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In the Matter of the Compensation of  
**MARK H. HARDIE, Claimant**  
Own Motion No. 08-0104M  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE  
Hollander & Lebenbaum, Claimant Attorneys  
Law Offices of Robert S Dorband, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of the July 9, 2008 Notice of Closure that did not award permanent disability for his “post-aggravation rights” new/omitted medical condition (“osteoarthritis of the left knee”).<sup>1</sup> Based on the following reasoning, we modify the Notice of Closure.

FINDINGS OF FACT

Claimant sustained a compensable left knee injury on December 10, 1992. The claim was accepted for a left knee torn medial meniscus. (Ex. 3). Claimant was initially awarded of 19 percent (28.5 degrees) scheduled permanent disability (PPD) for loss of use or function of the left leg (knee). (Ex. 4). His aggravation rights expired November 12, 2001.

On January 5, 1993, claimant underwent left knee surgery including a partial medial meniscectomy. (Ex. 13-2). On April 15, 1993, another partial medial meniscectomy was performed. (*Id.*) On September 11, 1995, claimant underwent a third left knee surgery, which included a partial lateral meniscectomy. (Ex. 14-3).

Before the expiration of claimant’s aggravation rights, on November 5, 1999, the insurer accepted as a new/omitted medical condition (“chondromalacia of the medial femoral condyle”). (Ex. 5).<sup>2</sup>

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<sup>1</sup> Claimant’s December 10, 1992 claim was accepted as a disabling claim and was first closed on November 12, 1996. Thus, claimant’s aggravation rights expired on November 12, 2001. Therefore, when claimant sought claim reopening in October 2007, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On July 9, 2008, the insurer voluntarily reopened the claim. On July 9, 2008, the insurer issued its Notice of Closure.

<sup>2</sup> On September 6 and September 11, 2006, the insurer issued Notices of Closure that awarded an additional 3 percent (4.5 degrees) scheduled PPD for the loss of use of the left leg. (Exs. 8, 9). However, on October 10, 2006, an Order on Reconsideration rescinded the September 2006 closures. (Ex. 11).

A January 4, 2007 Notice of Closure awarded an additional 3 percent (4.5 degrees) scheduled PPD for the loss of use or function of the left leg, bringing claimant's total scheduled PPD award to 22 percent (33 degrees). (Ex. 12). An April 4, 2007 Order on Reconsideration reduced the total scheduled PPD award to 20 percent (30 degrees). (Ex. 14).

On February 26, 2008, the insurer issued a Modified Notice of Acceptance to include a "post-aggravation rights" new/omitted medical condition of left knee osteoarthritis. (Ex. 16).

On July 9, 2008, the insurer voluntarily reopened the claim for a "post-aggravation rights" new/omitted medical condition. (Ex. 21). Contemporaneously, the insurer issued an Notice of Closure that did not award any additional scheduled PPD. (Ex. 20).

Claimant requested review of the July 9, 2008 Notice of Closure and the appointment of a medical arbiter. On August 13, 2008, we issued an Interim Own Motion Order Postponing Action On Review Of Carrier Closure, which referred the claim to the Director for the appointment of a medical arbiter. *Mark H. Hardie*, 60 Van Natta 2085 (2008).

On October 6, 2008, Dr. Wong, the medical arbiter, found the following left/right knee range of motion (ROM): 120/125 degrees flexion, and -15/0 degrees extension. Dr. Wong also reported that there was a Grade III-IV patellar chondromalacia with chronic effusion. Dr. Wong further concluded that claimant was significantly limited in the use of his left knee.

### CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of a "post-aggravation rights" new medical condition. (Ex. 21). Such a claim may qualify for payment of permanent disability compensation.<sup>3</sup> ORS 656.278(1)(b); *Goddard v. Liberty*

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<sup>3</sup> The insurer reopened the claim for "left knee torn medial meniscus, left knee chondromalacia of the femoral condyle and osteoarthritis of the left knee." (Ex. 21). However, the left knee torn medial meniscus and left knee chondromalacia of the femoral condyle were accepted before the expiration of claimant's 5-year aggravation rights. (Exs. 5, 14). Moreover, the claim was previously closed for those conditions, which resulted in permanent disability evaluations. Thus, the only "post-aggravation rights" new/omitted medical condition for which the claim was reopened and closed is left knee osteoarthritis. See *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238, 244-45 (2004); *Michael E. Johnson*, 59 Van Natta 2515, 2516 (2007).

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*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).

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.” *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. Wong found decreased knee ROM and a “chronic condition.” Claimant also underwent surgery which qualifies for an impairment award. Moreover, claimant’s “post-aggravation rights” new medical condition involves the same “injured body part” (left knee) that was the basis of his previous scheduled PPD award. 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. *Nielsen*, 55 Van Natta at 3207.

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); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994).

The parties do not dispute the impairment findings of the medical arbiter, Dr. Wong. Additionally, Dr. Wong performed a thorough and complete examination. Consequently, we rely on Dr. Wong’s October 6, 2008 report to rate claimant’s permanent disability.

Claimant’s claim was closed by Own Motion Notice of Closure dated July 9, 2008. Thus, the applicable standards are found in WCD Admin. Order 07-060 (eff. January 1, 2008). *See* OAR 436-035-0003(1).

Dr. Wong found the following left/right knee range of motion (ROM): 120/125 degrees flexion, and –15/0 degrees extension. Because claimant has no history of injury to the contralateral joint, a comparison with the right knee

is appropriate. OAR 436-035-0011(3). Accordingly, claimant receives the following ROM values: 2.4 percent for flexion;<sup>4</sup> and 0 percent for extension.<sup>5</sup> OAR 436-035-0220(1), (2). This results in a total value of 2.4 percent for decreased left knee ROM, which is rounded to 2 percent. OAR 436-035-0011(4).

Dr. Wong also reported that there was a Grade III-IV patellar chondromalacia with chronic effusion, which receives a value of 5 percent. OAR 436-035-0230(11).

Claimant underwent three left knee surgeries including the following: a partial medial meniscectomy (January 5, 1993), another partial medial meniscectomy (April 15, 1993), and a partial lateral meniscectomy (September 11, 1995). (Exs. 13-2, 14-3). Claimant receives 5 percent for a partial loss of the medial meniscus and 5 percent for partial loss of the lateral meniscus. OAR 436-035-0230(5)(d).<sup>6</sup> OAR 436-035-0005(9); OAR 436-035-00230(5)(d).

Finally, Dr. Wong opined that claimant was significantly limited in the ability to repetitively use his left knee. Under such circumstances, he receives an impairment value of 5 percent for a chronic condition. OAR 436-035-0019.

Therefore, we combine the ratable impairment findings as follows: 5 percent (surgery) combined with 5 percent (surgery) equals 10 percent; 10 percent combined with 5 percent (chondromalacia) equals 15 percent; 15 percent combined with 5 percent (chronic condition) equals 19; 19 percent combined with 2 percent (ROM) equals 21 percent. OAR 436-035-0011(6)(a).

Claimant has received a prior award of 20 percent (30 degrees) scheduled PPD for the left leg. As discussed above, the limitation in ORS 656.278(2)(d) applies. 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 20 percent

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<sup>4</sup> This value is determined by comparing the flexion findings, left/right, as follows:  $120/125 = X/150$ ;  $X = 144$  degrees; 144 degrees equals 2.4 percent. See OAR 436-035-0011(3), (4); OAR 436-035-0220(1).

<sup>5</sup> Claimant's extension findings on the injured knee is -15 degrees. The maximum knee extension ROM finding is 0 degrees. Because the injured knee has "retained" a range of motion that exceeds the maximum "normal," there is no loss of range of motion. OAR 436-035-0007(7); OAR 436-035-0011(2); OAR 436-035-0220(2).

<sup>6</sup> No additional value is awarded for multiple resections of a single meniscus. OAR 436-035-0230(5)(d).

scheduled PPD award is less than his current 21 percent scheduled PPD. Consequently, claimant is awarded an additional 1 percent (1.5 degrees) scheduled PPD for loss of use or function of the left leg.

Claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of any increased compensation created by this order (the 1 percent (1.5 degrees) scheduled PPD for the left knee), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(3); OAR 438-015-0040(1); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on November 28, 2008