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In the Matter of the Compensation of  
**BURKE RIVERS, Claimant**  
WCB Case No. 10-06320  
ORDER ON REVIEW  
Jodie Phillips Polich, Claimant Attorneys  
Holly O'Dell, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Kekauoha's order that: (1) affirmed an Order on Reconsideration that did not award additional permanent disability for a low back condition; and (2) declined to remand the claim for a medical arbiter examination. On review, the issues are offset, permanent disability, and remand.

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

A prior ALJ's order found the SAIF Corporation responsible for claimant's L4-5 disc herniation under two new medical condition claims (one under his 2007 injury claim and the other under his 2008 injury claim). In doing so, the prior ALJ found that the 2007 work injury and the 2008 work injury were a material contributing cause of claimant's need for medical treatment/disability for his L4-5 disc herniation. The prior ALJ further determined that neither "otherwise compensable injury" had combined with a preexisting condition and, even if a combined condition was in existence, SAIF had not established that that an "injury" was not the major contributing cause of claimant's need for treatment/disability. *See* ORS 656.266(2)(a). The prior ALJ's order was not appealed and became final by operation of law.

Thereafter, SAIF accepted the L4-5 disc herniation (under both new medical condition claims), processed the claims, and then issued two Notices of Closure (the closure of the "2007" new medical condition claim issued one day before the closure of the "2008" new medical condition claim). Because it had awarded permanent impairment and work disability under the "2007" new medical condition claim, SAIF offset that award against claimant's award under the "2008" new medical condition claim.

After an Order on Reconsideration affirmed a Notice of Closure applying that offset, claimant requested a hearing. Thereafter, the ALJ affirmed the Order on Reconsideration.

Claimant challenges the ALJ's analysis of OAR 436-035-0015, which pertains to offsets.<sup>1</sup> *See also* OAR 436-035-0007(4).<sup>2</sup> Specifically, he contends that the requirements of subsections (1)(b) and (c) have not been satisfied. In doing so, claimant assumes that the "prior claim" mentioned in those subsections refers to his 2007 initial low back injury claim. Reasoning that he had not received a permanent disability award based on the initial closure of the 2007 injury claim, claimant asserts that the aforementioned "offset" rule requirements have not been met.

We have previously determined that, for purposes of rating permanent disability for a new/omitted medical condition claim, the phrase "injury or disease" as used in the Director's "offset" rule encompasses a new/omitted medical condition claim that is being evaluated for permanent disability. *See Loyd E.*

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<sup>1</sup> OAR 436-035-0015 (WCD Admin. Order 10-051 (eff. June 1, 2010)) provides, in relevant part:

"If a worker has a prior award of permanent disability under Oregon Workers' Compensation Law, the award is considered in subsequent claims under ORS 656.222 and 656.214.

"(1) A prior award can be used to offset an award for a subsequent claim when all the following are true:

"(a) The prior claim is closed under Oregon Workers' Compensation Law;

"(b) The prior claim has an award of permanent disability;

"(c) The disability in the prior claim has not fully dissipated as outlined in section (2) of this rule; and

"(d) Both claims have similar disabilities as outlined in sections (3) and (4) of this rule.

"(2) A disability from a prior claim is considered to have fully dissipated if there is not a preponderance of medical evidence or opinion establishing that disability from the prior injury or disease was still present on the date of the injury or disease of the claim being determined. If disability from the prior injury or disease was not still present, an offset is not applied."

<sup>2</sup> OAR 436-035-0007(4) (WCD Admin. Order 10-051 (eff. June 1, 2010)) provides:

"Where a worker has a prior award of permanent disability under Oregon workers' compensation law, disability is determined under OAR 436-035-0015 (offset), rather than OAR 436-035-0013, for purposes of determining disability only as it pertains to multiple Oregon workers' compensation claims."

*Garoutte*, 56 Van Natta 416, 432 (2004). Consistent with that rationale, it follows that the “prior injury or disease” described in section (2) of the rule likewise includes prior new/omitted medical condition claims arising from another injury or disease claim.

Here, after considering the procedural posture of these claims and particularly in light of the findings reached in the prior ALJ’s order (which has become final by operation of law), the record supports a conclusion that claimant’s new medical condition claim under his 2007 injury claim constitutes a “prior claim.”<sup>3</sup> In addition, that claim was closed before the closure of claimant’s new medical condition claim under his 2008 injury claim. Finally, based on the medical evidence (as confirmed by the unappealed Notice of Closure regarding the “2007” new medical condition claim), claimant’s disability from this “prior claim” was still present on the date of his “2008” new medical condition claim.<sup>4</sup> Consequently, we are persuaded that the disability in the “prior claim” has not fully dissipated. Accordingly, an offset under OAR 436-035-0015 is applicable.<sup>5</sup>

In conclusion, SAIF was authorized to offset the prior permanent disability award for the 2007 claim for a new medical condition (“L4-5 disc herniation”) against the current award for the same condition accepted under the 2008 claim. Therefore, we affirm.

### ORDER

The ALJ’s order dated July 6, 2011 is affirmed.

Entered at Salem, Oregon on February 3, 2012

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<sup>3</sup> In reaching this conclusion, we note that the prior ALJ’s order directly related claimant’s 2007 work injury to his L4-5 disc herniation, finding that the work injury was a material contributing cause of claimant’s need for treatment/disability for the disc condition. In light of this determination, it follows that claimant’s new medical condition claim arising from his 2007 work injury was “prior” to his new medical condition claim arising from his 2008 work injury.

<sup>4</sup> We further note that claimant had surgery in January 2010 for his L4-5 disc condition. Because this surgery was considered in evaluating his permanent disability under his “2007” new medical condition claim, it follows that his disability from that “prior claim” was still present on the date of his “2008” new medical condition claim and had not fully dissipated.

<sup>5</sup> Our decision does not conflict with the holdings in *Pacific Motor Trucking Co. v. Yeager*, 64 Or App 28 (1983), and *Albert T. Jones*, 60 Van Natta 1158 (2008), *aff’d without opinion*, 233 Or App 227 (2009). Neither of those decisions concerned the application of OAR 436-035-0015 regarding the evaluation of permanent disability for a new/omitted medical condition claim, as well as the existence of a “prior” new/omitted medical condition claim.