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In the Matter of the Compensation of  
**CIRENIO A. GARCIA-ALVAREZ, Claimant**  
Own Motion No. 15-00047OM  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE  
Welch Bruun & Green, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of a June 29, 2015 Own Motion Notice of Closure that did not award permanent disability for his “post-aggravation rights” new/omitted medical conditions (right ankle medial talar contusion, right ankle microtrabecular fracture involving the upper medial talar dome, and right osteochondral defect of the medial talus).<sup>1</sup> For the following reasons, we modify the closure notice.

FINDINGS OF FACT

On April 21, 2009, claimant, a dairy farmer, sustained a compensable right ankle injury, for which the SAIF Corporation accepted a right ankle sprain. (Ex. 4). His aggravation rights expired on April 21, 2014.

In October 2009, Dr. Teed, claimant’s attending physician, opined that a right ankle MRI showed some bony bruising of the talus over the anteromedial aspect, consistent with either a small trabecular fracture or persistent bone contusion. (Ex. 9). On March 5, 2010, Dr. Teed stated that claimant’s right ankle was essentially medically stationary with no residual deficits. (Ex. 17).

In April 2014, claimant returned to Dr. Teed for complaints of persistent right ankle pain. (Ex. 18). Based on a May 2014 MRI, Dr. Teed diagnosed early right ankle degenerative joint disease related to the ankle sprain. (Ex. 20).

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<sup>1</sup> Claimant’s April 21, 2009 claim was accepted as a nondisabling claim. Thus, his aggravation rights expired on April 21, 2014. Therefore, when claimant sought claim reopening in July 2014, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On September 9, 2014, the SAIF Corporation voluntarily reopened claimant’s Own Motion claim for “post-aggravation rights” new/omitted medical conditions (right ankle medial talar contusion and right ankle microtrabecular fracture involving the upper medial talar dome). ORS 656.278(1)(b), (5). On June 18, 2015, SAIF voluntarily reopened claimant’s Own Motion claim for another “post-aggravation rights” new/omitted medical condition (right osteochondral defect of the medial talus). *Id.* On June 29, 2015, SAIF issued its Notice of Closure for both reopened claims.

On July 18, 2014, claimant requested that SAIF accept a right ankle medial talar contusion and right ankle microtrabecular fracture involving the upper medial talar dome. (Ex. 22).

On August 29, 2014, Dr. Ballard examined claimant at SAIF's request, and found equal ranges of motion (ROM) in the bilateral ankles, and 5/5 strength. (Ex. 25-6). He diagnosed a chronic right ankle strain and right medial dome talar traumatic lesion. (*Id.*) Dr. Ballard stated that claimant had no preexisting condition in his ankles, and no combined right ankle condition. (Ex. 25-7-8). Dr. Ballard opined that the April 2009 work injury was a material contributing cause of the disability/need for treatment of the claimed right ankle medial talar contusion and right ankle microtrabecular fracture involving the upper medial talar dome, and that the accepted sprain was the major contributing cause of those conditions. (Ex. 25-8). He recommended referral to an orthopedic foot and ankle specialist, a repeat MRI, and possibly a right ankle arthroscopy. (Ex. 25-8-9). Dr. Ballard stated that claimant was not currently medically stationary, but noted that he had equal ROM in both ankles. (Ex. 25-9).

On September 9, 2014, SAIF accepted and voluntarily reopened claimant's Own Motion claim for "post-aggravation rights" new/omitted medical conditions (right ankle medial talar contusion and right ankle microtrabecular fracture involving the upper medial talar dome). (Exs. 26, 27).

In October 2014, Dr. Teed concurred with Dr. Ballard's report, but deferred to an ankle specialist to refer claimant for a repeat MRI. (Ex. 28).

In December 2014, Dr. Lafleur, orthopedist, diagnosed right osteochondral defect of the right medial talus. (Ex. 29-2). He recommended that claimant see another physician for surgical considerations, but noted that claimant was resistant to undergoing surgery. (*Id.*) In February 2015, Dr. Teed did not consider claimant to be a good surgical candidate. (Ex. 31).<sup>2</sup>

In a June 16, 2015 concurrence letter, Dr. Teed indicated that claimant had returned to his regular work as a dairy farmer. (Ex. 33-1). He opined that claimant's right ankle medial talar contusion, right ankle microtrabecular fracture involving the upper medial talar dome, and right osteochondral defect

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<sup>2</sup> In April 2015, SAIF denied claimant's new/omitted condition claim for "pain on both feet and knees, right hip." (Ex. 32). That denial was not appealed.

of the medial talus were medically stationary.<sup>3</sup> (Ex. 33-2). Dr. Teed agreed that Dr. Ballard's August 2014 report could be used for evaluating claimant's impairment (*i.e.*, "[ROM] and strength findings"). (*Id.*) According to Dr. Teed, claimant had no limitation in the repetitive use of his right foot/ankle. (*Id.*)

On June 18, 2015, SAIF accepted and voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" new/omitted medical condition (right osteochondral defect of the medial talus). (Exs. 34, 35).

On June 29, 2015, an Own Motion Notice of Closure for both reopened claims did not award any permanent disability for the "post-aggravation rights" new/omitted medical conditions (right ankle medial talar contusion, right ankle microtrabecular fracture involving the upper medial talar dome, and right osteochondral defect of the medial talus). (Ex. 36). Claimant requested review of the closure notice, asserting that the claims were prematurely closed or, alternatively, seeking an additional permanent disability award. (Ex. 37).<sup>4</sup>

On October 9, 2015, we referred the claim to the Director for the appointment of a medical arbiter. *Cirenio A. Garcia-Alvarez*, 67 Van Natta 1832 (2015).

On February 11, 2016, Dr. Borman, the medical arbiter, found the following right/left foot/ankle ROM: 20/20 degrees subtalar inversion; 0/0 degrees subtalar eversion; 15/20 degrees dorsiflexion (extension); and 30/30 degrees plantar flexion. He noted that claimant had left foot/ankle symptoms, but no prior history of injury or disease. Dr. Borman found no instability or loss of strength in claimant's ankles. He found no loss of plantar sensation or hypersensitivity in the right foot. Dr. Borman opined that claimant was not significantly limited in the repetitive use of the right foot/ankle, and that he was capable of being on his feet for more than two hours in an 8-hour day. He considered the examination findings to be valid and due to the accepted conditions.

### CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of "post-aggravation rights" new/omitted medical conditions (right ankle medial talar contusion, right ankle microtrabecular fracture involving the upper medial talar dome, and right

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<sup>3</sup> Dr. Teed acknowledged that claimant might ultimately require surgical intervention. (Ex. 33-2).

<sup>4</sup> Claimant subsequently withdrew the premature closure issue, and requested the appointment of a medical arbiter for the purposes of evaluating his permanent impairment.

osteocondral defect of the medial talus). Such a claim may qualify for payment of permanent disability compensation. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004).

We first determine whether ORS 656.278(2)(d) applies to limit any award of permanent disability for the “post-aggravation rights” new/omitted medical conditions. The permanent partial disability (PPD) limitation set forth in ORS 656.278(2)(d) applies where there is (1) “additional impairment” to (2) “an injured body part” that has (3) “previously been the basis of a [PPD] award.” *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003). If those conditions are satisfied, the Director’s standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate “post-aggravation rights” new or omitted medical condition claims. Under such circumstances, we redetermine the claimant’s permanent disability pursuant to those standards before application of the limitation in ORS 656.278(2)(d). *Jeffrey L. Heintz*, 59 Van Natta 419 (2007); *Nielsen*, 55 Van Natta at 3207-08.

Conversely, where it is determined that the limitation in ORS 656.278(2)(d) does not apply, the permanent disability for the “post-aggravation rights” new/omitted medical condition is rated under the Director’s standards without “redetermination” of disability. *Randy D. Boydston*, 59 Van Natta 2360 (2007); *Terry J. Rasmussen*, 56 Van Natta 1136 (2004).

Here, all three factors are not satisfied regarding claimant’s right ankle conditions. Specifically, before the closure of this Own Motion claim, he has not received a prior PPD award for his right foot/ankle. Consequently, the ORS 656.278(2)(d) limitation does not apply to claimant’s right ankle, and the PPD for claimant’s newly accepted right ankle conditions is rated under the Director’s standards without a “redetermination” of disability.

Claimant’s claim was closed by a June 29, 2015 Own Motion Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). *See* OAR 436-035-0003(1).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter’s findings, 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). Only findings of impairment that are permanent and caused by the accepted condition, direct

medical sequela, or a condition directly resulting from the work injury may be used to rate impairment. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(1), (2); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994).

Here, Dr. Borman, the medical arbiter, performed a thorough and complete examination. Because a preponderance of the medical evidence does not demonstrate that Dr. Ballard's impairment findings, as ratified and supplemented by Dr. Teed (claimant's attending physician), are more accurate, we rely on Dr. Borman's opinion to rate claimant's permanent impairment.

Dr. Borman found the following right/left foot/ankle ROM: 20/20 degrees subtalar inversion; 0/0 degrees subtalar eversion; 15/20 degrees dorsiflexion (extension); and 30/30 degrees plantar flexion. Because claimant has no history of injury or disease to the contralateral joint, a comparison with the left foot/ankle is appropriate. OAR 436-035-0011(3). Claimant receives the following right foot/ankle ROM values: zero percent for inversion; 4 percent for eversion; 2 percent for dorsiflexion (extension); and zero percent for plantar flexion. OAR 436-035-0011(3); OAR 436-035-0190(2), (4), (6), (8).<sup>5</sup> These values are added for a total right foot/ankle ROM impairment value of 6 percent. OAR 436-035-0011(2); OAR 436-035-0190(10)(a).

There are no other ratable impairment findings. Because claimant's date of injury was April 21, 2009, the 6 percent impairment value for the loss of use or function in the right foot/ankle is converted to 3 percent whole person impairment. OAR 436-035-0235(1), (3).

As noted above, the ORS 656.278(2)(d) limitation does not apply. The June 29, 2015 Own Motion Notice of Closure did not award any permanent impairment benefits. (Ex. 36). Consequently, we modify the closure notice to

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<sup>5</sup> We compare the right/left subtalar inversion findings as follows:  $20/20 = X/30$ ;  $X = 30$  degrees; 30 degrees receives an impairment value of zero. OAR 436-035-0011(3); OAR 436-035-0190(2).

Because claimant's right subtalar eversion is zero degrees, the values under the standards are used, rather than a contralateral joint comparison. OAR 436-035-0011(3); *Lester A. Von Flue*, 62 Van Natta 2706, 2708 n 2 (2010). Consequently, the right subtalar eversion is valued at 4 percent. OAR 436-035-0190(4).

Given claimant's left dorsiflexion (extension) finding, the result is the same using the standards or a contralateral joint comparison. OAR 436-035-0011(3); OAR 436-035-0190(6).

We compare the right/left plantar flexion findings as follows:  $30/30 = X/40$ ;  $X = 40$  degrees; 40 degrees receives an impairment value of zero. OAR 436-035-0011(3); OAR 436-035-0190(8).

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award 3 percent whole person impairment for claimant's "post-aggravation rights" new/omitted medical conditions (right ankle medial talar contusion, right ankle microtrabecular fracture involving the upper medial talar dome, and right osteochondral defect of the medial talus).<sup>6 7</sup>

Because our decision results in increased permanent disability, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased permanent disability compensation created by this order (the 3 percent whole person impairment award granted by this order), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(4); OAR 438-015-0040(1); OAR 438-015-0080(3).

**IT IS SO ORDERED.**

Entered at Salem, Oregon on June 7, 2016

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<sup>6</sup> Because claimant was released to or returned to his regular work, he is not entitled to a work disability award. OAR 436-035-0009(4); *Kevin T. Kinnamore*, 68 Van Natta 398 (2016).

<sup>7</sup> Claimant's total award to date is 3 percent whole person impairment for his right foot/ankle conditions.