1986. (Ex. 14).

<sup>5</sup> Apportionment applies where the claimant has a “superimposed or unrelated condition.” *See* OAR 436-035-0013 (2005). For purposes of the Director’s rules, a prior Oregon workers’ compensation claim is not considered a “preexisting condition.” *See* OAR 436-035-0015 (2005).

Additionally, claimant's September 5, 1986 low back injury claim was closed by a March 6, 1987 Determination Order that awarded 5 percent (16 degrees) unscheduled PPD without "offsetting" the prior 20 percent award from the August 1979 injury claim.<sup>6</sup> Given that the date of onset of the "post-aggravation rights" new/omitted medical condition was in October 1986, we found that these circumstances provided further support for our conclusion that claimant had no disability or loss of earning capacity from the prior claim that was still present on the date of onset of the "post-aggravation rights" new/omitted medical condition.

SAIF contends that, in effect, we have placed the burden of proof on the carrier to prove that claimant's impairment was *not* due to the compensable injury ("post-aggravation rights" new/omitted medical condition). We disagree.

Under ORS 656.266(1), the burden of proving the extent of claimant's permanent disability rests with him. We have simply applied the Director's standards and other applicable statutes, as we are required to do under ORS 656.278(1)(b) (2001). Our analysis and application of those rules and ORS 656.278(2)(d) resulted in claimant's PPD award for this claim.

Addressing the issue concerning existing disability at the onset of the "post-aggravation rights" new or omitted medical condition claim, SAIF asserts that it is "unlikely that the record in any workers' compensation case will be able to answer that question, because people go on with their lives and do not routinely have their physical capacities measured in the absence of an injury."

In response, the "offset" rule does not require a carrier to develop "disability" evidence for the "old" claim originating with the original injury or first claim closure. To the contrary, the rule (as previously interpreted in *Garoutte*), looks to the evidence in the particular record to establish whether disability existed at the time the new/omitted medical condition arose. That requirement is not limited to contemporaneous evidence, although such evidence would likely be highly probative. In other words, subsequent evidence could be sufficient to

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<sup>6</sup> We further note that the February 7, 2005 Notice of Closure did not "offset" the prior 20 percent award from the 1979 low back injury claim, but, rather "apportioned" the ROM findings. (Ex. 49-1). This apportionment was based on Dr. Irvine's "guess" that 50 percent of claimant's findings were due to the prior 1979 injury and subsequent 1980 surgery. (Ex. 45). SAIF then applied the "limitation" under ORS 656.278(2)(d) (2001) and subtracted the award of 12.5 percent unscheduled PPD that had been previously awarded under the September 1986 injury claim.

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establish “existing” disability at the time of onset of the “post-aggravation rights” new/omitted medical condition, provided that such evidence was deemed persuasive based on a review of a particular record.

Here, for the reasons discussed in our prior order, the “subsequent” evidence from Dr. Irvine and Dr. Ballard does not persuasively address whether claimant had “existing disability” at the time of onset of the new medical condition. Consequently, the fundamental elements for application of the Director’s “offset” rule have not been satisfied.

Arguably, the medical arbiter’s reference to “apportionment” could be interpreted as evidence of “existing” disability. However, as previously noted, the prior closure of this injury claim did not apply an offset. Additionally, the prior closure occurred after the date of onset of the new/omitted medical condition, at which time claimant had returned to regular work. Finally, and most importantly, the medical arbiter did not persuasively address this pivotal “existing” disability element required by the “offset” rule.

Turning to the “apportionment” question, SAIF argues that we have effectively engaged in “playing doctor” because *no* physician attributes *all* of claimant’s impairment findings to this injury. SAIF contends that our rating conflicts with the statute that requires that disability must be due to the compensable injury. *See* ORS 656.214(5). Based on the following reasoning, we disagree.

As explained in our prior order, we have relied on the medical arbiter’s impairment findings. It is undisputed that the medical arbiter recorded these findings. Admittedly, the medical arbiter used the term “apportion” in describing these findings. Nonetheless, for the reasons expressed in our prior order, such an “apportionment” does not satisfy the Director’s “apportionment” rule. Moreover, the arbiter’s “apportionment” description conflicts with the Director’s “offset” rule. Therefore, under these particular circumstances, by virtue of the Director’s standards, all of claimant’s permanent impairment findings, as reported by the medical arbiter, must be considered as due to the compensable injury.

Finally, SAIF contends that we erroneously interpreted the limitation provision under ORS 656.278(2)(d) in *Garoutte*, when we reasoned that the limitation “applies to the current claim only, and not to prior claims.” In *Garoutte*, we analyzed and harmonized the statutory scheme, concluding that we must apply the Director’s standards in claims involving ORS 656.222 and/or

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ORS 656.278(2)(d). SAIF's argument challenges the rationale expressed in *Garoutte*. On reconsideration, we continue to adhere to the reasoning expressed in our prior order and our reliance on our interpretation of ORS 656.278(1)(b) and (2)(d) and their application to other injury claims and awards as set forth in *Garoutte* and its progeny.

In conclusion, based on the reasons expressed above, as well as those set forth in our prior order, we decline SAIF's request that we reduce claimant's additional award of 13.5 percent (43.2 degrees) unscheduled PPD.

Accordingly, we withdraw our October 21, 2005 order. On reconsideration, as supplemented herein, we adhere to and republish our October 21, 2005 order in its entirety. The parties' rights of appeal and reconsideration shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on December 2, 2005