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In the Matter of the Compensation of  
**MICHELLE A. GRIFFITH, Claimant**  
Own Motion Nos. 15-00012OM, 12-00123OM  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE ON  
RECONSIDERATION  
Black Chapman et al, Claimant Attorneys  
Olson & Dickson LLP, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

On September 16, 2016, we issued an Own Motion Order Reviewing Carrier Closure that modified October 5, 2012 and December 31, 2014 Own Motion Notices of Closure to award permanent total disability (PTD) benefits, effective as of March 13, 2008 (claimant's medically stationary date). Asserting that claimant is precluded from an award of PTD benefits because her disability is due to a worsened condition, the self-insured employer seeks reconsideration. Based on the following reasoning, we adhere to our decision.<sup>1</sup>

As we explained in our prior order, analyzing ORS 656.206 in conjunction with ORS 656.278, results in the following elements that may be considered in determining entitlement to PTD compensation regarding "post-aggravation rights" new/omitted medical conditions. *See James S. Daly*, 58 Van Natta 2355, 2374 (2006). First, disability for a previously accepted condition is considered as it existed at the last claim closure that preceded the expiration of claimant's 5-year aggravation rights.<sup>2</sup> *Daly*, 58 Van Natta at 2361. Second, any disability that

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<sup>1</sup> As a preliminary matter, we find that (based on the envelope that contained the employer's request for reconsideration) the employer's request was mailed to the Board on Monday, October 17, 2016. Because the 30th day from our September 16 order was October 16 (a Sunday), the final day to file a timely request for reconsideration was Monday, October 17. *See* OAR 438-005-0046(1)(a), (1)(j); OAR 438-012-0065(2); *Von D. Bailey*, 60 Van Natta 1123, 1123 n 1 (2008) (30-day deadline for filing reconsideration did not expire until the Monday after the Saturday that was the 30th day after the mailing date of the Own Motion order); *Bunny G. Johnson*, 54 Van Natta 198, 199 n 1 (2002) (when the last day of the 30-day appeal period falls on a Saturday or legal holiday, including Sunday, the appeal period runs until the end of the next day that is not a Saturday or legal holiday). Consequently, the employer's request for reconsideration was timely filed. *Gladys Biggs*, 54 Van Natta 1094 (2002).

<sup>2</sup> In *Daly*, 58 Van Natta at 2362, we reasoned that, under this method, the PTD evaluation would include consideration of permanent disability from the accepted conditions occurring before the expiration of aggravation rights, but would not include consideration of permanent disability from any "worsened condition" after the expiration of aggravation rights, which would be contrary to the statutory scheme and the rationale expressed in *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Sherlee M. Samel*, 56 Van Natta 931 (2004); and *Jimmy O. Dougan*, 54 Van Natta 1213, *recons*, 54 Van Natta 1552 (2002), *aff'd Dougan v. SAIF*, 193 Or App 767 (2004), *vacated*, 339 Or 1 (2005).

predates the initial compensable injury is also considered. *Id.* at 2364-65. Third, when such disabilities exist, they are considered with any disability from the “post-aggravation rights” new/omitted medical conditions to determine whether the claimant has established entitlement to PTD. *Id.* at 2371.

On reconsideration, the employer essentially challenges our application of the first and third elements. Based on the following reasoning, we disagree with those challenges.

Regarding the first element, claimant’s previously accepted conditions were the “thoracic strain; laminectomy at T6-7; facetectomy at T4-T10; and fusion from T4-T10,” which were last closed on January 10, 1991 (before the expiration of her 5-year aggravation rights on June 30, 1992.) (*See Exs. 17, 34-2, 155-1, 178-7*). A June 5, 1992 Opinion and Order ultimately awarded 32 percent (102.4 degrees) unscheduled PPD for claimant’s thoracic and lumbar spine for those previously accepted conditions. (Ex. 21). Thus, permanent disability resulting from that last claim closure of the accepted conditions that preceded the expiration of claimant’s aggravation rights may be considered in evaluating PTD on the closures of the “post-aggravation rights” new/omitted medical condition claims (T1 through L2 fusion; post-operative degenerative disc disease at L2-3; thoracic spine instability T1-11; and lower lumbar instability at L2-3) currently being rated.

As previously explained, claimant cannot be granted PTD benefits for a “worsened condition.” *See* footnote 2. However, the employer asserts that “PTD benefits are warranted based exclusively on factors outside the previously accepted [conditions]” (thoracic strain; laminectomy at T6-7; facetectomy at T4-T10; and fusion from T4-T10). We disagree with that proposition. The employer’s contention would prevent consideration of permanent disability from the previously accepted conditions occurring before the expiration of aggravation rights, which is contrary to the *Daly* rationale. In this regard, the first element that we may consider in determining entitlement to PTD benefits *includes* permanent disability awarded for previously accepted conditions prior to the expiration of aggravation rights. *Daly*, 58 Van Natta at 2361-62.

Thus, as addressed above and in our prior order, we may consider the 32 percent (102.4 degrees) unscheduled PPD awarded prior to expiration of aggravation rights for claimant’s thoracic and lumbar spine for the previously accepted conditions (thoracic strain; laminectomy at T6-7; facetectomy at T4-T10; and fusion from T4-T10).

In our prior order, we intended to include consideration of this “pre-aggravation rights” 32 percent (102.4 degrees) unscheduled PPD award for the previously accepted thoracic and lumbar spine conditions, which constitutes consideration of the first element regarding entitlement to PTD benefits for the “post-aggravation rights” new/omitted medical conditions. *Daly*, 58 Van Natta at 2361-62. To further clarify this point, we replace the first paragraph on page 13 of our prior order with the following:

“Based on our review of Dr. Lorber’s (claimant’s attending physician’s) opinions (particularly his subsequent clarifications), we consider his reference to the “whole spine” to focus on her fused spinal condition as well as her 32 percent unscheduled PPD award prior to the expiration of her aggravation rights. Moreover, the accepted and reopened “post-aggravation rights” new/omitted medical conditions (T1 through L2 fusion; post-operative degenerative disc disease at L2-3; thoracic spine instability T1-11; and lower lumbar instability at L2-3) on which the October 2012 and December 2014 claim closures are based explicitly include the entire spinal fusion and related conditions that we interpret Dr. Lorber’s opinions to be addressing.”

In arguing that we awarded PTD benefits for a “worsening” of claimant’s previously accepted conditions, the employer contends that we referenced claimant’s “fused spinal conditions” as the focus of claimant’s PTD entitlement. However, as we explained in our prior order, the “post-aggravation rights” new/omitted medical conditions being considered in our review of the October 2012 and December 2014 claim closures *included* “T1 through L2 fusions.”

In this regard, in February 1996, claimant underwent extensive spinal surgery that included T5 through T10 osteotomies of the previous fusion mass and a T1 through L-2 fusion with CD instrumentation. (Exs. 36, 37). This 1996 surgery prompted claimant’s request for acceptance of “post-aggravation rights” new/omitted medical conditions, which ultimately resulted in the employer’s acceptance and reopening of several new/omitted medical conditions (T1 through L2 fusion; post-operative degenerative disc disease at L2-3; thoracic spine instability T1-11; and lower lumbar instability at L2-3) on which the October 2012 and December 2014 claim closures were based. (Exs. 153, 161-2, 179). Those October 2012 and December 2014 claim closures were the subject of our review.

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In *Nancy J. Ferguson*, 64 Van Natta 2315, 2325 (2012), we awarded PTD benefits, rejecting the carrier's argument that, because the claimant was unable to work before her 2002 claim for "post-aggravation rights" new/omitted medical conditions, her current inability to work was not due to those conditions but, instead, was due to a "worsening" of the previously accepted conditions. We found that the claimant's disability and inability to work were not due to a worsening of the previously accepted conditions because the record established that the impairment was due to conditions that were ultimately determined compensable as "post-aggravation rights" new/omitted medical conditions. Further, we reasoned that the claim closure being considered on review involved the closure of those "post-aggravation rights" new/omitted medical conditions.

Here, in our prior order, we relied on *Ferguson* and, on reconsideration, we continue to find it directly on point. As explained in our prior order, the identified impairments (including the T1 through L2 fusions) were conditions that were ultimately determined compensable as "post-aggravation rights" new/omitted medical conditions. (Exs. 153, 161-2, 179). Therefore, it is appropriate to consider those fusions, as well as the other "post-aggravation rights new/omitted medical conditions (T1 through L2 fusion; post-operative degenerative disc disease at L2-3; thoracic spine instability T1-11; and lower lumbar instability at L2-3) in determining claimant's entitlement to PTD benefits. *Daly*, 58 Van Natta at 2371.

Accordingly, our September 16, 2016 order is withdrawn. On reconsideration, as supplemented, we republish our September 16 order. The parties' rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on October 31, 2016