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In the Matter of the Compensation of  
Own Motion No. 15-00076OM  
**GUSTAVO F. AVILA**, Claimant  
OWN MOTION ORDER  
Hooton Wold & Okrent LLP, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of an October 9, 2015 Own Motion Notice of Closure that did not award permanent partial disability (PPD) for his “post-aggravation rights” new/omitted medical condition (lumbosacral strain combined with preexisting degenerative disc disease at L4-5 and L5-S1 beginning on September 19, 2008).<sup>1</sup> On review, claimant seeks rescission of the Notice of Closure because the SAIF Corporation did not request permanent impairment findings from the attending physician. Based on the following reasoning, we set aside the Notice of Closure as invalid.

#### FINDINGS OF FACT

On September 19, 2008, claimant sustained a compensable low back injury. SAIF accepted a nondisabling lumbosacral strain. (Ex. 17). On December 5, 2008, Dr. Davidoff, claimant’s attending physician, declared his low back condition medically stationary without permanent impairment. (Ex. 22).

In June 2015, claimant requested that SAIF accept a “post-aggravation rights” new/omitted medical condition for “lumbosacral strain combined with preexisting degenerative disc disease at L4-5 and L5-S1.” (Ex. 31).

On July 1, 2015, Dr. Rosenbaum examined claimant on behalf of SAIF. (Ex. 32). Dr. Rosenbaum reported that claimant’s lumbar strain was declared medically stationary on December 5, 2008, which he opined was appropriate

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<sup>1</sup> Claimant’s September 19, 2008 claim was accepted as a nondisabling claim. Thus, his aggravation rights expired on September 19, 2013. Therefore, when claimant sought claim reopening in June 2015, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On August 6, 2015, the SAIF Corporation voluntarily reopened the claim for a “post-aggravation rights” new/omitted medical claim for “lumbosacral strain combined with preexisting degenerative disc disease at L4-5 and L5-S1 beginning on September 19, 2008.” ORS 656.278(1)(b), (5). On October 9, 2015, SAIF issued its Notice of Closure

because “the strain [was] no longer playing the major contributory role.” (Ex. 32-8). Dr. Rosenbaum’s report included range of motion findings. (Ex. 32-5).

On August 6, 2015, SAIF accepted and voluntarily reopened a “post-aggravation rights” new/omitted medical condition for “lumbosacral strain combined with preexisting degenerative disc disease at L4-5 and L5-S1 beginning on September 19, 2008.” (Exs. 31, 33, 34). That same date, SAIF denied this combined condition “on or after December 5, 2008.” (Ex. 33).

On September 25, 2015, Dr. Rosenbaum agreed that, at the time of Dr. Davidoff’s December 5, 2008 examination, claimant’s combined condition was medically stationary and without permanent impairment. (Ex. 35-2). He also agreed that the 2008 injury was no longer the major contributing cause of claimant’s disability and need to treat his current combined condition on or after December 5, 2008. (*Id.*)

SAIF did not seek information from Dr. Davidoff regarding claimant’s permanent impairment findings. Moreover, SAIF did not request Dr. Davidoff’s concurrence with Dr. Rosenbaum’s impairment findings.

An October 9, 2015 Own Motion Notice of Closure did not award PPD benefits for the “post-aggravation rights” new/omitted medical condition (lumbosacral strain combined with preexisting degenerative disc disease at L4-5 and L5-S1 beginning on September 19, 2008). (Ex. 36). Claimant requested review.

### CONCLUSIONS OF LAW AND OPINION

On review, claimant argues that the October 2015 Own Motion Notice of Closure should be rescinded because there is no documentation from his attending physician concerning his permanent impairment. SAIF counters that rescission of the closure notice is not appropriate, contending that it properly closed the claim based on the examining physician’s agreement with the December 2008 medically stationary date and the attending physician’s 2008 findings. Based on the following reasoning, we rescind the Notice of Closure.

In *Charles D. Leffler*, 67 Van Natta 1997, 2004 (2015), we held that an Own Motion Notice of Closure may be invalid when, prior to closure of a “post-aggravation rights” new/omitted medical condition claim, the carrier does not

obtain the attending physician's findings of permanent impairment or the attending physician's ratification of such impairment findings from another provider.<sup>2</sup> ORS 656.278(1)(b), (6); OAR 436-035-0001 *et seq.*; OAR 438-012-0055.

Here, SAIF argues that, because it denied the aforementioned accepted "post-aggravation rights" combined condition claim effective December 5, 2008, it was not required to obtain further impairment findings from the attending physician subsequent to that date. In doing so, SAIF asserts that, on December 5, 2008, the attending physician had previously declared claimant's accepted lumbosacral strain condition medically stationary without permanent impairment. Based on the following reasoning, we disagree with SAIF's position.

SAIF's argument disregards the fact that it has accepted and voluntarily reopened a "post-aggravation rights" new/omitted medical condition claim (lumbosacral strain combined with preexisting degenerative disc disease at L4-5 and L5-S1 beginning on September 19, 2008). (Exs. 33, 34). As a result of its decision to voluntarily reopen this Own Motion claim, SAIF must process that claim to closure and apply the Director's standards in doing so. *See* OAR 438-012-0055; *Glen G. Lovitt*, 64 Van Natta 1046, 1049 (2012).

As explained in *Leffler*, application of those standards to claimant's new/omitted medical condition requires that findings of permanent impairment be made by 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; *Leffler*, 67 Van Natta at 2004. Here, the attending physician's 2008 opinion regarding the previously accepted lumbosacral strain condition is not sufficient because it does not address the *current* "reopened" new/omitted medical condition. *See also Kevin J. Schmidt*, 62 Van Natta 375, *recons*, 62 Van Natta 598, *recons*, 62 Van Natta 949 (2010) (issuance of "pre-closure" "ceases" denial of accepted Own Motion combined condition does not obviate the carrier's obligation to process the claim to closure;

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<sup>2</sup> In contrast, we have held that an Own Motion Notice of Closure is not premature when, prior to closure of a "post-aggravation rights" new/omitted medical condition claim, the carrier unsuccessfully attempted to obtain the attending physician's findings of permanent impairment or the attending physician's ratification of such impairment findings from another provider. *See Dwayne L. Minner*, 67 Van Natta 2006, 2009 (2015) (when the record established that the carrier had made two unsuccessful attempts to obtain the attending physician's concurrence with another physician's impairment finding before closing the claim, the closure of the claim was not found premature).

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such denial also does not prevent the appointment of an arbiter to evaluate the “post-aggravation rights” new/omitted medical condition for which the Own Motion claim was voluntarily reopened).

Here, SAIF did not attempt to obtain permanent impairment findings regarding claimant’s *current* “reopened” new/omitted medical condition claim (lumbosacral strain combined with preexisting degenerative disc disease at L4-5 and L5-S1 beginning on September 19, 2008) from Dr. Davidoff, claimant’s attending physician, either directly from him or through his concurrence with Dr. Rosenbaum’s or any other provider’s permanent impairment findings. Under such circumstances, we conclude that the October 9, 2015 Notice of Closure is invalid. *See Leffler*, 67 Van Natta at 2004.

Accordingly, we set aside the October 9, 2015 Notice of Closure and remand the claim to SAIF for further processing in accordance with this order. Claimant’s counsel is awarded an “out-of-compensation” attorney fee equal to 25 percent of any increased temporary disability compensation created by this order, not to exceed \$1,500, payable directly to claimant’s attorney. ORS 656.386(4); OAR 438-015-0080(1).

**IT IS SO ORDERED.**

Entered at Salem, Oregon on March 1, 2016