

In the Matter of the Compensation of  
**RYAN M. HINZ, Claimant**

WCB Case No. 14-02581

ORDER ON REVIEW

M & L Legal Attorneys, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fisher's order that affirmed an Order on Reconsideration that set aside a Notice of Closure as premature. On review, the issue is premature claim closure.

We adopt and affirm the ALJ's order with the following change and supplementation. In the last paragraph on page 2, we replace the first sentence with the following: "A January 28, 2013 Opinion and Order upheld the employer's denials of claimant's new/omitted medical condition claims for chronic/posttraumatic headaches, posttraumatic epilepsy, and ligamentous disruption. (Ex. 67)."

On February 10, 2009, claimant sustained a compensable head concussion. (Ex. 8). The employer closed the concussion claim on October 31, 2012, awarding 10 percent whole person impairment and work disability. (Exs. 63, 64). The listed medically stationary date was October 3, 2012. (Ex. 64).

A January 28, 2013 ALJ's order upheld the employer's denials of claimant's new/omitted medical condition claims for chronic/posttraumatic headaches, posttraumatic epilepsy, and ligamentous disruption. (Ex. 67). A February 13, 2014 Order on Review set aside the employer's denial of the claim for posttraumatic headaches.<sup>1</sup> *Ryan M. Hinz*, 66 Van Natta 287 (2014).

The employer modified the acceptance to include the posttraumatic headache condition. (Ex. 69). On February 27, 2014, the employer issued a Notice of Closure for the headache condition that did not award additional permanent or temporary disability benefits. (Exs. 71, 72). The listed medically stationary date was October 3, 2012. (Ex. 72). Claimant requested reconsideration. (Exs. 73A, 73B).

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<sup>1</sup> The order explained that the parties agreed that the medical opinions used the terms "chronic headaches" and "posttraumatic headaches" interchangeably. 66 Van Natta at 287 n.1.

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An April 30, 2014 Order on Reconsideration set aside the February 27, 2014 Notice of Closure, finding that the claim was prematurely closed. (Ex. 74). In reaching that conclusion, the Appellate Review Unit (ARU) determined that the evidence was unclear as to claimant's medically stationary status, as well as work disability. (*Id.*) The employer requested a hearing.

The ALJ determined that Dr. Erb was claimant's attending physician at closure and affirmed the reconsideration order, reasoning that the medically stationary status of the newly accepted headache condition was unclear.

On review, the employer argues that Dr. Erb's October 3, 2012 report established that claimant's posttraumatic headache condition was medically stationary at claim closure. The employer contends that Dr. Erb unequivocally declared claimant's work-related conditions medically stationary, while acknowledging the need for continued palliative care. The employer also argues that Dr. Erb disavowed the need for further diagnostic testing. According to the employer, no medical provider has opined that additional treatment or the passage of time will materially improve the headache condition. We disagree with the employer's contentions, reasoning as follows.

As the party challenging the Order on Reconsideration, the employer must establish error in the reconsideration process. *Marvin Wood Prods, v. Callow*, 171 Or App 175,183 (2000).

"Medically stationary" means that no further material improvement would reasonably be expected from medical treatment or the passage of time. ORS 656.005(17). The issue of 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).

For the reasons explained in the ALJ's order, we agree that Dr. Erb was claimant's attending physician at claim closure. On October 3, 2012, Dr. Erb responded to questions from claimant's former attorney. She had treated claimant 10 times since February 2010 and explained that she had been treating his headaches with medication. (Ex. 61-1). Dr. Erb believed that claimant's headache condition would benefit from Gabapentin and Gralise. (Ex. 61-1, -2). She concluded that the posttraumatic headaches were due to the February 2009 injury, although she recognized that the condition had not yet been accepted.<sup>2</sup> (Ex. 61-2).

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<sup>2</sup> Dr. Erb explained that "chronic headache" was not a separate diagnosis from "posttraumatic headache." (Ex. 61-1).

Dr. Erb was asked if claimant's "work related conditions" were medically stationary and whether he needed palliative care. (*Id.*) She responded: "It is my medical opinion that he is medically stationary. He needs palliative care for medications and monitoring medications." (*Id.*) However, Dr. Erb did not clarify what condition(s) she believed were "medically stationary." We are unable to determine whether she was referring only to the accepted head concussion or if she was including the headache condition, which had not been accepted at that time.

In any event, when read in context, Dr. Erb's report is not sufficient to establish that claimant's posttraumatic headache condition was medically stationary. She explained that claimant had Class I brain injury impairment "due to the accepted condition of disabling head concussion and the non accepted posttraumatic (migraine) headaches." (*Id.*) However, Dr. Erb did "not feel that [claimant] has had a complete trial of medications." (*Id.*) She explained that "[p]resently we do not [have] full treatment for the migraine headaches, therefore we do not have full treatment for the episodes of disorientation and this makes him unsafe around certain types of machinery." She recommended Gralise, which "would resolve his symptoms to a significant extent." Dr. Erb explained: "This along with appropriate medication treatment for his sleep would hopefully allow him to return to full-time work. However, I have not been able to fully assess this due to restrictions on medications." (*Id.*)

A recommendation for treatment does not, by itself, support a conclusion that there was a reasonable expectation of material improvement in the worker's condition. *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). Here, however, Dr. Erb's opinion, when read in context, establishes a reasonable expectation of material improvement in claimant's headache condition with appropriate medications. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical records are evaluated in context and based on the record as a whole). Consequently, we agree with the ALJ's conclusion that the employer has not sustained its burden of proving error in the reconsideration process.<sup>3</sup> Therefore, we affirm.

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<sup>3</sup> In light of our conclusion, it is not necessary to address claimant's additional argument that the medical evidence at closure was insufficient to determine work disability. However, we provide the following response to claimant's argument that he could not obtain medical treatment, specifically the treatment recommended by Dr. Erb, while the denied headache condition was being litigated. After we set aside the employer's denial of the claim for posttraumatic headaches, the employer closed the claim two weeks later, advising claimant that his claim qualified for "administrative closure." (Exs. 70, 72). *See* ORS 656.268(1)(c); OAR 436-030-0034(1) (WCD Admin. Order 11-058, eff. January 1, 2012).

Claimant's attorney is entitled to an assessed fee for services on review. 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 is \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, his counsel's fee submission, and the employer's objections), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

### ORDER

The ALJ's order dated August 6, 2014 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, payable by the employer.

Entered at Salem, Oregon on February 2, 2015

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Although the employer advised claimant that his claim qualified for "administrative closure," the employer did not argue at hearing that it had satisfied the procedures required for an administrative closure nor does the record support the conclusion that it complied with OAR 436-030-0034 (WCD Admin Order 11-058; eff. January 1, 2012). *See Linda J. Kangas*, 62 Van Natta 2480, 2487-88 (2010) (carrier must strictly comply with the requirements in OAR 436-030-0034 to establish that a claim was properly closed "administratively").