

---

In the Matter of the Compensation of  
**DEBRA CARR, Claimant**  
WCB Case No. 09-00149  
ORDER ON REVIEW  
Strooband & Ousey PC, Claimant Attorneys  
The Law Office Of Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The insurer requests review of Administrative Law Judge (ALJ) Smith's order that: (1) found that the issue of premature closure was raised during the reconsideration proceeding before the Appellate Review Unit (ARU); (2) determined that claimant's aggravation claim for her right elbow and bilateral carpal tunnel syndrome (CTS) conditions was prematurely closed; and (3) awarded an "out-of-compensation" attorney fee pursuant to OAR 438-015-0055(2). On review, the issues are scope of issues, premature closure and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following supplementation.

Claimant requested reconsideration of a Notice of Closure dated August 14, 2008, as corrected on August 28, 2008. The closure notice awarded both temporary and permanent disability. (Exs. 93, 95).

On the request for reconsideration form, claimant checked boxes requesting reconsideration on the issues of impairment findings and permanent disability. Claimant did not check boxes on the form that provided for the issues of medically stationary date and premature claim closure. (Ex. 95A).

On reconsideration, the ARU addressed the issues of claimant's medical stationary status and premature closure. Based on the closing report of claimant's attending physician, Dr. Korpa, a January 7, 2009 Order on Reconsideration determined that the Notice of Closure was not premature, and affirmed the closure in all respects. (Ex. 101). Claimant requested a hearing, raising issues of premature closure and permanent disability.

---

## CONCLUSIONS OF LAW AND OPINION

### Scope of Issues/Premature Closure

The ALJ determined that, even though claimant had not raised the issue of premature closure on the request for reconsideration form, based on the language contained on the form itself,<sup>1</sup> and OAR 436-030-0115(5),<sup>2</sup> the ARU had the authority to perform a complete review of the claim closure, to include the premature closure issue. Turning to the merits of claimant's hearing request, the ALJ concluded that the claim was prematurely closed.

On review, the insurer contends that the ARU (and the ALJ) erred in addressing the issue of premature closure when it had not been specifically raised by claimant at reconsideration. Alternatively, the insurer contends that "sufficient information" existed to close the claim and that the ALJ erred in reaching the opposite conclusion. For the following reasons, we affirm the ALJ's decision.

First, OAR 436-030-0115(5) provides that, at reconsideration, "the director will review those issues raised by the parties *and the requirements under ORS 656.268(1)*." (Emphasis added). Pursuant to ORS 656.268(1), an insurer or self-insured employer is required to close the worker's claim and determine the extent of the worker's permanent disability when "the worker has become medically stationary and there is sufficient information to determine permanent disability." Applying these authorities in *Judith K. Jackson-Harris*, 60 Van

---

<sup>1</sup> The reconsideration request form provides options for a claimant to check a "yes" or "no" box to object to various aspects of the claim closure. However, the form also notified the parties as follows:

*"Notice to all parties:* A request for reconsideration automatically includes review of the appropriateness of the closure under ORS 656.268.(e.g., medically stationary, sufficient information to close, etc.)" (Ex. 95A; emphasis in original).

<sup>2</sup> OAR 436-030-0115(5) (WCD Admin. Order 08-054; eff. July 1, 2008) provides:

"Only one reconsideration proceeding may be completed on each Notice of Closure and the director will review those issues raised by the parties and the requirements under ORS 656.268(1). Once the reconsideration proceeding is initiated, issues must be raised and further evidence submitted within the time frames allowed for processing the reconsideration request. When the director requires additional information to complete the record, the reconsideration proceeding may be postponed under ORS 656.268(6).

Natta 2345 (2008), we held that although the claimant did not raise the issue of premature closure when she requested reconsideration, the ARU had jurisdiction to review all issues necessary for reconsideration of the Notice of Closure. We explained that, whether or not raised by a party during the reconsideration proceeding, any number of issues can “arise out of the reconsideration order itself,” and, as such, may become an issue at a hearing. *Id.*; *James D. Pietrzykowski*, 57 Van Natta 3141, 3147 (2005) (on remand), *aff’d Pietrzykowski v. Albertsons, Inc.*, 212 Or App 421 (2007).

We see no reason to depart from our holding in *Jackson-Harris*, and similar cases. *See Gilbert A. Parra*, 61 Van Natta 853, 855, 858 (2009) (ORS 656.268(5)(c) does not limit the scope of issues the ARU may address during the reconsideration process; ARU is authorized to do a “complete review” of the closure notice); *Denise Coleman*, 55 Van Natta 3832, 3834-35, *recons*, 55 Van Natta 4098 (2003) (ALJ was correct that even though the claimant had not raised the issue of extent of scheduled permanent disability on the request for reconsideration form, the ARU had the authority under OAR 436-030-0115(5) to perform a complete review of the claim closure, including that issue); *Estella Rogan*, 50 Van Natta 205, 205 n 4 (1998) (Department was authorized to address premature closure issue on reconsideration even though issue was not expressly raised by the parties); *Ruth E. Griffin*, 46 Van Natta 418, 419 (1994) (holding that the premature closure issue could be addressed, notwithstanding the claimant’s failure to “check” the box when requesting reconsideration).

Accordingly, we conclude that the ARU had jurisdiction to address the “unraised” premature claim closure issue, and that the issue (which arose out of the reconsideration order) was properly before the ALJ at hearing. *Jackson-Harris*, 60 Van Natta at 2346; *Rogan*, 50 Van Natta at 205 n 4; *Griffin*, 46 Van Natta at 419. Finally, we agree with the ALJ’s reasoning that the insurer lacked sufficient information<sup>3</sup> to close the claim and that, therefore, the Notice of Closure

---

<sup>3</sup> Under the Director’s rules, “sufficient information” requires either: (1) a closing examination that meets the requirements of OAR 436-010-0280 when there is a reasonable expectation of loss of use or function, changes in the worker’s physical abilities, or permanent impairment attributable to the accepted condition based on evidence in the record or the physician’s opinion; or (2) a written statement from the attending physician that clearly indicates there is no permanent impairment, residuals, or limitations attributable to the accepted condition, and there is no reasonable expectation, based on evidence in the record, of loss of use or function, changes in the worker’s physical abilities, or permanent impairment attributable to the accepted condition. OAR 436-030-0020(2)(a), (b). If the attending physician indicates that there is no impairment, *but the record reveals otherwise*, a detailed closing examination meeting the requirements of OAR 436-010-0280 is required. OAR 436-030-0020(2)(a) (emphasis added).

was prematurely issued.<sup>4</sup> *See* OAR 436-010-0280; OAR 436-030-0020(2). In that regard, we agree that, although the attending physician (Dr. Korpa) indicated on August 4, 2008 that there was no permanent impairment due to the accepted condition, the record otherwise reveals a reasonable expectation of permanent impairment attributable to the accepted condition. (*See* Ex. 91).

### Attorney Fee

We agree with the ALJ that claimant's counsel is entitled to an "out-of-compensation" attorney fee for services at hearing. However, we find that such a fee is more properly awarded under OAR 438-015-0045,<sup>5</sup> as opposed to OAR 438-015-0055.<sup>6</sup> The ALJ set aside the insurer's closure as premature on the basis that there was insufficient information to close the claim as of August 14, 2008. The only benefits that flow directly from such a decision (*i.e.*, setting aside the closure) are temporary disability benefits. Therefore, while the ALJ's decision results in additional temporary disability, it does not relate to future permanent disability benefits because such benefits are only awarded once the claim is re-closed. In such cases, the applicable attorney fee is found in OAR 438-015-0045. *See Loren L. Boll*, 58 Van Natta 3115, 3121 n 3 (2006), *recons*, 59 Van Natta 56 (2007) (a claimant's counsel's attorney fee award for establishing at hearing or on Board review that a claim has been prematurely closed is limited to an "out-of-compensation" fee based on additional temporary

---

<sup>4</sup> The insurer cites *Stepp v. SAIF*, 304 Or 375, 381 (1987), for the proposition that the attending physician's report was more than sufficient to close a claim reopened pursuant to ORS 656.273(1) because his finding of no impairment meant that the reopened conditions were unchanged (no impairment was awarded by the initial closure), and thus no further "inquiry" was necessary for there had been no worsening. *Id.*; (*see* Exs. 53, 91). However, the insurer's reliance on *Stepp* is misplaced. We have noted that the lesson from *Stepp* is that a claimant cannot relitigate the extent of permanent disability in the guise of an aggravation claim when there has been no permanent worsening of the claimant's condition. *See Thomas T. Frank*, 49 Van Natta 238 (1997); *Calvin L. Williams*, 47 Van Natta 444 (1995). Thus, *Stepp* is applicable when determining the *extent* of permanent disability (which does not occur until *after* a claim has been closed). The present case, however, involves the issue of *premature closure*, rather than extent of permanent disability.

<sup>5</sup> OAR 438-015-0045 provides that, "[i]f the [ALJ] awards additional compensation for temporary disability, the [ALJ] shall approve a fee of 25 percent of the increased compensation, but not more than \$1,500, to be paid out of the increased compensation."

<sup>6</sup> Pursuant to OAR 438-015-0055(2), "If a claimant requests review of an [ALJ's] order on the issue of compensation for permanent disability and the Board awards additional compensation, the Board shall approve a fee of 25 percent of the increased compensation, provided that the total of fees approved by the [ALJ] and the Board shall not exceed \$6,000."

disability resulting from that decision and does not extend to future permanent disability benefits because those benefits can only be awarded once the claim is re-closed); *Darrell R. Evans*, 45 Van Natta 2211 (1993) (where the ALJ determined that the claim was prematurely closed, the ALJ properly awarded an attorney fee payable out of the increased temporary disability compensation, not to exceed \$1,050).

Accordingly, we modify the ALJ's order to award an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by the ALJ's order, not to exceed \$1,500, payable to claimant's attorney. OAR 438-015-0045.

For services on review regarding the scope of issues/premature closure issue, claimant's counsel is entitled to an assessed fee. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$2,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the scope of issues/premature closure issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved. Claimant's counsel is not entitled to an attorney fee award for services devoted to the attorney fee issue. *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986).

#### ORDER

The ALJ's order dated April 30, 2009 is affirmed in part and modified in part. The ALJ's "out-of-compensation" attorney fee award is modified to a fee equal to 25 percent of the increased temporary disability compensation created by that order, not to exceed \$1,500, payable directly to claimant's counsel. The remainder of the ALJ's order is affirmed. For services on Board review regarding the scope of issues/premature closure issue, claimant's attorney is awarded an assessed fee of \$2,500, payable by the insurer.

Entered at Salem, Oregon on October 20, 2009