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In the Matter of the Compensation of  
**JERRY V. DRUERY, Claimant**  
Own Motion No. 08-0015M  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE  
Sara L Gabin, AAL, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of the December 20, 2007 Notice of Closure that awarded an additional 9 percent (13.5 degrees) scheduled permanent partial disability (PPD), for a total award of 24 percent (36 degrees) scheduled PPD for loss of use or function of the right leg (knee).<sup>1</sup> Based on the following reasoning, we modify the Notice of Closure to award an additional 6 percent (9 degrees) scheduled PPD.

FINDINGS OF FACT

On February 8, 1973 claimant sustained a compensable right knee injury. Claimant's aggravation rights have expired.

The claim initially closed by Determination Order on March 15, 1973, awarding no PPD. A subsequent Determination Order of July 30, 1973 awarded 15 percent (22.5 degrees) scheduled PPD award for loss of use or function of claimant's right leg (knee). (Ex. 5).

In August 2006, claimant sought treatment for right knee pain. (Ex. 8-1). Dr. James diagnosed right knee osteoarthritis. (Ex. 11-5). In November 2006, SAIF voluntarily reopened claimant's claim for a "worsened condition" claim. (Ex. 12).

Claimant subsequently underwent a total right knee replacement surgery. (Ex. 13). Thereafter, Dr. James diagnosed right knee residual medial collateral ligament laxity. (Ex. 16-4).

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<sup>1</sup> Claimant's February 8, 1973 claim was accepted as a disabling claim and was first closed on March 15, 1973. Thus, claimant's aggravation rights expired on March 15, 1978. Therefore, when claimant sought claim reopening in August 2006, the claim was within our Own Motion jurisdiction. ORS 656.278(1). The SAIF Corporation voluntarily reopened the claim for a "worsened" condition on November 6, 2006. ORS 656.278(5); ORS 656.278(1)(a). In December 2007, SAIF also voluntarily reopened the claim for "post-aggravation rights" new/omitted medical conditions ("right knee lateral osteoarthritis" and "right knee medial collateral ligament laxity"). (Ex. 22). ORS 656.278(5); ORS 656.278(1)(b). On December 20, 2007, SAIF issued its Notice of Closure.

On December 10, 2007, SAIF voluntarily reopened claimant's claim for "post-aggravation rights" new or omitted medical conditions (right knee lateral osteoarthritis and medial collateral ligament laxity). (Ex. 22).

On December 20, 2007, SAIF issued a Notice of Closure closing the "worsened condition" and "new/omitted medical condition" claims. Regarding the "post-aggravation rights" new/omitted medical conditions, claimant was awarded an additional 9 percent (13.5 degrees) scheduled PPD, for a total award of 24 percent (36 degrees) scheduled PPD for the right leg (knee).

Claimant requested review of the Notice of Closure and the appointment of a medical arbiter. On February 28, 2008, we issued an Interim Own Motion Order Postponing Action on Review of Carrier Closure to obtain a medical arbiter examination regarding the "post-aggravation rights" new medical condition.

On April 24, 2008, Dr. Blake, the medical arbiter, found loss of knee ROM as follows: 110 degrees right flexion; 140 degrees left flexion; -7 degrees right extension; and 0 degrees left extension. Dr. Blake further found that claimant "was not significantly limited in the ability to repetitively use the right knee," although he was "limited with his ability to repetitively squat, knee, climb ladders, jump or walk on uneven grounds."

### CONCLUSIONS OF LAW AND OPINION

The Own Motion claim was reopened for both the processing of a "worsened condition" and "post-aggravation rights" new medical conditions ("right knee lateral osteoarthritis" and "right knee medial collateral ligament laxity"). (Exs. 12; 22). Insofar as the claim concerns "post-aggravation rights" new medical conditions, it may qualify for payment of PPD compensation. ORS 656.278(1)(b); *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).<sup>2</sup>

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<sup>2</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. 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), sections 2, 4.

The PPD limitation set forth in ORS 656.278(2)(d) 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>3</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) 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, all three factors are satisfied. Dr. Blake, the medical arbiter, found decreased knee ROM, which qualifies for an impairment rating. Additionally, claimant had right knee surgery, which also qualifies for an impairment rating. Moreover, claimant’s “post-aggravation rights” new medical conditions (“right knee lateral osteoarthritis” and “right knee medial collateral ligament laxity”) involve the same “injured body part” that was the basis of his previous 15 percent scheduled PPD award for his initially accepted right knee condition. Therefore, the limitation in ORS 656.278(2)(d) applies to claimant’s scheduled PPD. However, before application of the statutory limitation, we redetermine claimant’s scheduled PPD pursuant to the Director’s standards. *See* OAR 436-035-0007(3); *Nielsen*, 55 Van Natta at 3207.

We turn to the merits of the PPD issue. Claimant’s claim was closed by an Own Motion Notice of Closure on December 20, 2007. Thus, the applicable standards are found in WCD Admin. Order 05-074 (eff. January 1, 2006). *See* OAR 436-035-0003(1).

For the purpose of rating claimant’s PPD, only the opinions of claimant’s attending physician at the time of claim closure, or any findings with which he or she concurred, and a medical arbiter’s findings may be considered. *See* ORS 656.245(2)(b)(B); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994).

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<sup>3</sup> ORS 656.278(2)(d) 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.”

Dr. Blake, the medical arbiter, provided a thorough and complete appraisal of claimant's condition, as well as his permanent restrictions and limitations. Consequently, we rely on Dr. Blake's report to rate claimant's PPD.

Dr. Blake found right knee flexion of 110 degrees and left knee flexion of 140 degrees. He also found right knee extension -7 degrees and left knee extension 0 degrees. Because claimant has no history of injury to the contralateral joint, a comparison with the left knee is appropriate. OAR 436-035-0011(3).

Accordingly, claimant receives a value of 11.6 percent for flexion and 0 percent for extension.<sup>4</sup> OAR 436-035-0220(1) and (2). Adding these values results in a total value of 11.6 percent, which is then rounded to a total value of 12 percent for decreased knee ROM.

Claimant's right knee surgery entitles him to 20 percent permanent impairment. OAR 436-035-0230(5)(d).

Claimant was also found to have Grade 1 mild instability of the right knee. However, where there is a prosthetic knee replacement, instability for the knee is not rated unless it is Grade 2 or greater. OAR 436-035-0230(3)(d). Thus, no value for instability is granted.

Under OAR 436-035-0019(1)(b), a claimant is entitled to a 5 percent scheduled chronic condition impairment value when a "preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, the worker is significantly limited in the repetitive use" of a knee. Here, Dr. Blake, the medical arbiter, expressly concluded that claimant was not significantly limited in the repetitive use of his knee. Thus, the record does not persuasively support the basis for a chronic condition impairment value.<sup>5</sup>

Claimant also asserts that he is limited in his ability to engage in certain functions "routinely required by [his] work." Nevertheless, the "chronic condition" rule focuses on significant limitations on the repetitive use of the

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<sup>4</sup> This value is determined by comparing the flexion findings, right/left, as follows:  $110/140=X/150$ ;  $X=117.8$  degrees; 118 degrees equals 11.6 percent. See OAR 436-035-0011(3), (4); OAR 436-035-0220(1).

<sup>5</sup> In support of his assertion of a "chronic impairment," claimant refers to a "post-closure" report from his treating physician, Dr. Isaacson. As previously noted, we consider Dr. Blake's findings and opinions to be detailed and complete. In any event, Dr. Isaacson did not indicate that claimant was significantly limited in the repetitive use of his right knee, which is the prescribed standard for a "chronic condition" impairment value. (See Exs. 20-21).

relevant body part, not on a claimant's ability to perform work. *Gonzalez v. SAIF*, 183 Or App 183, 190-91 (2002); *Fidel Vivanco*, 59 Van Natta 1287, 1290 (2007); *Gordiano Mendoza*, 60 Van Natta 248, 249 (2008). Accordingly, based on the foregoing reasoning, we conclude that claimant is not entitled to a chronic condition impairment value.

Therefore, in determining claimant's PPD, we combine the ratable impairment findings as follows: 20 percent (surgery) combined with 12 percent (ROM) equals 30 percent. OAR 436-035-0011(6)(a).

Claimant has received a prior award of 15 percent scheduled PPD for loss of use or function of his right knee. As addressed above, the limitation in ORS 656.278(2)(d) applies to claimant's scheduled PPD award. Therefore, claimant is entitled to additional scheduled PPD only to the extent that the PPD rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant's prior 15 percent scheduled PPD award is less than his current 30 percent scheduled PPD. Consequently, claimant is entitled to an additional 15 percent (22.5 degrees) scheduled PPD for loss of use or function of the right leg (knee). Because the December 20, 2007 Notice of Closure awarded an additional 9 percent (13.5 degrees) scheduled PPD, for a total of 24 percent scheduled PPD, claimant is awarded an additional 6 percent scheduled PPD, for a total of 30 percent scheduled PPD for loss of use or function of the right leg (knee).

Accordingly, we modify the December 20, 2007 Notice of Closure to award an additional 6 percent (9 degrees) scheduled PPD, for a total award of 30 percent (45 degrees) scheduled PPD for loss of use or function of the right leg (knee). Because our decision results in increased compensation, claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order (the 6 percent (9 degrees) increased scheduled PPD award for loss of use or function of the right leg (knee) granted by this order), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(2); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on July 2, 2008