
In the Matter of the Compensation of
SUE J. BROCK, Claimant
WCB Case No. 14-06082
ORDER ON REVIEW
Ronald A Fontana, Claimant Attorneys
Gilroy Law Firm, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Fisher's order that: (1) found that her left shoulder injury claim was not prematurely closed; (2) affirmed an Order on Reconsideration that did not award permanent impairment/work disability for a left shoulder condition; and (3) declined to award penalties or attorney fees for allegedly unreasonable claim processing. On review, the issues are premature closure, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the premature closure issue.

As a result of claimant's compensable injury, the self-insured employer accepted a left shoulder contusion. (Ex. 37). After Dr. Newland, the attending physician, stated that claimant's shoulder contusion was medically stationary without permanent impairment and without need for work restrictions, the employer closed the claim. (Exs. 36, 39).

An Order on Reconsideration found that the claim was not prematurely closed. Thereafter, claimant requested a hearing.

The ALJ rejected claimant's argument, based on *Brown v. SAIF*, 262 Or App 640 (2014), *rev allowed*, 356 Or 397 (2014), that the claim was prematurely closed because the employer did not have sufficient information to determine that claimant's unclaimed/unaccepted left shoulder rotator cuff tear and her "compensable injury" were medically stationary without permanent impairment. In doing so, the ALJ relied on *Stuart C. Yekel*, 67 Van Natta 1279, 1282 (2015), which declined to extend the *Brown* rationale to the rating of permanent impairment.

The ALJ also determined that the medical evidence established that claimant's accepted conditions and any direct medical sequelae were medically stationary without any related permanent impairment or work restrictions. Consequently, the ALJ affirmed the Order on Reconsideration. Considering such circumstances, the ALJ concluded that penalties/attorney fees were not warranted.

On review, claimant contests the ALJ's "medically stationary" conclusion, and argues that the Notice of Closure was improper. Based on the following reasoning, we affirm.

A claim may be closed when the claimant's condition is medically stationary and there is sufficient information to determine the extent of permanent disability. ORS 656.268(1)(a); OAR 436-030-0020(1)(a). "Medically stationary" means that no further material improvement would reasonably be expected from medical treatment or the passage of time. ORS 656.005(7). The term "medically stationary" does not mean there is no longer a need for continuing medical care. *Maarefi v. SAIF*, 69 Or App 527, 531 (1984); *Pennie Richerd-Puckett*, 61 Van Natta 336 (2009).

When determining whether claim closure was premature, we consider the medically stationary status of only the accepted conditions at the time of claim closure and any direct medical sequelae.¹ *Manley v. SAIF*, 181 Or App 431, 438 (2002) (accepted conditions and direct medical sequelae must be medically stationary at claim closure). Claimant bears the burden of proving that her condition was not medically stationary at claim closure. ORS 656.266(1); *Berliner v. Weyerhaeuser Corp.*, 54 Or App 624 (1981).

For the purpose of rating permanent impairment, only the opinions of claimant's attending physician at the time of claim closure, other medical findings with which the attending physician concurred, and the findings of a medical arbiter may be considered. ORS 656.245(2)(b)(C); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). On reconsideration, where a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, 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). Impairment is based on the accepted conditions and the direct medical sequelae of the accepted conditions. *Yekel*, 67 Van Natta at 1283-84.²

¹ Claimant's claim was closed by a July 17, 2014 Notice of Closure. Thus, the applicable rules are found in WCD Admin. Order 11-058 (eff. January 1, 2012) and 12-061 (eff. January 1, 2013).

² A footnote in *Magana-Marquez v. SAIF*, 276 Or App 32, 34 n 2 (2016), suggests that, based on *Brown*, the proper focus for assessing a claimant's entitlement to a permanent disability award is whether the permanent impairment or work disability is related to the compensable injury/occupational disease,

Here, it is undisputed that claimant's accepted conditions were medically stationary at the time of claim closure. Additionally, the record does not establish that claimant's rotator cuff tear or any other conditions are a direct medical sequelae of the accepted shoulder contusion. *See* ORS 656.268(15).

However, citing *Brown*, claimant contends that the Notice of Closure was premature because Dr. Newland stated that her unaccepted/unclaimed left shoulder rotator cuff tear was likely to result in permanent impairment and work restrictions. Asserting that the rotator cuff tear was part of the "compensable injury," claimant argues that the "medically stationary" status of this "work-related injury incident" condition must also be confirmed before the claim can be validly closed. *See Brown* 262 Or App at 652 (a "compensable injury" is an "accidental but work-related injury incident").

We recently declined to extend the *Brown* holding to premature closure disputes. *See Katherine A. Lapraim*, 68 Van Natta 39 (2016). In *Lapraim*, citing the *Manley* rationale, we reasoned that, when determining whether a claim closure is premature, we consider the medically stationary status of only the accepted conditions and their direct medical sequelae at the time of claim closure, rather than the medically stationary status of unaccepted new/omitted conditions. *Lapraim*, 68 Van Natta at 40.

Accordingly, consistent with the *Lapraim* holding, because the record establishes that claimant's accepted condition was medically stationary, and there were no direct medical sequelae of the accepted condition, the Notice of Closure was not premature.³

Claimant also contends that the Notice of Closure was improper because it did not include a description of claimant's job. *See* OAR 436-030-0020(2)(b)(A), (7)(c). Based on the following reasoning, we disagree.

OAR 436-030-0020(2)(a) provides that "sufficient information" for closure purposes may be provided by an attending physician's written statement that there is no permanent impairment, residuals, limitations, loss of function or change in the worker's physical abilities.

rather than the accepted conditions. However, we consider that footnote to be *dicta*. *William Snyder*, 68 Van Natta 199, 200, n 1 (2016). Further, we have concluded that the most administratively judicious approach to this subject is to continue to adhere to the *Yekel* rationale unless the court rules to the contrary. *Id.*

³ Under these circumstances, penalties and attorney fees are not warranted.

Here, Dr. Newman confirmed that claimant had no permanent impairment or work restrictions related to her accepted left shoulder contusion. (Ex. 36). Under such circumstances, the employer was not required to include a description of claimant's job with the Notice of Closure. *See, e.g., Barbara J. Lovejoy*, 65 Van Natta 2572, 2574 (2013).

Finally, Dr. Newland, as well as the medical arbiter panel, determined that no permanent impairment was attributable to claimant's accepted shoulder contusion. (Exs. 36, 45-6). Consequently, the ALJ correctly affirmed the Order on Reconsideration, which did not award permanent impairment. *See Yekel*, 67 Van Natta at 1282.

In conclusion, based on the aforementioned reasoning, in addition to the reasons expressed in the ALJ's order, we conclude that the claim was not prematurely closed and that permanent impairment/work disability awards are not warranted. Accordingly, we affirm.

ORDER

The ALJ's order dated August 14, 2015 is affirmed.

Entered at Salem, Oregon on February 23, 2016