
In the Matter of the Compensation of
VICKIE J. CARPENTER, Claimant
Own Motion No. 15-000600M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Moore Jensen, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey, Lanning, and Somers. Member Curey concurs in part and dissents in part.

Claimant requests review of the September 9, 2015 Notice of Closure that awarded an additional 12 percent scheduled permanent partial disability (PPD) for her “post-aggravation rights” new/omitted medical conditions (right knee medial meniscus tear, new disruption of the ACL, tear of the lateral meniscus and a full thickness chondral defect of the weight bearing surface of the medial femoral condyle).¹ On review, claimant seeks an additional scheduled PPD award. In addition, she seeks penalties and attorney fees for the self-insured employer’s allegedly unreasonable claim processing. For the following reasons, we modify the closure notice and decline to award penalties and penalty-related attorney fees.

FINDINGS OF FACT

On March 10, 1998, claimant sustained a compensable right knee injury. The self-insured employer initially accepted brachioplexus stretch, left shoulder with posttraumatic impingement syndrome, left cervical/thoracic strain, and right knee strain. (Exs. 2, 3, 4-2). On February 10, 1999, claimant underwent anterior cruciate ligament (ACL) reconstruction. (Ex. 25-3).

A December 17, 1999 Notice of Closure awarded 6 percent (9 degrees) scheduled PPD for the right knee. (Ex. 5). Claimant’s aggravation rights expired on December 17, 2004.

¹ Claimant’s March 10, 1998 claim was accepted as a disabling claim and was first closed December 17, 1999. Thus, claimant’s aggravation rights expired on December 17, 2004. Therefore, when claimant sought claim reopening in September 2013, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On March 10, 2014, the self-insured employer voluntarily reopened claimant’s Own Motion claim for a “worsened condition” (right knee strain and right knee ACL tear), as well as a “post-aggravation rights” new/omitted medical condition (right knee medial meniscus tear). On October 22, 2014, the employer voluntarily reopened the Own Motion claim for “post-aggravation rights” new/omitted medical conditions (new disruption of the ACL, tear of the lateral meniscus, and a full thickness chondral defect of the weight bearing surface of the medial femoral condyle). On September 9, 2015, the employer issued its Notice of Closure for these reopened claims.

On October 23, 2001, claimant underwent removal of hardware from the ACL reconstruction and excision of the infrapatellar branch of the saphenous nerve for a neuroma. (Exs. 25-3, 29-7).

In November 2001, the employer accepted a right knee ACL tear as part of the 1998 injury claim. (Ex. 6). A July 22, 2002 Notice of Closure awarded no additional PPD. (Ex. 9). That July 2002 closure notice was rescinded by an October 1, 2002 Order on Reconsideration. (Ex. 11).

On October 29, 2002, claimant underwent removal of interferential screw and ganglion cyst, right knee. (Ex. 25-3).

In December 2002, the employer accepted a “neuroma saphenous” as part of the 1998 injury claim. (Ex. 12). An April 8, 2003 Notice of Closure awarded no additional PPD. (Ex. 14-1). That April 2003 closure notice was rescinded by an August 1, 2003 Order on Reconsideration. (Ex. 20-2).

In June 2003, the employer accepted a “neuroma saphenous nerve right knee” and a “ganglion cyst right knee” as part of the 1998 injury claim. (Ex. 16-1). A June 16, 2003 Notice of Closure awarded no additional PPD. (Ex. 19-1). That June 2003 closure notice was rescinded by a September 16, 2003 Order on Reconsideration. (Ex. 22).

A December 1, 2003 Notice of Closure awarded an additional 3 percent (4.5 degrees) scheduled PPD for the right knee. (Ex. 23). A February 23, 2004 Order on Reconsideration increased this award for a then-total award of 14 percent (21 degrees) scheduled PPD for loss of use or function of the right leg (knee). (Ex. 25).

On December 20, 2010, the employer voluntarily reopened claimant’s Own Motion claim for a “post-aggravation rights” new/omitted medical condition (post-traumatic arthritis of the right knee as a consequence of the industrial injury). (Exs. 30, 34). A December 22, 2010 Own Motion Notice of Closure awarded no additional PPD. (Ex. 35). That December 2010 closure notice was not appealed and became final by operation of law.

On February 18, 2014, claimant underwent a right knee arthroscopy that included: (1) microfracture of the medial femoral condyle; (2) partial medial and lateral meniscectomies; and (3) debridement of disrupted ACL fibers. (Ex. 48).

On March 10, 2014, the employer voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" new/omitted medical condition (right knee medial meniscus tear) and for a "worsening" of the previously accepted right knee strain and ACL tear conditions. (Ex. 50).

On October 22, 2014, the employer voluntarily reopened claimant's Own Motion claim for "post-aggravation rights" new/omitted medical conditions (new disruption of the ACL, tear of the lateral meniscus, and a full thickness chondral defect of the weight bearing surface of the medial femoral condyle). (Ex. 69).

On January 26, 2015, Dr. Hobson, claimant's attending physician, performed a right total knee arthroplasty (TKA). (Ex. 76). Thereafter, claimant participated in physical therapy, and Dr. Hobson monitored her results and improvement. (Exs. 100, 106, 110).

On August 19, 2015, claimant returned to Dr. Hobson for a "recheck" of her right knee. (Ex. 110). At that time, Dr. Hobson reported that she was doing quite well and had made excellent progress. He noted some weakness and tingling that was improving, but overall her symptoms were fairly mild and very consistent with recovering from TKA. He stated that she had no limp. (Ex. 110-1). He noted that x-rays showed a right TKA in excellent position, without complication or evidence of loosening or lysis. (Ex. 110-2). He measured the following knee ranges of motion (ROM): "0 to just about 117 degrees on the right side versus 135 degrees on the contralateral side." (*Id.*) He noted good stability with varus and valgus stressing, and appropriate Lachman and drawer testing. He found good sensation, 5/5 strength, and stated that skin color and turgor were good, with no warmth or erythema. (*Id.*) He declared claimant medically stationary, and released her from care. (Exs. 110-3, 111). Finally, he released claimant to regular work, without restrictions. (Ex. 111).

A September 9, 2015 Own Motion Notice of Closure declared claimant medically stationary as of August 19, 2015, and awarded an additional 12 percent (18 degrees) scheduled PPD for loss of use or function of the right leg (knee). That award was based on a 20 percent impairment value for the right TKA combined with a 7 percent impairment value based on Dr. Hobson's ROM measurements, less the prior award of 14 percent scheduled PPD. (Ex. 112-2).

Claimant requested review of the September 2015 Own Motion Notice of Closure, seeking additional scheduled PPD. She also requested the appointment of a medical arbiter. On November 4, 2015, we referred the claim to the Director for the appointment of a medical arbiter. *Vickie J. Carpenter, 67 Van Natta 1979 (2015)*.

On January 6, 2016, the medical arbiter panel (Drs. Morrison, Meyerding, and Melson) measured the following right/left knee ROM: 83/135 degrees flexion; and 9/0 degrees extension.² The panel noted that claimant had no history of injury or disease to the contralateral left knee joint. They measured 4/5 strength loss in the right hamstrings, and 5/5 strength in all other muscle groups. They found no plantar sensation loss. They noted that, as a consequence of the injury and its sequelae, claimant was unable to repetitively use her right knee for more than two-thirds of a period of time. Regarding instability, they stated that “[m]ild instability grade I is noted on the right MCL, and right anterior instability grade II of the mild category is noted.” They did not find that claimant was restricted from being on her feet for a total of more than two hours in an eight-hour period due to the accepted condition.

The arbiter panel opined that all of claimant’s disability was a consequence of her original accepted condition and the newly accepted conditions, but they were unable to separate them because the newly accepted conditions were sequelae of her original conditions. They found that all of the permanent impairment was due to the accepted knee injury, and no apportionment was required. Finally, they considered the examination findings to be valid for the purposes of rating claimant’s permanent impairment.

CONCLUSIONS OF LAW AND OPINION

Scheduled PPD

The claim was reopened for the processing of “post-aggravation rights” new/omitted medical conditions (right knee medial meniscus tear, new disruption of the ACL, tear of the lateral meniscus and a full thickness chondral defect of the weight bearing surface of the medial femoral condyle). Such a claim may qualify for payment of permanent disability compensation.³ ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004).

² Although the panel documented “-9” degrees extension, they also noted that claimant had 83 degrees flexion for a “total” right knee motion of “74” degrees. Therefore, we interpret the panel’s findings to mean that claimant had 9 degrees “retained motion” in extension. OAR 436-035-0011(2).

³ To the extent that the Notice of Closure pertains to the reopened “worsening” claim, claimant is not entitled to a PPD award. ORS 656.278(1)(a); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238, 245 (2004).

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).

Here, regarding claimant’s right knee conditions, no party disputes that all three factors are satisfied. 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. *See* OAR 436-035-0007(3); *Janine M. Porter*, 63 Van Natta 913, 918 (2011); *Nielsen*, 55 Van Natta at 3207-08.

Claimant’s claim was closed by a September 9, 2015 Own Motion Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). *See* OAR 436-035-0003(1).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter’s findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012); *Marisol Chavez-Ortega*, 65 Van Natta 2078, 2079 (2013). Only findings of impairment that are permanent and caused by the accepted condition, direct medical sequela, or a condition directly resulting from the work injury may be used to rate impairment. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(1), (2); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994).

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter’s opinion that unambiguously attributes the claimant’s permanent impairment to the compensable condition, “the medical arbiter’s report provides the default determination of a claimant’s impairment.” *Hicks v. SAIF*, 194 Or App 655, *adh’d to as modified on recons*, 196 Or App 146, 152 (2004). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician’s impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, relying on the above law, claimant asserts that the findings of Dr. Hobson, her attending physician, are not more accurate than those of the panel and, therefore, the arbiter panel’s report should be used to determine her permanent impairment.

The employer counters that the impairment findings from Dr. Hobson are more accurate and should be used to rate permanent impairment. Specifically, the employer asserts that Dr. Hobson's opinion of impairment is reliable, supported by the record as a whole, and provided sufficient information to rate claimant's disability. The employer notes that Dr. Hobson's impairment findings are similar to those measured at the end of claimant's physical therapy treatment in April 2015. The employer also contends that the arbiter panel's report is insufficient because it did not distinguish between impairment related to the previously accepted conditions and impairment related to the newly accepted conditions. In addition, although the panel measured loss of strength in the right hamstrings and noted that there was no injury or disease in the collateral knee joint, the employer asserts that they did not identify the peripheral nerve involved in that strength loss or provide collateral strength findings, as required by the standards.

We disagree that a preponderance of the evidence demonstrates that Dr. Hobson's impairment findings are more accurate and should be used. We reason as follows.

First, the employer contends that Dr. Hobson's impairment findings are similar to those measured at the end of claimant's physical therapy treatment in April 2015. However, claimant's physical therapy ended on April 23, 2015, almost four months before her right knee condition was declared medically stationary. (Exs. 107, 110). In addition, the physical therapist did not make any specific findings of permanent impairment other than to state that claimant "continues to report a 25% disability of the R LE according to the Lower Extremity Functional Scale." (Ex. 107). Finally, Dr. Hobson did not concur with that "25% disability" finding. Instead, he provided his own impairment findings. (Ex. 110). Moreover, the fact that Dr. Hobson's impairment findings differ from those of the arbiter panel does not make Dr. Hobson's findings more accurate. *See Daniel J. Bergmann, 67 Van Natta 338, 343 (2015).*

Second, contrary to the employer's argument, the panel did provide collateral strength findings; *i.e.*, in addition to measuring loss of strength in the right hamstrings, they found that all other muscle groups were "5/5." Further, although the panel did not identify the peripheral nerve involved in this right hamstrings strength loss, the standards allow the use of anatomy texts or the *AMA Guides to the Evaluation of Permanent Impairment* to identify the nerve(s) involved. *See OAR 436-035-0011(7)(b).*

Third, in attributing claimant's impairment findings to the accepted conditions, the panel stated: "We are of the opinion that all of her disability is a consequence of her original accepted condition and the newly accepted conditions but are unable to separate them out since the newly accepted conditions are sequelae of her original conditions." They also opined that all impairment was due to the knee injury and no apportionment is required. Thus, the panel did not identify a statutory "preexisting condition" that is not otherwise compensable. *See* OAR 436-035-0007(1)(b)(B)(ii); *Carmelo L. Villa*, 68 Van Natta 452, 456 (2016); *see also* OAR 436-035-0013(2)(b)(C); OAR 436-035-0014(1). Furthermore, as addressed above, under the facts of this case, we redetermine claimant's scheduled PPD pursuant to the Director's standards. *See* OAR 436-035-0007(3); *Nielsen*, 55 Van Natta at 3207.

Finally, the panel performed a thorough and complete examination, and noted that the findings were valid for rating. Based on the foregoing reasons, we find no ambiguity in the panel's opinion or impairment findings. Under these circumstances, a preponderance of the medical evidence does not demonstrate that the attending physician's findings are more accurate than the medical arbiter panel's findings. Therefore, we rate claimant's permanent impairment based on the panel's findings without "apportionment." OAR 436-035-0007(5); *Banderas*, 252 Or App at 144-45; *Hicks*, 196 Or App at 152; *Villa*, 68 Van Natta at 456; *Bergmann*, 67 Van Natta at 344.

The panel found the following right/left knee ROM: 83/135 degrees flexion and 9/0 degrees extension. Because claimant has no history of injury or disease to the contralateral joint, a comparison with the left knee is appropriate. OAR 436-035-0011(3). Accordingly, claimant receives the following right knee ROM values: 20.4 percent for flexion;⁴ and 0.9 percent for extension.⁵ OAR 436-035-0220(1), (2). These values are added for a total right knee ROM impairment value of 21.3 percent, which is rounded to 21 percent. OAR 436-035-0011(4).

Claimant receives an impairment value of 20 percent for the January 2015 right TKA surgery. OAR 436-035-0230(5)(d). She also underwent several other surgeries to her right knee. However, not all surgical procedures receive a

⁴ This value is determined by comparing the flexion findings right/left as follows: $83/135 = X/150$; $X = 92.22$, rounded to 92 degrees, which equals 20.4 percent impairment. *See* OAR 436-035-0011(3), (4); OAR 436-035-0220(1).

⁵ Given the left knee extension findings, the result is the same whether the standards or a contralateral comparison is used. *See* OAR 436-035-0011(2), (3); OAR 436-035-0220(2).

value, and the remaining surgeries are not ratable under the standards. OAR 436-035-0007(13)(a); OAR 436-035-0230(5)(d); *Anna M. Wilson*, 60 Van Natta 2986, 2991 (2008).

Regarding instability, the panel found that “[m]ild instability grade I is noted on the right MCL, and right anterior instability grade II of the mild category is noted.” The panel also found that all findings were valid for rating, and stated that no invalid findings were observed.

Valid instability in the knee substantiated by clinical findings is valued based on the ligament demonstrating the laxity, even if the ligament itself has not been injured. OAR 436-035-0230(3). However, when there is a prosthetic knee replacement, instability of the knee is not rated unless the severity of the instability is equivalent to Grade II or higher. OAR 436-035-0230(3)(d). Therefore, claimant is not entitled to a value for a Grade I medial collateral ligament instability. *Id.*

Based on the following reasoning, claimant is entitled to a value of 10 percent for the anterior cruciate ligament instability. OAR 436-035-0230(3) rates instability under categories of “Mild,” “Moderate,” and “Severe,” with anterior cruciate ligament instability receiving impairment values of 5 percent, 10 percent, and 15 percent, respectively. In addition, OAR 436-035-0230(3)(b) describes different levels of “instability” impairment ranging from “grade 1” through “grade 3” and provides: “For knee joint instability the severity of joint opening is mild at a grade 1 or 1+ (1-5mm), moderate at a grade 2 or 2+ (6-10mm), and severe at a grade 3 or 3+ (>10mm).”

Based on their examination, the panel determined that claimant exhibited valid “right anterior instability grade II of the mild category.” Although the panel did not include measurements of the “joint opening,” we find that their reference to “grade II of the mild category” establishes that claimant’s instability impairment is between Grade I and Grade II.

However, prorating or interpolating between listed values is not allowed under the standards. *See* OAR 436-035-0007(12). Instead, for findings that fall between the listed impairment values, the next higher appropriate value is used for rating. *Id.* Therefore, claimant is entitled to an impairment rating of Grade II (10 percent) for her anterior cruciate ligament instability. *See* OAR 436-035-0007(12); OAR 436-035-0230(3); *Michael A. Pope*, 58 Van Natta 2151, 2154 (2006) (applying earlier version of the rule subsequently renumbered as “OAR 436-035-0007(12),” the claimant was entitled to a Class 2 rating for a skin disorder where the impairment was between Class 1 and Class 2); *Constance L. Taylor*, 54 Van Natta 1448, 1451 n 4 (2002) (same).

The panel measured 4/5 strength of the hamstrings muscle. Where, as here, there is no evidence of spinal nerve root or lumbosacral plexus injury, “valid loss of strength in the leg or foot is valued as if the peripheral nerve supplying (innervating) the muscle(s) demonstrating the decreased strength was impaired * * * as modified under OAR 436-035-0011(7).” OAR 436-035-0230(9).

The 4/5 grade of strength measured by the panel is assigned a 20 percent value under OAR 436-035-0011(7)(a). The impairment value of the involved nerve is multiplied by this value. OAR 436-035-0011(7). Although the panel identified the muscle involved in claimant’s strength loss (hamstrings), they did not identify the innervating nerves. However, the standards allow the use of anatomy texts or the *AMA Guides to the Evaluation of Permanent Impairment* to identify the nerve(s) involved. OAR 436-035-0011(7)(b).

According to *Gray’s Anatomy* 1483 (39th ed 2005), the hamstrings muscle is innervated by the tibial nerve. The “Tibial Nerve (medial popliteal or internal popliteal above knee)” receives an impairment value of 35 percent of the leg. OAR 436-035-0230(9). 35 percent is then multiplied by 20 percent for a total of 7 percent for loss of right hamstrings strength. See OAR 436-035-0011(7); OAR 436-035-0230(9); *Pamela L. Mentzer*, 64 Van Natta 1753, 1756-57 (2012); *Johnny M. Mathes*, 59 Van Natta 2129, 2137 (2007).

The panel opined that claimant is significantly limited in the repetitive use of her right leg (knee). Therefore, she receives a 5 percent impairment value for a “chronic condition” limitation. OAR 436-035-0019(1)(b).

There are no other ratable permanent impairment findings. Therefore, we combine claimant’s right leg (knee) impairment values as follows: 21 percent (ROM) combined with 20 percent (surgery) is 37 percent; 37 percent combined with 10 percent (instability) is 43 percent; 43 percent combined with 7 percent (strength loss) is 47 percent; 47 percent combined with 5 percent (chronic condition) results in a total of 50 percent (75 degrees) scheduled PPD for the loss of use or function of the right leg (knee). OAR 436-035-0011(6); OAR 436-035-0019(2).

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 14 percent (21 degrees) scheduled PPD award is less than her current 50 percent (75 degrees) scheduled PPD, which leaves a remainder of 36 percent (54 degrees). The September 2015 Own Motion

Notice of Closure awarded an additional 12 percent (18 degrees) scheduled PPD. Accordingly, we modify the Notice of Closure to award an additional 24 percent (36 degrees) scheduled PPD for loss of use or function of the right leg (knee).⁶

Because our decision results in increased scheduled PPD, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased scheduled PPD compensation created by this order (the 24 percent (36 degrees) scheduled PPD award granted by this order), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(5); OAR 438-015-0040(1); OAR 438-015-0080(3).

Penalties/Attorney Fees

Claimant requests penalties and attorney fees for the employer's allegedly unreasonable claim processing. She contends that the employer did not have sufficient information to determine the extent of her disability when the claim was closed. She also asserts that the employer unreasonably waited to obtain information necessary for claim closure and, thus, unreasonably resisted payment of compensation. Based on the following reasoning, we conclude that the employer's claim processing was not unreasonable.

Because this claim is in Own Motion status, claim closure is governed by ORS 656.278, rather than ORS 656.268. Consequently, penalties under ORS 656.268(5)(d) are not available for the allegedly unreasonable claim processing of claimant's Own Motion claim. *See Julie A. Cleland*, 64 Van Natta 1828, 1840 (2012); *Billy J. Arms*, 59 Van Natta 2927, 2928 (2007); *John S. Ross*, 57 Van Natta 1510, 1516 (2005).

Nonetheless, ORS 656.262(11)(a) provides for a penalty if a carrier unreasonably delays or unreasonably refuses to pay compensation. *See David J. Swanson*, 57 Van Natta 885, 887 (2005) (penalty under ORS 656.262(11)(a) was awarded for the carrier's unreasonable delay in claim processing). Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amount "then due," plus "penalty-related" attorney fees.

⁶ Claimant's total award to date is 50 percent (75 degrees) scheduled PPD for the loss of use or function of the right leg (knee).

The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the refusal to pay is not unreasonable. “Unreasonableness” and “legitimate doubt” are to be considered in the light of all the evidence available to the insurer. *Brown v. Argonaut Insurance*, 93 Or App 588, 591 (1988).

When we have found that a carrier unreasonably delayed or unreasonably refused payment of compensation under relevant Own Motion law, we have assessed penalties under ORS 656.262(11)(a). See *Howard D. Smith*, 57 Van Natta 1817, 1827-30 (2005); *Swanson*, 57 Van Natta at 887; *Richard L. Wilson*, 56 Van Natta 407, recons, 56 Van Natta 1614 (2004). In accordance with that statute, we examine the record to determine whether a penalty for unreasonable claim processing is appropriate.

Here, claimant argues that the employer had insufficient information to close her claim because it relied on Dr. Hobson’s August 19, 2015 “recheck” exam, which did not constitute a “closing exam.” We disagree.

In *Charles D. Leffler*, 67 Van Natta 1997 (2015), we applied ORS 656.278(1)(b), ORS 656.278(6), OAR 438-012-0055, and OAR 436-035-0007(5), (6), and interpreted those statutory and administrative procedures to require the carrier to process a newly accepted “post-aggravation rights” new/omitted medical condition claim to closure and to apply the Director’s standards in doing so. We found that application of the standards requires that findings of permanent impairment be made by the claimant’s attending physician at the time of claim closure or by providers with whom the attending physician concurs. ORS 656.278(1)(b), (6); OAR 436-035-0001 *et seq.*; OAR 438-012-0055.

Here, those requirements were satisfied. There is no dispute that Dr. Hobson is claimant’s attending physician. Furthermore, he declared claimant’s right knee condition medically stationary and made findings of permanent impairment, as summarized below.

On August 19, 2015, claimant returned to Dr. Hobson for a “recheck” regarding her January 2015 TKA. (Ex. 110). At that time, Dr. Hobson reported that she was doing quite well and had made excellent progress. He noted some weakness and tingling that was improving, but overall her symptoms were fairly mild and very consistent with recovering from TKA. He reported that she had no limp. (Ex. 110-1). He took x-rays that showed a right TKA in excellent position without complication or evidence of loosening or lysis. He also measured bilateral

ROM, noted good stability with varus and valgus stressing, and noted appropriate Lachman and drawer testing. He found good sensation, 5/5 strength, and noted that skin color and turgor were good, with no warmth or erythema. (Ex. 110-2). He declared her medically stationary, and released her from care. (Exs. 110-3, 111). Finally, he released her to regular work, without restrictions. (Ex. 111).

The fact that Dr. Hobson called this August 2015 exam a “recheck” rather than a “closing exam” is not controlling. In this regard, no incantation of “magic words” or statutory language is required, provided the opinion otherwise meets the appropriate legal standard. *See Freightliner Corp. v. Arnold*, 142 Or App 98, 105 (1996). Although claimant contends that Dr. Hobson expected her right knee condition to improve, his unrebutted opinion declared her right knee condition medically stationary as of August 19, 2015. (Ex. 110-3). Moreover, the above summary of Dr. Hobson’s August 2015 findings establishes that the employer did not unreasonably delay or unreasonably refuse to pay compensation by using those findings to close the claim.

Finally, without explanation, claimant contends that the employer unreasonably waited to obtain information necessary for claim closure and, thus, unreasonably delayed payment of compensation. We disagree.

As addressed above, on August 19, 2015, Dr. Hobson declared claimant’s right knee condition medically stationary, measured permanent impairment, and released her to regular work without restrictions. (Exs. 110, 111). It is unclear when the employer received this information. However, on September 9, 2015, the employer issued an Own Motion Notice of Closure that rated claimant’s permanent impairment based on Dr. Hobson’s findings. (Ex. 112). Under such circumstances, we do not find that the employer unreasonably delayed payment of compensation.

Accordingly, claimant is not entitled to penalties or penalty-related attorney fees under ORS 656.262(11)(a).

IT IS SO ORDERED.

Entered at Salem, Oregon on June 22, 2016

Member Curey concurring in part and dissenting in part.

I agree with the majority's reasoning and conclusions regarding the penalty and attorney fee issues, and with the determination of the scheduled PPD award, with the exception of the rating of an impairment value for anterior cruciate ligament instability. Because I would find that claimant is not entitled to an impairment rating for knee instability, I dissent in part.

Claimant has the burden of proving the extent of disability resulting from the "post-aggravation rights" new/omitted medical conditions (right knee medial meniscus tear, new disruption of the ACL, tear of the lateral meniscus and a full thickness chondral defect of the weight bearing surface of the medial femoral condyle). ORS 656.266(1). I find that the medical evidence on stability is unclear and that this record does not meet claimant's burden regarding instability impairment.

First, the arbiter panel did not provide any clinical findings or measurements of the "joint opening" as required by OAR 436-035-0230(3)(b). Without such findings, I am unable to determine which category, if any, of instability should be applied in this case.

Second, the arbiter panel's findings regarding stability are less than clear. The panel stated, "mild instability grade I is noted on the right MCL." Of note, claimant does not have an accepted MCL condition and the finding relating to the MCL is, itself, irrelevant. Finding further, the panel said, "and right anterior instability grade II of the mild category is noted."⁷ While "mild" and "grade I" clearly represent a "Grade I" instability finding, the panel's finding of "mild" and "grade II" is inconsistent and unclear and does not allow the Board to rate claimant's knee instability.

While the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusion in the absence of such evidence. *Benz v. SAIF*, 170 Or App 22, 25 (2000); *see also SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record). Therefore, unfortunately, I am not free to make any reasonable inference with this unclear record and conclude that claimant has failed to meet his burden of proving entitlement to an instability award.

Consequently, I respectfully dissent from that portion of the majority's opinion that finds claimant entitled to a 10 percent impairment value for instability.

⁷ It is unfortunate that no clarification of the arbiter panel's instability findings appear in the record.