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In the Matter of the Compensation of  
**BELINDA A. BUTCHER, Claimant**  
Own Motion No. 07-0158M  
**OWN MOTION ORDER REVIEWING CARRIER CLOSURE**  
Ransom Gilbertson Martin et al, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of that portion of the August 27, 2007 Notice of Closure that did not award any temporary disability benefits. Claimant contends that she is entitled to temporary total disability (TTD) benefits.<sup>1</sup> Based on the following reasoning, we modify the closure.

FINDINGS OF FACT

Claimant compensably injured her low back on March 5, 1986. Claimant's aggravation rights have expired.

On April 27, 2005, claimant sought treatment with Dr. McQueen, her attending physician, for low back complaints. Diagnosing a low thoracic/upper lumbar strain, Dr. McQueen prescribed heat, pain and anti-inflammatory medication, and physical therapy. He released claimant from work through May 24, 2005. (Exs. 6-1, 6-2, 6-3, 6-4). Throughout claimant's follow-up examinations, Dr. McQueen noted that claimant's condition was improving with the prescribed treatment. On May 24, 2005, Dr. McQueen returned claimant to full time work as of that date, again noting that claimant's condition had improved. (Ex. 6-5).

Claimant returned to Dr. McQueen on June 17, 2005 due to increased low back symptoms. Continuing to prescribe pain and anti-inflammatory medication and future physical therapy, Dr. McQueen released claimant from work "until [claimant's] back is 100 percent better." He further noted that consideration for a referral to a back specialist and MRI studies might be necessary. (Ex. 6-6).

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<sup>1</sup> Claimant's March 5, 1986 claim was accepted as a disabling claim and was first closed on September 4, 1986. Thus, claimant's aggravation rights expired on September 4, 1991. Therefore, when claimant sought claim reopening on April 2005, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On August 21, 2007, the SAIF Corporation voluntarily reopened claimant's claim for a "post-aggravation rights" new/omitted medical condition ("lumbosacral strain/sprain"). ORS 656.278(1)(b); ORS 656.278(5). On August 27, 2007, SAIF issued its Notice of Closure.

In February 2006, claimant requested that SAIF modify its acceptance to include “lumbosacral joint sprain/strain” as a “post-aggravation rights” new/omitted medical condition. On April 17, 2006, SAIF issued a denial of this “post-aggravation rights” new/omitted medical condition claim. Claimant requested a hearing. (WCB Case No. 06-02777).

On April 7, 2006, claimant attended an SAIF-arranged medical examination with Dr. Vessely, who diagnosed a lumbar sprain/strain (fully resolved) and lumbar spondylosis (preexisting). Dr. Vessely noted that claimant “continue[d] to work full time.” Dr. Vessely opined that claimant’s compensable lumbar sprain/strain was medically stationary. (Ex. 8).

On April 20, 2007, an Administrative Law Judge (ALJ) set aside SAIF’s April 2006 denial. (Ex. 12). That order was not appealed. Thereafter, SAIF issued its Modified Notice of Acceptance to include “lumbosacral strain/sprain” as a “post-aggravation rights” new/omitted medical condition in this 1986 claim. (Ex. 13).

In May 2007, claimant requested that SAIF reopen her claim and pay TTD compensation beginning April 9, 2005. (Ex. 14). On August 21, 2007, SAIF voluntarily reopened claimant’s claim for the “post-aggravation rights” new/omitted medical condition (“lumbosacral strain/sprain”). (Ex. 16). ORS 656.278(1)(b); ORS 656.278(5).

On August 27, 2007, SAIF issued its Notice of Closure, which did not award TTD compensation. Claimant requested Board review.

### CONCLUSIONS OF LAW AND OPINION

The August 27, 2007 Notice of Closure did not award TTD compensation. Claimant contends that she is entitled to TTD benefits beginning April 9, 2005. Based on the following reasoning, we modify the TTD award.

Entitlement to TTD benefits on this reopened “post-aggravation rights” new/omitted medical condition claim is determined under ORS 656.278 and the Board’s Own Motion rules enacted under that statute. The requirements for payment of TTD benefits for claims reopened under ORS 656.278(1)(a) or (1)(b) include at least the following.

First, the claimant must require (including a physician’s recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment (treatment that relates to or is used in the cure of diseases, tends to heal, restore

to health, or to bring about recovery). Second, temporary disability benefits are payable from the date the attending physician authorizes temporary disability related to the hospitalization, surgery, or other curative treatment, which may be the date the requisite treatment is recommended. Third, temporary disability benefits are payable under ORS 656.210, 656.212(2) and 656.262(4).

*Mark A. Cavazos*, 55 Van Natta 3004 (2003) (where the claimant did not require hospitalization, surgery or other curative treatment, the temporary disability authorized by the attending physician was not “for the hospitalization, surgery, or other curative treatment” as required under ORS 656.278(1)(a)); *David L. Hernandez*, 56 Van Natta 2441 (2004) (temporary disability commences with surgery recommendation *and* attending physician authorization, *Cavazos* followed); *Loyd E. Garoutte*, 56 Van Natta 416, 423 n 12 (2004) (analysis of entitlement to temporary disability same under ORS 656.278(1)(a) and (b) because statutory language regarding payment of temporary disability benefits on open “worsened” condition claims and open “post-aggravation rights” new/omitted medical condition claims is identical).

Here, because the record does not establish that claimant required hospitalization or surgery, the issue is whether the prescribed treatment constitutes “curative treatment.” “Curative treatment” is defined as “treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery.” *Cavazos*, 55 Van Natta at 3012-13. The question of whether treatment constitutes “curative treatment” presents a medical question that must be addressed by medical evidence. *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (“the Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”).

Based on the following reasoning, we find that this record satisfies the requisite factors.

On April 27, 2005, restricting claimant from work, Dr. McQueen prescribed pain/anti-inflammatory medication and physical therapy. Dr. McQueen noted that claimant’s condition had gradually improved as a result of these treatments. Dr. McQueen continued to prescribe these treatments in June 2005, after claimant’s condition worsened following her return to regular work. In doing so, Dr. McQueen released claimant from work “until her back is 100 percent better.”

Under these particular circumstances, we conclude that Dr. McQueen’s treatment (which prescribed medication and physical therapy, while claimant was taken off work until her back was “100 percent better”) constituted “other curative treatment” for the purposes of ORS 656.278(1)(b). In other words, Dr. McQueen’s

opinions and reports persuasively establish that the treatment claimant received was related to, or was used in the cure of her condition, or tended to heal, restore her to health or to bring about her recovery.

Because the record establishes that claimant required “other curative treatment,” it follows that Dr. McQueen’s authorization for TTD was “for the hospitalization, surgery or other curative treatment.” ORS 656.278(1)(b). Furthermore, Dr. McQueen’s April 27, 2005 authorization for time loss satisfies the provisions of ORS 656.210, ORS 656.212(2), and ORS 656.262(4). Therefore, we conclude that the claimant was entitled to TTD benefits beginning April 27, 2005.<sup>2</sup>

Accordingly, we modify the Notice of Closure to award TTD beginning from April 27, 2005 and paid in accordance with the provisions of ORS 656.210, ORS 656.212, and ORS 656.262(4). OAR 438-012-0035(1).

Claimant’s attorney is awarded 25 percent of any increased temporary disability compensation created by this order, not to exceed \$1,500, payable directly to claimant’s attorney.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on February 19, 2008

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<sup>2</sup> Claimant contends that she is entitled to TTD beginning on April 9, 2005. However, the record contains no work release that would entitle claimant to TTD benefits under ORS 656.278(1)(b) beginning on that date. During her initial treatment with Dr. McQueen on April 27, 2005, claimant reported she had back pain at work on April 8, 2005, was “[t]reated by a nurse practitioner at urgent care and released to light duty on the 16<sup>th</sup> at [her current employer].” (Ex. 6-1). Claimant does not submit a copy of any work release occurring before Dr. McQueen’s April 27, 2005 examination. *Glenn E. McKelvey*, 57 Van Natta 1896, 1903 (2005) (statement from the claimant regarding his work status did not represent a release from work from the attending physician). Therefore, claimant has not established entitlement to TTD benefits before April 27, 2005.