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In the Matter of the Compensation of  
**THOMAS L. HINSON, Claimant**  
Own Motion No. 04-0396M  
**OWN MOTION ORDER REVIEWING CARRIER CLOSURE**  
J Michael Casey, Claimant Attorneys  
Royal & Sunalliance, Insurance Carrier

Reviewing Panel: Members Kasubhai and Langer.

Claimant requests review of the August 24, 2004 “Notice of Closure: Own Motion Claim” (Notice of Closure) that did not award permanent disability resulting from claimant’s “worsened condition” claim. Claimant seeks additional permanent disability benefits, contending that his claim “does not involve merely ‘worsened conditions,’” but also included “post-aggravation rights” new medical conditions. We affirm the Notice of Closure.<sup>1</sup>

### FINDINGS OF FACTS

On July 27, 1988, claimant sustained a compensable low back injury that the self-insured employer accepted as disabling. The claim was first closed on March 6, 1990, and claimant’s aggravation rights expired on March 6, 1995.

In 1998, claimant sought treatment for low back pain. Dr. Treible, one of claimant’s attending surgeons, diagnosed advanced degenerative disc changes with facet arthropathy at L5-S1, as well as retrolisthesis of L4 on L5 and disc bulging at L3-4. (Ex. 113). Claimant underwent fusion surgery in December 1998. (Ex. 125A).

In January 1999, the employer denied claimant’s 3 level fusion condition. On May 6, 1999, an Administrative Law Judge (ALJ) set aside the employer’s denial. In December 1999, we affirmed the ALJ’s decision. On that same date, we also issued an Own Motion Order authorizing claim reopening for a worsened

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<sup>1</sup> Claimant’s July 27, 1988 claim was accepted as a disabling claim and was first closed on March 6, 1990. Thus, claimant’s aggravation rights expired on March 6, 1995. Therefore, when claimant sought claim reopening on April 15, 1998, the claim was within our Own Motion jurisdiction. ORS 656.278(1) (2001). Consistent with our statutory authority, on December 7, 1999, we issued our Own Motion Order authorizing the reopening of the claim and noted that when claimant was medically stationary, should close the claim pursuant to OAR 438-012-0055. (WCB Case No. 98-0374M). On August 24, 2002, the employer issued its Notice of Closure.

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condition under ORS 656.278(1)(a) (1987). These orders were not appealed.

In August 1999, claimant was referred to Dr. McCluskey for intractable pain symptoms. In September 2000, Dr. McCluskey implanted an intrathecal spinal infusion catheter and pump.

In May 2002, Dr. McCluskey opined that claimant's condition was not medically stationary and continued to authorize temporary disability compensation. Thereafter, claimant's care was transferred to Drs. Ackerman and Chiu.

In October 2002, Dr. Chiu reported that claimant's treatment plan was to gradually improve pain symptoms through a regimen of intrathecal medications. In September 2003, Dr. Ackerman noted that claimant's treatment goal was to tolerate reasonable periods of sitting to allow him to perform a computer oriented job.

In December 2003, Dr. Ackerman reported that claimant had not made any appreciable improvement for several months. Stating that claimant's condition was close to medically stationary, Dr. Ackerman recommended a physical capacities evaluation (PCE).

On March 22, 2004, Dr. Ackerman reported that there had not been improvement. Dr. Ackerman recommended continued home exercises and a PCE.

On April 29, 2004, Dr. Ackerman observed that claimant was medically stationary as of his last visit. Specifically, Dr. Ackerman believed that claimant's condition had been medically stationary for "quite a few months."

On August 24, 2004, the employer issued an Updated Notice of Acceptance listing an "L3-4 disc herniation" as the only accepted condition. On that same date, the insurer issued an Own Motion Notice of Closure that, among other determinations: (1) declared claimant medically stationary as of March 22, 2004; (2) awarded temporary disability benefits until March 22, 2004; and (3) awarded no additional permanent disability for claimant's "worsened" condition.

Claimant seeks review of the employer's August 24, 2004 Notice of Closure, disputing his medically stationary date and the award of permanent disability.

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## CONCLUSIONS OF LAW AND OPINION

Claimant asserts that his conditions were not medically stationary as of March 22, 2004. In the alternative, he seeks an increased permanent disability award. We address each issue separately.

### Medically Stationary Date/Temporary Disability

As a preliminary matter, we must determine what conditions are involved in the determination of claimant's medically stationary status. When the claim was reopened in December 1999, "post-aggravation rights" new or omitted medical condition claims were not included within our Own Motion jurisdiction. ORS 656.278 (1987); *Arvin D. Lal*, 55 Van Natta 816, 819 (2003); *Larry L. Ledin*, 52 Van Natta 680 (2001), *aff'd SAIF v. Ledin*, 174 Or App 61 (2001). Instead, at that time, our Own Motion jurisdiction encompassed only "post-aggravation rights" claims for "worsening" of a compensable condition and claims for medical services related to injuries occurring before 1966. ORS 656.278(1) (1987); *see Edward G. Sprague*, 55 Van Natta 1564, 1567 (2003); *Pamela A. Martin, D'cd*, 54 Van Natta 1852, 1857 (2002). Consequently, as a matter of law, our December 1999 reopening order was based solely on a "worsening" of claimant's compensable conditions. *Ginney E. Etherton*, 55 Van Natta 2216 (2003); *Clarence R. Wikel*, 55 Van Natta 1329 (2003); *Arvin D. Lal*, 55 Van Natta at 820-21.

After our December 7, 1999 order reopening the claim, the employer accepted a "post-aggravation rights" new medical condition ("L3-4 disc herniation"). Notwithstanding that acceptance, the employer has apparently not processed this "post-aggravation rights" new medical condition claim in accordance with Board rules. Specifically, the employer was also required to either voluntarily reopen the claim based on the newly accepted condition or submit a recommendation to the Board within 90 days. OAR 438-012-0030(1).

Because the employer performed neither of these tasks before issuing its August 24, 2004 claim closure, that closure only related to the reopened "worsened" condition (fusion L4-5/L4-5 disc herniation),<sup>2</sup> not the "post-

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<sup>2</sup> The record does not contain a Notice of Acceptance prior to the August 24, 2004 Updated Notice of Acceptance at Closure. However, in its 1999 Own Motion Recommendation, the employer lists the previously accepted condition as a "fusion L4-5" and in its August 2004 Notice of Closure it lists the accepted condition as "L4-5 disc herniation."

aggravation rights” new medical condition (“L3-4 disc herniation”).<sup>3</sup> *Clarence R. Wikel*, 55 Van Natta at 1334. Therefore, the medically stationary issue is limited to the previously accepted “fusion L4-5/L4-5 disc herniation” conditions. We proceed to address that issue.

Under ORS 656.278(6) and OAR 438-012-0055, the propriety of closure turns on whether claimant was medically stationary at the time of the August 24, 2004 Notice of Closure, considering claimant’s condition at that point and not subsequent developments. *Sullivan v. Argonaut Ins. Co.*, 73 Or App 694 (1985); *Dale M. Ackler*, 55 Van Natta 3783, 3785 (2003); *Donald B. Huege*, 55 Van Natta 1952 (2003).

“Medically stationary” means that no further material improvement would reasonably be expected from medical treatment, or the passage of time. ORS 656.005(17). The issue of a claimant’s medically stationary status is primarily a medical question to be decided based on competent medical evidence. *Harmon v. SAIF*, 54 Or App 121, 125 (1981); *Thomas L. Bishop*, 55 Van Natta 147, 149 (2003). Claimant bears the burden of proving that his condition was not medically stationary at claim closure. *Rogers v. Tri-Met*, 75 Or App 470 (1985); *Berliner v. Weyerhaeuser Corp.*, 54 Or App 624 (1981).

As addressed above, claimant must establish that his accepted “fusion L4-5/L4-L5 disc herniation” conditions were not medically stationary at claim closure. Based on the following reasoning, the record supports a conclusion that these conditions were medically stationary at the August 2004 claim closure.

On April 29, 2004, Dr. Ackerman concluded that claimant’s compensable condition was medically stationary as of the prior visit; *i.e.*, March 22, 2004. Dr. Ackerman noted that there had been no appreciable improvement for several months and concluded that claimant’s condition had been medically stationary for “quite a few months.”<sup>4</sup> Dr. Ackerman’s opinions are unrebutted.

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<sup>3</sup> The employer remains responsible for processing this “post-aggravation rights” new medical condition (“L3-4 disc herniation”), as discussed in the next section.

<sup>4</sup> Although Dr. Ackerman included the L3-4 disc herniation condition in his opinion, our analysis is limited to the accepted “worsened” condition for which this Own Motion claim was reopened.

Based on the uncontroverted medical evidence, we find that claimant's accepted condition under his worsening claim was medically stationary on the date his claim was closed. Therefore, his claim was not prematurely closed.

Moreover, based on this medical record, we further conclude that he is not entitled to temporary disability benefits in excess of those benefits awarded by the Notice of Closure. Accordingly, we affirm the Notice of Closure's temporary disability award.

### Permanent Disability

Claimant contends that he is entitled to an increased permanent disability award for his "post-aggravation rights" new medical conditions ("L3-4, L4-5 and L5-S1 disc herniations")<sup>5</sup> and seeks the appointment of a medical arbiter. Based on the following reasoning, we affirm the Notice of Closure's permanent disability award.

As addressed above, when this Own Motion claim was reopened in December 1999, the Board's Own Motion jurisdiction did not include "post-aggravation rights" new/omitted medical condition claims. As such, the closure of the claim pertained only to claimant's "worsened condition" claim. *See Clarence R. Wikel*, 55 Van Natta at 1332-33; *Arvin D. Lal*, 55 Van Natta at 823-24.

Furthermore, under the law in effect at the time of the employer's August 2004 acceptance, the "post-aggravation rights" new medical condition claim ("L3-4 disc herniation") should have been processed under the Board's Own Motion authority. *Jerry W. Breazeale*, 55 Van Natta at 2055-56. Such processing requires that the employer either voluntarily reopen the claim based on the newly accepted condition, or submit a recommendation to the Board within 90 days, as provided by rule. OAR 438-012-0030(1). Once reopened, the employer would also be

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<sup>5</sup> Claimant asserts that because we concluded in our December 7, 1999 Order on Review that the 1988 injury was the major contributing cause of his current consequential low back condition, the "post-aggravation rights" new medical conditions include L3-4, L4-5 and L5-S1 disc herniations. Yet, resolution of that question will have no effect on claimant's appeal of this Notice of Closure. As previously noted, the employer has neither voluntarily reopened a "post-aggravation rights" new or omitted medical condition claim nor submitted a Carrier's Own Motion Recommendation from which a Board order reopened the claim for the new or omitted medical condition. In the absence of such events, the employer's Notice of Closure is limited to the reopened "worsening" claim. *Arvin D. Lal*, 55 Van Natta 816 (2003).

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required to process the claim for the “post-aggravation rights” new or omitted medical condition to closure. OAR 438-012-0055.

In conclusion, notwithstanding the employer’s acceptance of claimant’s “post-aggravation rights” new medical condition (L3-4 disc herniation), the August 2004 Notice of Closure only pertains to claimant’s “worsened condition” claim that was opened in December 1999. *Fred J. Del Pizzo, Jr.*, 55 Van Natta 1944, 1947 (2003); *Wikel*, 55 Van Natta at 1334; *Lal*, 55 Van Natta at 820.

Because the Own Motion claim was reopened for a worsened condition, claimant is not statutorily entitled to a permanent disability award. *See Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Dougan v. SAIF Corp.*, 193 Or App 767 (2004),<sup>6</sup> *rev allowed* 337 Or 58 (December 21, 2004).

Finally, because claimant’s request for the appointment of a medical arbiter is based on his contention that he is entitled to permanent disability compensation attributable to a worsened condition, it is denied. *See Ronald J. Reynolds*, 55 Van Natta 3597, 3602 (2003); *Arvin D. Lal*, 55 Van Natta 815, 824 (2003).

Accordingly, we affirm the August 24, 2004 Notice of Closure in its entirety.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 21, 2005

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<sup>6</sup> Because the accepted “post-aggravation rights” new medical condition (L3-4 disc herniation) was not included in the August 2004 Notice of Closure, the employer remains obligated to process that condition in accordance with ORS 656.278(1)(b) (2001), which includes the reopening and eventual closure of the claim. ORS 656.278(5) (2001); OAR 438-012-0020(1); OAR 438-012-0030; *Breazeale*, 55 Van Natta at 2056-57; *Lal*, 55 Van Natta at 822-23. When those events happen, if claimant is dissatisfied with the employer’s actions, he may request Board review at that time.