
In the Matter of the Compensation of
DALE E. VAN BIBBER, JR., Claimant
WCB Case No. 10-03414
ORDER ON REVIEW
Ransom Gilbertson Martin et al, Claimant Attorneys
Holly Odell, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman. Member Weddell dissents.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Ogawa's order that affirmed the Director's order that reduced claimant's permanent disability award under ORS 656.325(4). In its respondent's brief, SAIF contests those portions of the ALJ's order that declined to dismiss claimant's hearing request or remand the matter to the Director. On review, the issues are jurisdiction, remand, claim preclusion, and claim processing. We affirm.

FINDINGS OF FACT

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

Claimant was compensably injured on January 21, 2005. SAIF accepted minimally displaced fractures of the L1, L2, L3, and L4 transverse processes and left flank subcutaneous contusion. (Ex. 3).

In April 2005, claimant began treating with Dr. French, who prescribed physical therapy and progressive rehabilitation. (Ex. 4). Claimant either did not attend or canceled these sessions, and did not follow-up with Dr. French until May 27, 2005. Because claimant was still symptomatic, Dr. French ordered x-rays, with claimant to return in one week. (Ex. 5). Claimant neither returned nor obtained the x-rays.

On June 15, 2005, SAIF notified claimant that his benefits would be suspended unless he participated and/or cooperated in his medical treatment. (Ex. 6). Claimant returned to Dr. French on June 30, 2005, who again requested x-rays. (Ex. 7).

On July 11, 2005, SAIF notified claimant of a possible suspension of his benefits for failing to comply with Dr. French's x-ray requests. (Ex. 8). Claimant obtained the x-rays on July 19, 2005. (Ex. 9).

On September 8, 2005, noting claimant's nonattendance at physical therapy appointments, Dr. French recommended no further treatment. (Ex. 17). He declared claimant's condition medically stationary and, due to his deconditioning, released him to regular work on a graduated basis. (Exs. 19, 20).

On December 29, 2005, Dr. French noted that claimant would have been able to occasionally lift or carry 100 pounds, as required by his job, if he had complied with his treatment regimen. (Ex. 25). He explained that claimant's "limitations" were "due to noncompliance, rather than a permanent residual from his work injury." (*Id.*)

On February 2, 2006, based on Dr. French's evaluation, SAIF issued a Notice of Closure with an award of 19 percent whole person impairment, but no work disability. (Ex. 29). Claimant requested reconsideration.

A May 26, 2006 Order on Reconsideration affirmed the Notice of Closure's permanent disability award. (Ex. 32). Claimant requested a hearing.

On October 27, 2006, an earlier ALJ affirmed the Order on Reconsideration, reasoning that claimant had returned to regular work and that any limitations on his ability to do regular work, or on Dr. French's release to regular work, were due to claimant's noncompliance with treatment rather than his work injury. (Exs. 34, 36). Claimant requested review.

On August 14, 2007, we reversed the ALJ's order. (Ex. 37); *Dale E. VanBibber, Jr.*, 59 Van Natta 1962 (2007) (*VanBibber I*). On reconsideration, we adhered to that determination. (Ex. 38); *Dale E. VanBibber, Jr., recons*, 59 Van Natta 2174 (2007) (*VanBibber II*). SAIF petitioned for judicial review.

Meanwhile, claimant returned to Dr. French on August 12, 2008. Dr. French ordered repeat x-rays, with claimant to follow-up in one month. (Ex. 40). The record does not indicate that claimant did either. (Exs. 41, 43).

On May 15, 2009, after claimant's completion of an authorized training program, SAIF issued another Notice of Closure. Claimant was awarded 19 percent whole person impairment and work disability. The Notice of Closure

stated that the work disability award was contingent on the outcome of SAIF's appeal of the Board's order. (Ex. 44).

On January 17, 2010, claimant sought treatment at the emergency room for intermittent episodes of low back pain for the last four to five years. (Ex. 46).

On March 3, 2010, the court affirmed our order. (Ex. 45); *SAIF v. VanBibber*, 234 Or App 68 (2010).

On March 31, 2010, SAIF sought reduction of claimant's permanent disability award with the Director. *See* ORS 656.325(4); OAR 436-060-0105(14). SAIF's request informed claimant that he had 10 days from the mailing date of the request to respond, as required by the rule. (Ex. 47). In an April 13, 2010 letter, claimant briefly informed the Director and SAIF that he "objected" to SAIF's reduction request. (Ex. 48). On April 19, 2010, SAIF responded that claimant's response was untimely and provided no substantive or procedural basis for his objection. (Ex. 49).

On May 18, 2010, claimant returned to Dr. French with continuing symptoms of low back pain. Dr. French reported that recent plain films suggested incomplete healing of the spinal fractures. He recommended surgical evaluation and axial injections. (Ex. 54; *see also* Ex. 51).

On June 9, 2010, the Director concluded that claimant unreasonably failed to follow Dr. French's medical advice and reduced claimant's work disability benefits to zero. (Ex. 56). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Jurisdiction/Remand

At hearing, SAIF asserted that because claimant's objection to the reduction request was untimely, his appeal of the Director's order was procedurally invalid, and his hearing request should be dismissed. Alternatively, SAIF sought remand to the Director to consider claimant's objection.

Reasoning that the "10-day" rule requirement was not jurisdictional, the ALJ declined to dismiss claimant's hearing request. Moreover, because claimant's objection to SAIF's reduction notice was untimely filed, the ALJ concluded that remand to the Director was not warranted.

On review, SAIF renews its jurisdictional argument concerning claimant's failure to comply with the Director's "10-day" response requirement.¹ Specifically, it contends that claimant's objection was barred, and his request for hearing should be dismissed. Alternatively, SAIF requests remand to the Director for its initial consideration of claimant's objection.

For the reasons discussed by the ALJ, we agree that claimant's hearing request should not be dismissed, and we deny SAIF's remand request. As noted by the ALJ, the "10-day response" period in OAR 436-060-0105(14) is nonjurisdictional.² In addition, the statute and rules provide for a hearing from the Director's reduction order, and neither places a limitation on the evidence or issues submitted at that hearing. *See* ORS 656.325(6); OAR 436-060-0008; OAR 436-060-0105. Nor are there any provisions allowing for remand to the

¹ OAR 436-060-0105(14) provides:

"The director may reduce any benefits awarded the worker under ORS 656.268 when the worker has unreasonably failed to follow medical advice, or failed to participate in a physical rehabilitation or vocational assistance program prescribed for the worker under ORS chapter 656 and OAR chapter 436. Such benefits must be reduced by the amount of the increased disability reasonably attributable to the worker's failure to cooperate. When an insurer submits a request to reduce benefits under this section, the insurer must:

"(a) Specify the basis for the request;

"(b) Include all supporting documentation;

"(c) Send a copy of the request, including the supporting documentation, to the worker and the worker's representative, if any, by certified mail; and

"(d) Include the following notice in prominent or bold face type:

"Notice to worker: If you think this request to reduce your compensation is wrong, you should immediately write to the Workers' Compensation Division, 350 Winter Street NE, PO Box 14480, Salem, Oregon 97309-0405. Your letter must be mailed within 10 days of the mailing date of this request. If the division grants this request, you may lose all or part of your benefits."

² Footnote two of the ALJ's order contains a typographical error. The third sentence of the footnote should begin: "The time limitation does not appear to be jurisdictional, * * *."

Director. Therefore, the determinative issue is whether the Director's reduction order was justified based on the evidence presented at the hearing.³

Preclusion

The ALJ concluded that claim preclusion did not apply to bar SAIF's reduction "claim." The ALJ reasoned that, although we discussed ORS 656.325 in our prior order, we did not apply that statute to determine whether claimant was entitled to work disability. To the contrary, the ALJ noted that we determined that the statute gave the Director the authority to reduce benefits for failure to participate in rehabilitation. According to the ALJ, because we lacked jurisdiction over the reduction issue in the prior proceeding, there was no final determination on the merits of whether claimant's work disability benefit should be reduced. The ALJ also noted that SAIF's reduction "claim" was not ripe until claimant was actually awarded work disability by our order.

On review, claimant argues that SAIF is barred from litigating the "reduction" issue because it involves the same factual transaction that was present in the prior determination. Claimant explains that there was already a Notice of Closure, a reconsideration, and a final disability determination. Accordingly, he contends that the claim was ripe, and a reduction petition should have been made with the Director after the first closure.

For the following reasons, we agree with the ALJ's conclusion that claim preclusion does not apply.

Under the doctrine of "claim preclusion," a party who has prosecuted one action against a defendant through to a final judgment is barred from prosecuting another action against the same defendant where the claim in the second action is "based on the same factual transaction that was at issue in the first [action], seeks a remedy additional to or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action." *Rennie v. Freeway Transp.*, 294 Or 319, 323 (1982). Claim preclusion does not require actual litigation of an issue of fact or law, or that the determination of the issue be essential to the final result of the action, claim, or proceeding. *Drews v. EBI Cos.*, 310 Or 134, 140 (1990). However, it does require the opportunity to litigate, whether or not used. *Id.*

³ Unlike with "suspension" orders under OAR 436-060-0105(12), OAR 436-060-0105(14) does not authorize the Director to modify or set aside a "reduction" order, even if a hearing request has been filed.

During the prior litigation, SAIF attempted to litigate the reduction issue. Nevertheless, we declined to consider that matter, reasoning that such a request must first be filed with the Director under ORS 656.325(4) and OAR 436-060-0105(14). Consistent with this reasoning, our order made no findings regarding whether claimant failed to comply with treatment, highlighting the fact that the only issue before us was “whether the disability resulted from the compensable injury” (as opposed to a preexisting condition). *VanBibber I*, 59 Van Natta at 1965.

In addressing the permanent disability issue, we explained that claimant was only entitled to a work disability component to his permanent disability award if his work disability resulted from the compensable injury. *Id.* at 1965 (citing ORS 656.214(1)(c)(B)). Noting that Dr. French had opined that claimant’s inability to return to regular work was the result of his noncompliance with his treatment, we explained that the record nevertheless supported a conclusion that claimant’s compensable low back injury caused his need for treatment. Therefore, we concluded that, despite his noncompliance with the treatment recommendations, claimant’s inability to work remained the result of his compensable injury. *Id.*

Citing ORS 656.325 and OAR 436-060-0105, we noted that a failure to participate in a treatment program “can result” in the reduction of compensation to the extent that such refusal increases the worker’s disability. However, we explained that the authority to take such action did not rest with this forum, but rather must be made with the consent of the Director. We observed that such consent apparently had neither been requested nor granted.⁴ *Id.* at 1965-66. Because the question before us was “simply whether the disability resulted from the compensable injury,” we declined to hold that claimant’s noncompliance with recommended treatment broke the causal connection between the compensable injury and his inability to work. *Id.* at 1966.

On reconsideration, we noted that if an injured worker refused to submit to recommended treatment, a permanent disability award should be adjusted to reflect the extent to which such refusal had contributed to the worker’s disability if such refusal was unreasonable. However, we reiterated that, under ORS 656.325, only the Director had the authority to reduce an injured worker’s benefits under such circumstances. *VanBibber II*, 59 Van Natta at 2174. Because SAIF had not requested that the Director reduce claimant’s permanent disability benefits based

⁴ We have previously interpreted ORS 656.325(4) to apply only to existing awards of permanent disability, and the courts have approved of that interpretation. *VanBibber*, 234 Or App at 77 n 6 (citing *Nelson v. EBI Cos.*, 64 Or App 16, 23 (1983), *aff’d*, 296 Or 246, 252 (1984), and *Lynne Fisher*, 52 Van Natta 1392 (2001)).

on his failure to cooperate with treatment, we again held that claimant's permanent disability should include work disability resulting from his compensable injury. *Id.* at 2175. We reiterated that Dr. French had opined that claimant would have been able to return to regular work if he had complied with treatment recommendations. Nevertheless, we reasoned that the initial cause of claimant's inability to return to regular work was his compensable injury, and Dr. French did not identify an intervening cause contributing to claimant's inability to return to regular work. Instead, he opined that claimant's failure to recover from his compensable injury was the result of noncompliance with treatment recommendations. Under such circumstances, we continued to find that claimant's work disability "resulted from" his compensable injury. *Id.*

On judicial review, the court concluded that substantial evidence supported our findings that, "despite his noncompliance with the treatment recommendations, * * * claimant's inability to return to regular work remained the result of his compensable injury," and that his condition was not preexisting. Accordingly, the court held that we did not err in requiring an award for work disability. *VanBibber*, 234 Or App at 78-79.

Thus, in the prior proceeding, we clarified that when a worker's disability results from the compensable injury--as opposed to a preexisting condition--the carrier's only remedy for a claimant's failure to comply with treatment recommendations is to request a reduction in benefits with the Director pursuant to ORS 656.325(4) and OAR 436-060-0105(14). Independent of such a request, we stressed that we did not have authority (on review of a claim closure under ORS 656.268) to reduce benefits below the amount required by the standards on the ground of noncompliance. Accordingly, we determined that claimant's failure to comply with Dr. French's treatment recommendations did not disqualify him from receiving a work disability award. Because the record unequivocally established that claimant's disability resulted from his compensable injury (as opposed to a preexisting condition), we concluded that he was entitled to a work disability award.

Based on this reasoning, we conclude that the prior proceeding did not afford the parties an opportunity to litigate the issue of whether claimant's benefits (as granted by a work disability award) should be reduced for noncompliance with treatment.⁵ Accordingly, SAIF's "reduction" claim is not precluded.

⁵ We note the dissent's concerns concerning successive and duplicative proceedings. We agree that SAIF should have granted a "work disability" award in its February 2, 2006 Notice of Closure. At that time, the record established that claimant's inability to return to regular work was due to his compensable injury. SAIF was also aware of claimant's noncompliance with Dr. French's prescribed

Although not argued by the parties, the dissent finds SAIF's "reduction" claim barred under the doctrine of issue preclusion. In so finding, the dissent argues that the factual issue, which it describes as "whether claimant's inability to return to regular work remained the result of his compensable injury, despite his noncompliance with treatment recommendations," was identical in both cases. The dissent explains that, in the prior proceeding, the Board and the court answered that question in the affirmative, holding that claimant's inability to return to regular work was the result of his compensable injury, despite his noncompliance with treatment recommendations. In the instant matter, however, the dissent contends that the Director has now answered that same question in the negative by finding that it was claimant's failure to participate in treatment, and not a "permanent residual from his work injury," that was hindering him from returning to work.

We disagree with the dissent's analysis and conclusions in this regard. The issue of whether claimant failed to follow his attending physician's prescribed treatment recommendations, thus warranting the reduction of his permanent impairment award, was not actually litigated and determined in the prior proceeding. To the contrary, we specifically noted (and the court affirmed) that the "reduction" issue was not before us, and we unambiguously declined to take into account any noncompliance as a potential cause of the work disability. We explained that, while there may be a reduction of compensation for claimant's refusal to comply with treatment, SAIF must seek the Director's approval for such a modification. Rejecting SAIF's arguments that we had the authority to reduce benefits for an unreasonable failure to comply with treatment, the court affirmed based on substantial evidence. Therefore, whether or not claimant's noncompliance contributed to his work disability was not decided in the prior proceeding.

In its reduction order, the Director specifically described the issue before it as "whether the worker failed to fully participate in physical rehabilitation as prescribed by his attending physician, *thereby warranting the reduction of benefits awarded* in accordance with ORS 656.325(4) and OAR 436-060-

treatment regime. If SAIF had awarded work disability, it could have then proceeded with its reduction request pursuant to ORS 656.325 and OAR 436-060-0105(14) in a timely fashion. Such an approach would have avoided the extensive litigation in this case, preserved judicial resources, and prevented needless delay in resolving the work disability dispute. Nonetheless, due to the reconsideration request, claimant's request for hearing, and SAIF's request for Board review, the work disability award was not finalized until the court's appellate judgment. Thereafter, SAIF sought reduction of the award under the proper procedures in ORS 656.325 and OAR 436-060-0105(14). We note that neither the statute nor rule place a time restriction on seeking such a reduction request.

0105(14).” (Ex. 56-1; emphasis added). We fail to see how that issue is the same as “whether the disability resulted from the compensable injury.” One concerns whether the disability is awardable in the first instance (*i.e.*, as related to the compensable injury), and the other involves whether that allowable award should be reduced due to a worker’s unreasonable noncompliance with treatment. As noted, we concluded that the two issues were different when we declined to address the latter “reduction” question in the prior proceeding. In seeking a reduction at this time, SAIF has merely complied with the procedure outlined in our prior order. (*See* Exs. 37-5, 38-2). Accordingly, we do not see how the prior proceedings would preclude the Director from exercising its discretion and modifying the work disability award upon SAIF’s request.

We also note that, as indicated in the Director’s order, the comment that claimant’s inability to return to work was not due to a “permanent residual from his work injury,” is a direct quote from Dr. French’s December 2005 opinion, and is not a “finding” by the Director based on the facts presented. (*See* Ex. 25). We documented this same passage in the prior proceeding, but nevertheless concluded that “despite” Dr. French’s opinion in that regard, it did not change the fact that his opinion also established that the “initial” cause of claimant’s inability to work was the result of his compensable injury. (Exs. 37-4, 38-2). Under such circumstances, we disagree that issue preclusion applies. *See Drews*, 310 Or at 139.

Propriety of the Reduction Order

Based on the record at closure, the ALJ found that reduction of claimant’s permanent disability benefits was warranted. The ALJ explained that, because of claimant’s noncompliance, the work conditioning program Dr. French had prescribed to facilitate return to regular work was cancelled. The ALJ noted that claimant did not present evidence that his failure to attend the prescribed medical treatment or physical therapy appointments was beyond his control. The ALJ further observed that claimant did not provide any explanation or reason for not attending those appointments. Accordingly, the ALJ concluded that claimant had failed to reasonably cooperate in his medical treatment. Consequently, the ALJ affirmed the Director’s reduction of claimant’s work disability award.

On review, claimant argues that his choice not to attend physical therapy cannot be considered unreasonable. In doing so, he notes that Dr. French, once he obtained the x-rays in 2010, did not recommend physical therapy. According to claimant, SAIF has not persuasively proven that his disability is due to missed therapy appointments and “deconditioning,” rather than incompletely healed fractures.

In reviewing a Director's reduction of benefits decision, the standard of review is for an abuse of discretion. That determination is based on the following reasoning.

ORS 656.325(4) provides:

“When the employer of an injured worker, or the employer's insurer determines that the injured worker has failed to follow medical advice from the attending physician * * * or has failed to participate in or complete physical restoration or vocational rehabilitation programs * * *, the employer or insurer may petition the director for reduction of any benefits awarded the worker. Notwithstanding any other provision of this chapter, if the director finds that the worker has failed to accept treatment as provided in this subsection, the director may reduce any benefits awarded the worker by such amount as the director considers appropriate.”

As noted above, pursuant to OAR 436-060-0105(14), the Director “may reduce any benefits awarded the worker under ORS 656.268 when the worker has unreasonably failed to follow medical advice, or failed to participate in a physical rehabilitation or vocational assistance program * * *.” Under the rule, “[s]uch benefits must be reduced by the amount of the increased disability reasonably attributable to the worker's failure to cooperate.”

ORS 656.325(4) and OAR 436-060-0105(14) state that the Director “may” reduce benefits. Because these authorities use permissive language, the ALJ's and our review of the Director's reduction order is for “abuse of discretion.” See *SAIF v. Kurcin*, 344 Or 399, 405 (2002) (analyzing language in OAR 438-006-0091(3), the use of “may” in “continuance” rule was permissive language, which placed “abuse of discretion” review authority with Board in evaluating an ALJ's ruling regarding the continuance of a hearing); *Roberta L. Jones-Lapeyr*, 58 Van Natta 2202, 2207 (2006) (because the language in OAR 436-010-0265(3) used “may,” the standard of review under ORS 656.325(1) of the Director's order regarding approval or disapproval of more than three IMEs was for an “abuse of discretion”).

When dealing with an abuse of discretion, the legal issue is not whether the decision maker reached the only possible decision, or even the correct decision. Instead, the legal issue is whether the evidentiary record contains sufficient

evidence to support the decision as not being unreasonable or an abuse of discretion. See *Kurcin*, 334 Or at 405-06 (“If the record would support a decision by the ALJ either to grant or to deny a continuance, then the Board on review must conclude that the ALJ’s choice is not an abuse of discretion.”); *Schreindl v. SAIF*, 48 Or App 127, 131 (1980); *Jones-Lapeyr*, 58 Van Natta at 2208; *Abraham Heamish*, 42 Van Natta 785, 789 (1990) (because there was evidence in the record to support the Director’s decision to terminate vocational assistance, the decision could not be an abuse of discretion).

Furthermore, based on the reasoning in *Colclasure v. Washington County School District*, 317 Or 526 (1993), we consider all evidence in the “hearing” record in determining whether there was an abuse of discretion by the Director.

In *Colclasure*, the court held that, in reviewing a Director’s vocational assistance decision under *former* ORS 656.283(2), an ALJ is entitled to independently find facts presented at a hearing at which the parties developed a record. The court stated that the provisions of *former* ORS 656.283(2) contemplated, at a minimum, an opportunity to be heard, an opportunity to present and rebut evidence, and a reviewable record. Noting that the Director’s informal procedure did not provide the claimant a quasi-judicial hearing, or result in a reviewable record, the court concluded that the procedure before the ALJ comported with the hearing and decisional process required in a contested case, while the Director’s procedure did not.⁶ *Id.* at 535-36.

Ultimately, the court construed *former* ORS 656.283(2) to contemplate the following process: (1) the Director informally investigates and issues an order; (2) the ALJ conducts a hearing at which the parties develop a record; (3) based on that record, the ALJ finds the facts from which to conclude whether the Director’s decision survives review; and (4) the Board reviews the record developed before the ALJ. *Id.* at 537; see also *Richard A. Colclasure*, 46 Van Natta 1246 (1994) (on remand).⁷

⁶ The court stated that it would have ruled differently if the Director had conducted a contested case hearing, made a record, and entered findings of fact thereon. *Id.* at 535 n 4.

⁷ When *Colclasure* was decided, the order issued by the ALJ was a final order appealable to the Board. (The version of ORS 656.283(2) in *Colclasure* was subsequently amended to provide for review “only by the director,” and now exists at ORS 656.340). Neither the statute nor the administrative rule required the Director to hold a hearing, to create a record or to make findings in support of his decision on such a matter. This prior system for vocational assistance review is analogous to the current statutory and regulatory scheme concerning reduction of benefit decisions.

Here, as in *Colclasure*, the Director's review procedure did not include a quasi-judicial hearing. However, the hearing before the ALJ satisfied the procedures required in a contested case. Therefore, the ALJ had the authority to make findings based on all the evidence developed at the hearing, including claimant's "post-claim closure" or "post-reduction order" evidence. In line with *Colclasure*, we consider the entire record developed by the ALJ to determine if it supports the Director's conclusion that claimant's benefits should be reduced. Based on that review, we find no abuse of discretion in the Director's reduction decision. We reason as follows.

In 2010, Dr. French reported that, based on the most recent 2008 x-rays, there was "some suggestion of incomplete healing" of claimant's lumbar fractures, and he recommended surgical evaluation and axial injections. (Exs. 54, 58). While these later reports raise questions about Dr. French's earlier "speculative" "pre-claim closure" comments in 2005 that claimant could have returned to work if he had participated fully with his treatment regime (Ex. 25), he did not expressly address that matter or retract his prior comments. In any event, these comments do not explain why claimant did not attempt to attend treatments, sessions, or x-rays. As such, we find this later evidence insufficient to outweigh Dr. French's prior opinion. Therefore, because there is evidence in the record to support the Director's decision to reduce claimant's work disability benefits to zero based on an unreasonable failure to treat, the decision was not an abuse of discretion. Accordingly, we affirm.

ORDER

The ALJ's order dated March 24, 2011 is affirmed.

Entered at Salem, Oregon on January 3, 2012

Member Weddell dissenting.

I disagree with the majority that SAIF's reduction "claim" was not precluded. Therefore, I respectfully dissent.

"Issue preclusion permits a party who has obtained a valid and final determination on an issue in a prior proceeding to avoid relitigation of that same issue in a subsequent proceeding provided that that issue was 'actually litigated and determined in the prior action * * * [and] was essential to the judgment.'" *Thomas v. U.S. Bank Nat. Ass'n*, 244 Or App 457, 468-69 (2011) (quoting *State Farm Fire & Cas. v. Reuter*, 299 Or 155, 158 (1985)); see also *Drews v. EBI Cos.*,

310 Or 134, 139 (1990); *N. Clackamas Sch. Dist. v. White*, 305 Or 48, 53, *modified*, 305 Or 468 (1988). “The purposes of the doctrine are to prevent parties from being harassed by successive, duplicative proceedings and to promote the efficient use of judicial resources.” *Thomas*, 244 Or App at 469; *accord White*, 305 Or 50–51. Issue preclusion applies to factual issues decided in a prior proceeding. *State v. Romanov*, 210 Or App 198, 202, (2006).

There are five requirements that must be met for issue preclusion to apply: (1) the issue in the two proceedings must be identical; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard; (4) the party sought to be precluded was a party or was in privity with a party in the prior proceeding; and (5) the prior proceeding was the type of proceeding to which a court will give preclusive effect. *Nelson v. Emerald People’s Util. Dist.*, 318 Or 99, 104 (1993).

Here, in the prior proceeding, the Board and the court expressly determined that, “*despite his noncompliance with the treatment recommendations*, the record establishes that claimant’s inability to return to regular work remained the result of his compensable injury.” *SAIF v. VanBibber*, 234 Or App 68, 78 (2010). Consequently, the court affirmed the Board’s determination that a work disability award was required. *Id.* at 79.

Thus, the issue of “whether claimant’s inability to return to regular work remained the result of his compensable injury, despite his noncompliance with treatment recommendations” was an issue that was actually litigated and essential to a final decision on the merits in the prior proceeding. SAIF had a full and fair opportunity to be heard on that issue, as it was the basis for its argument that claimant was not entitled to a work disability award, or that any such award should be reduced. There is also no dispute that the fourth and fifth requirements for issue preclusion are also satisfied.

That leaves only the first element--namely, whether that issue (“whether claimant’s inability to return to regular work remained the result of his compensable injury, despite his noncompliance with treatment recommendations”) is “identical” to an issue in this case. Here, in eliminating claimant’s work disability award, the Director “found that Dr. French concluded [that] *the worker’s work limitations were the direct result of the worker’s actions, or failure to comply with his treatment regimen.*” (Ex. 56-4). The Director reasoned that claimant “would have been able to return to his job had [he] complied with Dr. French’s

prescribed treatment plan of PT and work conditioning, and that it was due to [claimant's] failure to participate in treatment, and not 'a permanent residual from his work injury,' that was hindering [him] from returning to work." (*Id.*) (emphasis added).

Thus, the factual issue ("whether claimant's inability to return to regular work remained the result of his compensable injury, despite his noncompliance with treatment recommendations") was identical in both cases. In the prior proceeding, the Board and the court determined that claimant was unable to return to work because of "his compensable injury," and not because of "his noncompliance with treatment recommendations." *VanBibber*, 234 Or App at 78. In the current proceeding, the Director, and now the majority, has determined that claimant's "failure to participate in treatment," and *not* his "work injury," prevented him "from returning to work." (Ex. 56-4) (emphasis added).

Those contrary findings are not reconcilable. Because the previous finding was essential to the merits of the final decision in the prior proceeding, that determination is preclusive in this case. Yet, by affirming the Director's reduction decision, the majority is ultimately endorsing two contradictory conclusions: (1) in the prior proceeding, that claimant's inability to return to regular work remained the result of his compensable injury, despite his noncompliance with treatment recommendations; and (2) in the instant matter, that claimant's inability to work was due to his failure to participate in treatment, and not his work injury. I cannot endorse such irreconcilable findings.

Finally, the majority does not explain how its approach "prevent[s] parties from being harassed by successive, duplicative proceedings" and "promote[s] the efficient use of judicial resources." *Thomas*, 244 Or App at 469. Here, SAIF previously sought to eliminate claimant's work disability award based on alleged noncompliance with treatment recommendations. It attempted to do so in a way that was procedurally and statutorily improper. Once that approach was rejected, it sought the same remedy based on the same theory, but now following the proper procedure. I cannot conclude that such maneuvering should be rewarded, or that such "successive, duplicative proceedings" effectively "promote[s] the efficient use of judicial resources." *Id.*

Moreover, I disagree with the majority's conclusion that this proceeding is also not barred under the doctrine of "claim preclusion." Under that doctrine, a party is barred from prosecuting an action, or raising a defense, that is "based on the same factual transaction that was at issue in the first [action], seeks a remedy additional to or alternative to the one sought earlier, and is of such a nature as

could have been joined in the first action.” *Rennie v. Freeway Transp.*, 294 Or 319, 323 (1982). Claim preclusion does not require actual litigation of an issue of fact or law, or that the determination of the issue be essential to the final result of the action. *Drews*, 310 Or at 140. Rather, only the *opportunity* to litigate the question to a final determination must be present. *Id.* “To prevent splitting of the dispute or controversy, courts employ a broad definition of what could have been litigated.” *Id.* at 141. Thus, “[c]laim preclusion conclusiveness between the parties applies ‘with respect to *all or any part of the transaction*, or series of connected transactions,’ out of which the action or proceeding arose.” *Id.* (emphasis added).

Here, each element of claim preclusion is satisfied. First, SAIF’s attempt to reduce claimant’s benefits is based on the same *factual* transaction as its previous attempt—namely, claimant’s purported failure to comply with treatment recommendations before it issued the February 2006 Notice of Closure. Moreover, SAIF is seeking the same remedy (reduction or elimination of a work disability award) that it previously sought.

Finally, SAIF’s “prosecution” of a work disability award reduction “*could* have been joined in the first action.” To do so, SAIF was only required to follow the proper procedure for claim closure. At the time of that closure, the record unequivocally established that claimant’s inability to return to regular work was due to his compensable injury. (Ex. 25). Therefore, SAIF was *required* to award work disability *and then* subsequently petition the Director for a reduction of this award for claimant’s alleged noncompliance. *See* ORS 656.325(4). Furthermore, SAIF could have sought reconsideration of the 2005 Notice of Closure, thereby giving it the opportunity to also litigate the “reduction” issue before the Director under ORS 656.325(4) in conjunction with the reconsideration proceeding under ORS 656.268.

Instead of complying with the proper procedures for claim closure, SAIF elected to bypass those procedures and sought an elimination of the work disability award before the Board and the court. That improper maneuvering was rejected.

SAIF now seeks the same reduction of work disability benefits based on the same factual transaction as in the prior proceeding, only now it has followed the procedures that it should have and *could have* followed in that prior proceeding. The majority, however, rewards SAIF’s gambit by finding that SAIF did not previously have even the *opportunity* to litigate whether claimant’s work disability award should be reduced because SAIF elected to bypass the proper procedures for seeking such a reduction. I do not find such a conclusion supportable.

Moreover, I do not find the majority's approach consistent with the underlying policies of the workers' compensation system or judicial economy. In *Crowder v. Alumaflex*, 163 Or App 143, 148-49 (1999), the court noted that preclusion and preservation serve to "protect limited dispute-resolution resources from repeated expenditure upon the same overall dispute." See *Drews*, 310 Or at 141. The court explained that the principle embodied in the rules on preclusion and preservation is that, when the opportunity arises to raise an issue or claim, a party may be required to raise it or risk losing it. Based on the premise that "[t]o reduce litigation costs, it is important that issues be raised at the *lowest possible level* for resolution," the court explained that the "lowest possible level for resolution" is the level at which the issue first exists.

As noted above, the "reduction" issue existed at the time of the 2006 Notice of Closure, and SAIF knew of claimant's purported noncompliance at that time. SAIF elected to process the claim in an improper way, and that strategy was rejected. It does not follow, as the majority implicitly rationalizes, that SAIF *could not* have properly processed the claim and raised the reduction issue in the prior proceeding.

In sum, because I would find SAIF's reduction "claim" precluded, under both the doctrines of issue and claim preclusion, I dissent.