

In the Matter of the Compensation of
JOSEPH J. AGUILERA, Claimant
WCB Case No. 02-04808, 02-04643
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Bock. Member Biehl chose not to sign the order.

The self-insured employer requests review of Administrative Law Judge (ALJ) Stephen Brown's order that: (1) modified the medically stationary date in an Order on Reconsideration; and (2) affirmed the Order on Reconsideration's award of 15 percent (48 degrees) unscheduled permanent disability for a low back condition. On review, the issues are temporary disability (medically stationary date) and extent of unscheduled permanent disability. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's Findings of Fact.

CONCLUSIONS OF LAW AND OPINION

Temporary Disability (Medically Stationary Date)

Claimant compensably injured his back at work on August 28, 2001. The employer accepted a lumbar and thoracic strain. (Ex. 35). A Notice of Closure issued on January 28, 2002, finding claimant's condition medically stationary on January 3, 2002, and awarding temporary disability through that date, but awarding no permanent disability. (Ex. 51). Claimant requested reconsideration. In a letter to the Appellate Review Unit (ARU), the employer contended that the Notice of Closure should be affirmed in all respects. (Ex. 66).

On May 30, 2002, an Order on Reconsideration issued. The ARU found, in the body of the reconsideration order, that claimant's condition was medically stationary on January 3, 2002. (Ex. 75-2). Nevertheless, in the "order" portion of that document, claimant's condition was purportedly found medically stationary on "November 12, 2001." (Ex. 75-4). Claimant, however, was awarded temporary

disability from August 28, 2001 through January 3, 2002. (*Id.*) Claimant requested a hearing.

On the temporary disability (medically stationary date) issue, the ALJ determined that the employer was barred from challenging the medically stationary date at hearing due to its earlier position before the ARU that the January 3, 2002 medically stationary date in its Notice of Closure should be affirmed. In the alternative, the ALJ found, on the merits, that claimant's condition was medically stationary on January 3, 2002. Accordingly, the ALJ modified the "Order" portion of the May 30, 2002 Order on Reconsideration to be consistent with the findings in the body of the order on the issue of the medically stationary date. The ALJ characterized the November 12, 2001 medically stationary date as a "scrivener's error."

On review, the employer contends that, inasmuch as the Order on Reconsideration altered its Notice of Closure with regard to the medically stationary date, it should be allowed to defend that change at hearing. The employer is correct. At least arguably on its face, the May 30, 2002 Order on Reconsideration altered the medically stationary date stated in the January 28, 2002 Notice of Closure. (Exs. 51, 75-4). The employer was therefore entitled to defend the Order on Reconsideration on the "medically stationary" date issue at hearing. *See Machuca-Ramirez v. Zephyr Engineering, Inc.*, 184 Or App 565, 569-570 (2002) (when the order on reconsideration makes a change in the closure award, the proper focus is not on the carrier's initial award but on the propriety of the change in the reconsideration order); *Duncan v. Liberty Northwest Insurance Corp.*, 133 Or App 605, 611 (1995) ("if a reconsideration order changes the determination order, the propriety of that change can be raised by either party at a hearing.")

In any event, however, we agree with the ALJ that the medical evidence establishes that claimant's accepted condition was medically stationary on January 3, 2002. In his January 3, 2002 insurer-arranged medical examination (IME) report, Dr. Thompson stated that claimant's condition was "probably" medically stationary when he sought treatment with Dr. Rabie on November 12, 2001. (Ex. 44-7). However, instead of definitively pinpointing a medically stationary date, Dr. Thompson used the word "probably," and then set forth a date almost two months prior to his examination. Moreover, Dr. Thompson's opinion is not consistent with Dr. Rabie's November 12, 2001 chart note, wherein Dr. Rabie indicated that claimant's low back pain was "resolving slowly," with chiropractic treatment *starting* "today;" *i.e.*, on November 12, 2001. (Ex. 33).

Accordingly, on the merits, we disagree with the employer's contention that claimant's condition was medically stationary on November 12, 2001. We agree with the ALJ's ultimate determination to modify the "order" portion of the Order on Reconsideration to reflect a January 3, 2002 medically stationary date, consistent with the finding in the body of the Order on Reconsideration. (Ex. 75-2, -4).

Permanent Disability

The ALJ affirmed the unscheduled permanent disability award in the Order on Reconsideration based on the opinion of the medical arbiter, Dr. MacRitchie. On review, the employer contends that claimant was not entitled to a permanent disability award, because it had issued a "current condition" denial concurrently with its Notice of Closure for claimant's accepted lumbar and thoracic strain conditions, and Dr. MacRitchie's opinion did not properly consider the effect of the denial. (Exs. 49, 51). We need not resolve the employer's argument, however, because we decline to rely on the findings of Dr. MacRitchie in favor of those of Dr. Thompson, with which claimant's attending physician, Dr. Scherer, concurred. (Exs. 44, 48).

Claimant's disability is determined as of the date of the Order on Reconsideration. ORS 656.283(7). Only the medical arbiter or the attending physician at claim closure (or other physicians with whom the attending physician concurs) may make impairment findings for disability rating purposes. OAR 436-035-0007(13)(14); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666, 670 (1994). OAR 436-035-0007(14) provides in material part that "on reconsideration, where a medical arbiter is used, impairment is established by the medical arbiter, except where a preponderance of medical opinion establishes a different level of impairment."

Based on the following reasoning, we find a preponderance of medical opinion establishing a different level of impairment from that found by the arbiter, Dr. MacRitchie. Dr. MacRitchie's conclusion (that claimant did have permanent low back impairment) is inconsistent with an earlier, November 12, 2001 chart note from Dr. Rabie, describing claimant's "excellent range of motion without hesitation." (Ex. 33). Dr. MacRitchie's findings are likewise contradicted by those of the IME physician Dr. Thompson, with which Dr. Scherer concurred. (Exs. 44, 48). After conducting a thorough examination, Dr. Thompson concluded that, due to "marked functional interference and discrepancies" in his examination, it was not possible to rate any impairment. (Ex. 44-8). Dr. Scherer, claimant's

attending physician, concurred in those findings. (Ex. 48).

Under these circumstances, we find a preponderance of evidence from the attending physician establishing a different level of impairment from that found by the arbiter, Dr. MacRitchie. OAR 436-035-0007(14). Based on Dr. Thompson's findings (as concurred in by claimant's attending physician), claimant's unscheduled permanent disability award will be reduced to zero, consistent with the Notice of Closure.¹

Claimant's attorney is entitled to an assessed fee for services on review related to the temporary disability/medically stationary issue. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review related to the temporary disability issue is \$800, payable by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated October 23, 2002 is affirmed in part and reversed in part. That portion of the ALJ's order that affirmed the Order on Reconsideration's award of 15 percent (48 degrees) unscheduled permanent disability for a low back condition is reversed. Claimant's unscheduled permanent disability award is reduced to zero, as awarded by the January 28, 2002 Notice of Closure. The remainder of the ALJ's order is affirmed. For services on review, claimant's attorney is awarded \$800, payable by the employer.

Entered at Salem, Oregon on July 8, 2003

¹ We acknowledge receipt of the employer's motions for consideration of additional evidence and for consolidation. Based on our disposition of the permanent disability issue, the employer's motions are moot.