

In the Matter of the Compensation of  
**WILLIE L. FRISON, Claimant**

WCB Case No. 10-04862

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys  
Bruce A Bornholdt, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Fisher's order that found that his low back condition claim was not prematurely closed. On review, the issue is premature closure.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant compensably injured his back in July 2007. The SAIF Corporation initially accepted a lumbar strain and closed the claim in December 2007, without an award of permanent disability. (Ex. 12).

On March 3, 2010, claimant's attending physician, Dr. Breen, stated that claimant's accepted lumbar strain had combined with degenerative disc disease, and that as of December 7, 2007, the accepted lumbar strain was no longer the major contributing cause of claimant's need for treatment. (Ex. 14). Dr. Breen also stated that claimant could return to regular work and that there was no impairment due to the accepted strain. On that same date, SAIF accepted a lumbar strain combined with lumbar degenerative disc disease as of the date of injury. (Ex. 13). SAIF also denied compensability of the combined condition as of December 7, 2007. (*Id.*)

Thereafter, SAIF processed the newly accepted and denied combined condition and reclosed the claim on March 17, 2010, without an award of permanent disability. (Exs. 15, 16). Claimant requested reconsideration and appointment of a medical arbiter.

Dr. DiPaola performed a medical arbiter examination. (Ex. 19). An August 5, 2010 Order on Reconsideration found that the claim was not prematurely closed. Additionally, based on Dr. DiPaola's examination, the reconsideration order affirmed the March 17, 2010 Notice of Closure.

Claimant requested a hearing, where he contended that his claim had been prematurely closed. The ALJ found that the claim had not been prematurely closed and affirmed the reconsideration order. In doing so, the ALJ rejected claimant's request to take "administrative notice" of an October 7, 2010 order of another ALJ that set aside SAIF's aforementioned combined condition denial.

On review, claimant requests that we take "administrative notice" of that order, and, based on that order, find SAIF's closure to be premature. We decline claimant's requests, reasoning as follows.

ORS 656.268(1)(b) governs the disputed claim closure.<sup>1</sup> Claimant acknowledges that current case law interpreting that statute permits claim closure based on the issuance of a combined condition denial, provided there is sufficient information to determine permanent disability. *See Davis W. Dawley*, 62 Van Natta 2503 (2010); *Johnathan M. Humphrey*, 61 Van Natta 357, 358-59 (2009). Moreover, any appeal of denied conditions shall not delay claim closure pursuant to ORS 656.268. ORS 656.262(7)(c); *Dawley*, 62 Van Natta at 2503. Instead, if a condition is found compensable after claim closure, the carrier shall reopen the claim for processing regarding that condition. *Id.*

The reconsideration record establishes that the employer's denial issued before claim closure and, further, supports a conclusion that there was sufficient information to determine permanent impairment. Such circumstances do not invalidate a Notice of Closure. ORS 656.262(7)(b); ORS 656.268(1)(b); OAR 436-030-0020(1)(b);<sup>2</sup> OAR 436-030-0034(5) (providing for claim closure when a worker is not medically stationary but a major contributing cause denial has been issued on an accepted combined condition); *Dawley*, 62 Van Natta at 2504; *Humphrey*, 61 Van Natta at 359-60. Thus, we conclude that the claim was not prematurely closed.

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<sup>1</sup> Claimant alternatively argues that claim closure was not permissible under ORS 656.268(1)(a). However, because claim closure was appropriate under ORS 656.268(1)(b), it is not necessary to determine whether claim closure may also have been appropriate under ORS 656.268(1)(a). *See also* OAR 436-030-0034(5). Moreover, the case that claimant cites in support of his argument, *Davis W. Dawley*, 62 Van Natta 2850 (2010) ("*Dawley II*"), involved a compensability dispute, not the propriety of claim closure. Therefore, it is inapposite to the instant matter.

<sup>2</sup> Because of claimant's May 17, 2010 request for reconsideration, the applicable rules are found in WCD Admin. Order 09-056 (eff. January 1, 2010). OAR 436-030-0003(1).

Claimant seeks to distinguish *Dawley* on the ground that, here, unlike *Dawley*, the employer's combined condition denial was ultimately set aside subsequent to the closure notice.<sup>3</sup> We have previously explained, however, that a claim closure based on a combined condition denial is permissible regardless of the ultimate propriety of such a denial, which is determined in a separate proceeding. *Humphrey*, 61 Van Natta at 358-60. Thus, where, as here, a combined condition denial that formed the basis of a claim closure is subsequently set aside, we do not invalidate that claim closure; rather, the carrier must reopen the claim and, when appropriate, close that claim and rate any impairment for the combined condition. *Id.*; ORS 656.262(7)(c).

Finally, claimant acknowledges that his request to take "administrative notice" of a "post-reconsideration" fact would require the admission of evidence not in existence, and thereby not submitted, at the reconsideration proceeding. ORS 656.283(6), however, prohibits the admission of such evidence. Therefore, we may not take "administrative notice" of the requested fact. *See Crecencie Pavon-Valdez*, 56 Van Natta 4020, 4021 n2 (2004).

### ORDER

The ALJ's order dated February 11, 2011 is affirmed.

Entered at Salem, Oregon on June 23, 2011

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<sup>3</sup> Claimant also argues that such a factual distinction also potentially impacts his "aggravation rights" under ORS 656.273(4). However, as set forth in the ALJ's order, claimant's claim was previously closed in December 2007, thereby triggering ORS 656.273(4). (*See Ex. 12*). Consequently, the propriety of the instant closure does not affect any of claimant's rights available under ORS 656.273(4).