In the Matter of the Compensation of
SHERRI L. WILLIAMS, Claimant
Own Motion No. 07-0001M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
James Bailey, Bailey & Yarmo LLP, Claimant Attorneys
Gilroy Law Firm, Defense Attorneys

Reviewing Panel: Members Kasubhai and Langer.

Claimant requests review of the December 5, 2006 and January 19, 2007 Notices of Closure, contending that her claim was prematurely closed. Alternatively, claimant seeks a permanent disability award. In addition, claimant seeks penalties and attorney fees for the self-insured employer's allegedly unreasonable claim processing.[1] Based on the following reasoning, we deny claimant's requests and affirm the closure.[2]

FINDINGS OF FACT

Claimant was compensably injured on October 13, 1996. Her aggravation rights have expired.

In June 2006, claimant sought treatment with Dr. Ha for leg and low back pain. Diagnosing a recurrent L4-5 disc herniation, Dr. Ha recommended surgery. (Ex. 70). Claimant underwent surgery on June 7, 2006. (Ex. 72).

In August 2006, Dr. Ha noted that claimant's leg pain had resolved, but that she continued to experience discogenic low back pain. He referred claimant to Dr. Andrews for pain management. (Ex. 79).

On October 27, 2006, claimant returned to Dr. Ha with continuing back pain. He prescribed home exercises and anti-inflammatories. Dr. Ha recommended facet injections to determine whether claimant was experiencing facet arthrosis. He determined that claimant's condition was not medically stationary, but released her to full-duty with restrictions. (Ex. 81).

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[1] Claimant's October 13, 1996 claim was accepted as a disabling claim and was first closed on April 26, 1999. Thus, claimant's aggravation rights expired on April 26, 2004. Therefore, when claimant sought claim reopening on June 2006, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On November 29, 2006, the self-insured employer voluntarily reopened the claim for a "worsened condition." ORS 656.278(1)(a); ORS 656.278(5). On December 5, 2006, as amended January 19, 2007, the employer issued its Notice of Closure.

[2] Claimant initially challenged the temporary disability award, but that dispute has now been resolved.

On October 30, 2006, Dr. Andrews reported that claimant's narcotics use was being slowly "tapered." Continued home exercises, anti-inflammatories, and sleep medication were recommended. (Ex. 83).

On November 21, 2006, claimant attended an employer-arranged medical examination with Dr. Courogen. Dr. Courogen opined that claimant's condition was medically stationary "now almost six months post-surgery." (Ex. 84).

The employer voluntarily reopened claimant's claim for a "worsened condition" on November 29, 2006. ORS 656.278(1)(a); ORS 656.278(5). (Ex. 85). On December 15, 2006, the employer issued its Notice of Closure that declared claimant's condition medically stationary as of November 21, 2006. (Ex. 86).

On December 20, 2006, Dr. Belza examined claimant. Diagnosing chronic low back pain, modic endplate changes at L4-5 and facet syndrome, Dr. Belza recommended a lumbar SPECT scan to "elucidate possible facet syndrome." He noted that treatment options included facet joint blocks based on the SPECT scan or possible medial branch rhizotomies. If those approaches failed and claimant's symptoms continued, Dr. Belza commented that it "may lead to a stabilization procedure at the L4-5 level."

On January 4 and 5, 2007, through "check-the-box" responses, Dr. Ha concurred with Dr. Courogen's findings and conclusions.[3] (Exs. 89, 90).

On January 19, 2007, the employer amended its December 15, 2006 Notice of Closure to include a temporary disability award from June 5, 2006 through November 21, 2006. (Ex. 91).

CONCLUSIONS OF LAW AND OPINION

Premature Closure / Penalties

Claimant contends that her conditions were not medically stationary when her claim was closed. In addition, she seeks penalties for premature closure and improper claim processing.

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[3] Dr. Ha concurred with the following statement:

> "According to OAR 436-030-0035, a concurrence with another physician's report is an agreement ***in every particular,*** including medically stationary impression and date, unless the physician expressly states to the contrary and explains the reasons for the disagreement."

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 December 15, 200, as amended January 19, 2007, Notice of Closure, considering claimant's condition at that point and not subsequent developments.

"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 contends that her claim was prematurely closed. In doing so, she asserts that Dr. Courogen was neither aware of Dr. Ha's "not medically stationary" opinion nor Dr. Ha's pain management referral. Furthermore, claimant argues that Dr. Andrews, rather than Dr. Ha, was claimant's attending physician. As such, claimant contends that Dr. Ha's concurrence with Dr. Courogen's conclusion is not probative evidence on the medically stationary issue. Based on the following reasoning, the record does not establish the closure of the claim was premature closed.

It is unclear whether Dr. Courogen had considered Dr. Ha's October 27, 2006 chart note regarding claimant's medically stationary status. Nevertheless, Dr. Courogen acknowledged that claimant had been referred to Dr. Andrews for pain management, indicating that Dr. Courogen was aware of claimant's ongoing pain and further treatment/pain evaluations. Nonetheless, Dr. Courogen still opined that claimant's condition was medically stationary as of his November 21, 2006 report.

Moreover, the record does not support claimant's contention that Dr. Andrews assumed the role of attending physician. Claimant did not complete a Form 827 nor does Dr. Andrews acknowledge an attending physician status. *Howard R. Wells*, 58 Van Natta 653 (2006) (Whether a physician qualifies as an "attending physician" is a question of fact. The Board determined that by the claimant's and physician's signature on an 827 Form, that physician had accepted responsibility for the claimant's care and treatment). In any event, regardless of whether Dr. Andrews was claimant's attending physician, it is well settled that for purposes of determining whether a claimant's condition is medically stationary at the time of closure, we rely on competent medical evidence and not just the opinion of the attending physician. *See George Sweet*, 55 Van Natta 2815,

2818 (2003); *Charles M. Haney*, 53 Van Natta 195 (2001). Thus, the absence of a concurrence from Dr. Andrews regarding Dr. Courogen's medically stationary opinion would not be determinative on the premature closure issue.

Likewise, regardless of whether Dr. Ha continued to be claimant's attending physician, Dr. Ha's extensive familiarity with claimant and her complaints (both before and after the June 7, 2006 surgery), provided an advantageous position to comment on claimant's medically stationary status. Under such circumstances, we consider Dr. Ha observations regarding claimant's medically stationary status to be the most persuasive. *See Somers v. SAIF*, 77 Or App 259 (1986); *Weiland v. SAIF*, 64 Or App 810 (1983); *George Sweet*, 55 Van Natta at 2815. Finally, we note the absence of contradictory medical opinions rebutting Drs. Courogen's and Ha's medically stationary opinions.

In reaching this conclusion, we acknowledge that, in December 2006, shortly after the employer closed the claim, Dr. Belza opined that claimant might require surgical intervention if the facet block injections were unsuccessful. However, Dr. Belza's opinion regarding future surgery is couched in terms of possibility, which is not legally sufficient or persuasive. Instead, persuasive medical opinions must be based on medical probability, rather than possibility. *Gromley v. SAIF*, 52 Or App 1055 (1981) (opinion in terms of medical possibility rather than medical probability are not persuasive); *Timothy S. Adams*, 58 Van Natta 1135 (2006) ("possibility" of medical treatment insufficient); *Jeffrey D. Dugan*, 56 Van Natta 550 (2004) ("possibility" of surgery insufficient under ORS 656.278(1)(a)).

In any event, even if we were to consider Dr. Belza's observation that claimant may need future surgery, that observation did not address claimant's condition's medically stationary status at the time of the claim closure nor does it imply that she was not medically stationary on December 15, 2006, when the employer closed her claim. *See Schuening v. J.R. Simplot & Co.*, 84 Or App 622, 625 (1987). Rather, Dr. Belza's opinion focuses on claimant's current need for treatment, not her condition when her claim was closed. *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).

Finally, the term "medically stationary" does not mean that there is no longer a need for continuing medical care. *Maarefi v. SAIF*, 69 Or App 527, 531 (1984). Rather, the record must establish that there is a reasonable expectation that further or ongoing medical treatment would "materially improve" claimant's compensable condition at claim closure. *George D. Hilton*, 53 Van Natta 1641

(2001). Thus, although claimant may require further pain management treatment, the record does not establish that when the claim was closed on December 15, 2006 and January 19, 2007, continuing medical treatment provided a reasonable expectation of material improvement in her compensable condition.

In conclusion, based on the record and the reasoning above, we are persuaded that claimant's compensable condition was medically stationary when her claim was closed. Likewise, we do not consider the employer's claim processing to have been unreasonable. Consequently, the assessments of penalties and attorney fees are not warranted.

Permanent Disability

Claimant contends that she is entitled to an increased permanent disability award for a "post-aggravation rights" new medical condition and seeks the appointment of a medical arbiter. Based on the following reasoning, we affirm the Notices of Closure, which awarded no permanent disability.

When a claim has been reopened pursuant to our Own Motion authority for a "worsened condition" under ORS 656.278(1)(a), the subsequent closure of that claim pertains only to the reopened "worsened condition" claim. *Dennis D. Kessel*, 55 Van Natta 3651 (2003); *Clayton L. Sutherland*, 55 Van Natta 2694 (2003); *Ginney E. Etherton*, 55 Van Natta 2216 (2003).

Here, the claim was reopened for a "worsened condition" that was in Own Motion status. *See* ORS 656.278(1)(a). Accordingly, the employer's Notices of Closure pertained only to the Own Motion claim for a "worsened condition." *See Ginny E. Etherton*, 55 Van Natta at 2217.

Claimant contends that her condition does not merely represent a "worsening," but rather constitutes a "new injury." Yet, there is no indication that claimant initiated a new or omitted medical condition claim. Likewise, the employer neither voluntarily reopened the claim for a "post-aggravation rights" new or omitted medical condition nor submitted a Carrier's Own Motion Recommendation for or against reopening such a claim. In the absence of such events, the Notices of Closure are limited to the "worsening" claim that was reopened on November 29, 2006.[4] *Arvin D. Lal*, 55 Van Natta 816 (2003).

[4] The issues before us are limited to those concerning claimant's request for review of the closure of her reopened "worsened condition" claim for the accepted low back condition. However, a worker may initiate a new or omitted medical condition claim at any time. ORS 656.267(1). If claimant wishes

Finally, because the claim was reopened for a worsened condition that was in Own Motion status, claimant is not statutorily entitled to a permanent disability award. *See Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recons* 54 Van Natta 1552 (2002), *aff'd*, *Dougan v. SAIF*, 193 Or App 767 (2004), *vacated*, 339 Or 1 (2005).[5]

Accordingly, we affirm the December 15, 2006 and January 19, 2007 Notices of Closure.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 16, 2007

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to initiate a new or omitted medical condition claim she may request formal written acceptance of the claim from the employer. *Id*. If the employer receives such a claim, and the claim is "determined to be compensable," it must be processed according to the Board's rules. *See* 438-012-0001(4) (WCB Admin. Order No. 3-2005, eff. January 1, 2006); OAR 438-012-0030(1); *James W. Jordan*, 58 Van Natta 34, 37 (2006).

[5] 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. Effective January 1, 2006, the legislature amended ORS 656.278(4) to permit any party to appeal an Own Motion order. *See* House Bill 2294 (2005) section 2, 4.