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In the Matter of the Compensation of  
**NOEL G. BROWN, Claimant**  
WCB Case No. 07-07997  
ORDER ON REVIEW  
Floyd H Shebley, Claimant Attorneys  
Garrett Hemann et al, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Kekauoha's order that found that her thoracic injury claim was not prematurely closed. The self-insured employer moves to strike portions of claimant's appellant's brief that refer to materials not admitted into evidence at hearing. On review, the issues are motion to strike and premature closure.

We grant the employer's motion and adopt and affirm the ALJ's order with the following supplementation.

Motion to Strike

The employer argues that those portions of claimant's appellant's brief that refer to litigation orders, which were neither a part of the reconsideration record, nor admitted into evidence at hearing, should be stricken. Claimant requests that we take administrative notice of those orders because they involve the same parties and injury. We grant the motion to strike. *See Crecencie Pavon-Valdez*, 56 Van Natta 4020 n 2 (2004) (declining to take administrative notice of the ALJ's prior order in another case involving the claimant as evidence on any issue regarding the present reconsideration order); *Salvador Guevara-Morales*, 52 Van Natta 1427 (2000) (declining to take administrative notice of agency order that was not in reconsideration record in extent of disability case).

Premature Closure

In finding that the claim was not prematurely closed, the ALJ was not persuaded that there was a reasonable expectation of material improvement of the accepted conditions at the time of claim closure. The ALJ reasoned that no physician was able to attribute claimant's ongoing symptoms to the accepted disc herniations.

On review, claimant argues that the Order on Reconsideration which found the Notice of Closure premature, should be affirmed because there is no medical evidence that the accepted conditions were medically stationary. In doing so, claimant contends that Dr. Long, her attending physician, neither released her to return to work, nor declared her conditions medically stationary. Claimant also relies on the opinion of Dr. Lin, who examined her for the purpose of a medical treatment dispute and recommended further review of her CT scans. For the following reasons, we do not find the claim to have been prematurely closed.

Although claimant has the burden to prove that her claim was prematurely closed, because the employer requested a hearing regarding the Order on Reconsideration, it has the burden of establishing error in the reconsideration process. *Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000); *Steven C. Boling*, 57 Van Natta 3091 (2005). In other words, the employer must persuasively establish, from the reconsideration record, that the December 10, 2007 Order on Reconsideration setting aside the closure as premature was in error. *Callow*, 171 Or App at 184.

“Medically stationary” means that no further material improvement would reasonably be expected from medical treatment, or the passage of time. ORS 656.005(17). A claimant’s medically stationary status is primarily a medical question to be decided based on competent medical evidence. *Harmon v. SAIF*, 54 Or App 121, 125 (1981).

Here, the employer accepted claimant’s thoracic strain and T6-7 and T7-8 disc herniations. (Exs. B43, B148, B509). In October 2005, Dr. Regan performed a discectomy and fusion at T6-7 and T7-8. (Ex. B336). Imaging studies from October and November 2005 showed normal alignment of the fused vertebral bodies. (Exs. B373, B382, B389). Claimant reported that her thoracic pain was relieved by the surgery. (Exs. B400, B408).

A January 30, 2006 CT scan revealed a successful fusion. (Ex. B409). On February 1, 2006, Dr. Long released claimant to regular work without restrictions. (Exs. B407, B408, B416).

A September 2006 CT scan revealed a complete bony fusion at T6-7 and T7-8, which was similar to the January 2006 CT scan findings. (Ex. B423). Dr. Long found additional consolidation at the fused levels. (Ex. B424).

In October 2006, Dr. Long recommended diagnostic facet joint injections at T6-7, T7-8 and T8-9 to determine the source of claimant's ongoing symptoms. (Exs. B427, B430). Based on her response to the injections, Dr. Slack was unable to determine the source of claimant's pain. (Ex. B431). In November 2006, Dr. Slack also performed T6-7 and T7-8 facet nerve blocks. (Ex. B437). He opined that those facet joints may be the source of claimant's pain. (*Id.*) Dr. Slack reported a well-fused mass at T6-7, but indicated a possible non-union and pseudoarthrosis at T7-8. (Ex. B438). The bone scan revealed an adequate fusion at T6 through T8. (Ex. B448).

In February 2007, Dr. Long recommended neuroablation to determine whether claimant's symptoms came from her facet joint or fusion. (Ex. B458). Based on her response to the neuroablation, Dr. Slack opined that the facet joints were the primary source of claimant's pain. (Ex. B459).

March 2007 CT scan findings were similar to those in September 2006. (Ex. B462). Based on claimant's short-term response to the facet joint treatment, Dr. Long diagnosed T7-8 pseudoarthrosis, symptomatic since August 2006, and recommended a bone grown stimulator. (Exs. B465, B467).

In April 2007, Dr. Gripekoven, examining claimant at the employer's request, diagnosed a thoracic sprain/strain and T6-7 and T7-8 degenerative disc disease. (Ex. B469-11). Because claimant did not benefit from the prior injections and neuroablation, Dr. Gripekoven did not recommend further surgery or injections. (Exs. B469-11-12, B470). Dr. Gripekoven opined that claimant's symptoms indicated failed back syndrome. (Ex. B469-11-12). Although he was unable to state whether claimant's conditions had reached maximum medical improvement, Dr. Gripekoven believed there was no further curative treatment, or other invasive procedures, for claimant's conditions. (Exs. B469-12-13, B470).

Dr. Long disagreed with Dr. Gripekoven's conclusions. Dr. Long stated that claimant did not have a satisfactory fusion at T7-8, and that her symptoms were due to T7-8 pseudoarthrosis. (Ex. B474-2-3). He recommended use of a bone growth stimulator to help consolidate the T7-8 fusion. (Ex. B474-3). Dr. Long opined that there was a very distant possibility that claimant would be a candidate for additional thoracic surgery. (*Id.*)

In August 2007, claimant reported unchanged, persistent symptoms despite using a bone growth stimulator for four months. (Exs. B487, B494). Dr. Long recommended that Dr. Slack perform further diagnostic facet joint

injections and nerve root blocks to determine the source of claimant's symptoms. (*Id.*) An August 28, 2007 CT scan showed a stable fusion, unchanged since the March 2007 scan. (Ex. B492).

The employer denied Dr. Slack's request for authorization of the proposed injections. (Ex. B489). Claimant requested administrative review of the denied medical treatment. (Ex. B499).<sup>1</sup>

In October 2007, Dr. Long stated that the proposed treatment was intended to be diagnostic, not curative. He stated that the "precise source of [claimant's] symptoms is exactly the question being addressed." (Ex. B501).

In November 2007, Dr. Lin, examining claimant at the Director's request for the purposes of the medical treatment dispute, diagnosed failed back syndrome with chronic mid back and radicular symptoms. (Ex. B518-7). Because claimant did not receive substantial benefit from the prior injections and neuroablation, Dr. Lin opined that further injections and ablations were inappropriate. (Ex. B518-8). He recommended an independent review of the CT scans to determine whether the pseudoarthrosis had resolved. (*Id.*)

Claimant argues that her conditions were not medically stationary because Dr. Long did not release her to work or declare them medically stationary. In doing so, claimant notes that Dr. Gripekoven was unable to determine whether she had reached maximum medical improvement. However, medically stationary status is not based on a release to work. "Magic words" are also not necessary to determine medically stationary status. *John H. Dixon*, 56 Van Natta 1171, 1173 (2004).

Moreover, the term "medically stationary" does not mean that there is no longer a need for continuing medical care. *Maarefi v. SAIF*, 69 Or App 527, 531 (1984); *Jesus M. Zarzosa*, 56 Van Natta 1683, 1684 (2004), *aff'd without opinion*, 201 Or App 216 (2005) (recommendation for pain treatment did not, by itself, support a reasonable expectation of material improvement in the claimant's

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<sup>1</sup> The Workers' Compensation Division (WCD) eventually found that treatment to be inappropriate. (Ex. B525). See *James A. Poelwijk*, 53 Van Natta 553, 557 (2001) (because the Director's determination that the proposed medical treatments were not reasonable and necessary broke the chain of causation between the accepted condition and any disability associated with that treatment, a proposed treatment that was determined inappropriate would not support a finding that the claimant's compensable condition was not medically stationary); *Tony D. Houck*, 52 Van Natta 1361, 1362 (2000).

compensable condition). Rather, under the statutory definition of “medically stationary,” the issue is whether claimant’s condition, in the opinion of the medical experts, has reached a point where it will not materially improve with further treatment or the passage of time. ORS 656.005(17).

Claimant also contends that, in light of Dr. Long’s recommendations of further diagnostic testing, and an independent review of the CT scans, there is no medical evidence that her conditions were medically stationary. For the following reasons, we disagree.

The August 28, 2007 CT scan revealed a stable fusion, unchanged from the March 2007 scan. (Ex. B492). The January 2006, September 2006, and March 2007 CT scans all reflected similar findings. (Exs. B409, B423, B462). Moreover, Dr. Long recommended a bone growth stimulator to help consolidate claimant’s T7-8 fusion. (Ex. B474). However, claimant received no benefit after using the device for four months. (Exs. B487, B494).

Furthermore, Dr. Long explicitly stated that the proposed facet joint injections were intended to be diagnostic, not curative. (Ex. B501). He opined that the proposed treatment would determine whether claimant’s symptoms were due to her T7-8 fusion, T7-8 pseudoarthrosis, facet joints, or costovertebral joints. (Exs. B474, B476, B478, B487, B494, B501).

Dr. Lin did not consider the proposed injections to be appropriate. (Ex. B518-8). In doing so, he noted that the radiologists’ interpretations of the CT scans showed complete and intact fusions. (Ex. B518-7). Moreover, Dr. Lin’s recommendation for an independent review of the CT scans was for the purpose of determining whether claimant’s T7-8 pseudoarthrosis resolved. (Ex. B518-8).

Based on this record, we find that a preponderance of medical evidence indicates that there was no reasonable expectation of material improvement related to claimant’s compensable conditions. Under these circumstances, we find claimant’s compensable conditions were medically stationary at claim closure. ORS 656.005(17). Consequently, we affirm.

### ORDER

The ALJ’s order dated March 12, 2009 is affirmed.

Entered at Salem, Oregon on June 25, 2009