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In the Matter of the Compensation of  
**JUAN A. ARENAS-RAYA, Claimant**  
WCB Case No. 15-02640  
ORDER ON REVIEW  
Hollander & Lebenbaum et al, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that: (1) found that claimant's low back claim was not prematurely closed; and (2) affirmed an Order on Reconsideration that awarded no permanent impairment or work disability beyond the 18 percent permanent impairment and 43 percent work disability he had previously been granted. On review, the issues are premature closure and extent of permanent disability (impairment and work disability). We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary.

Claimant sustained a compensable back injury in 2010. A May 2012 Order on Reconsideration awarded 18 percent whole person impairment and 43 percent work disability. (Ex. 48).

On October 8, 2014, the SAIF Corporation accepted an L5-S1 disc herniation as a new/omitted medical condition. (Ex. 62).

On October 29, 2014, Dr. Rosenbaum, claimant's attending physician, examined claimant, made impairment findings, and declared his condition medically stationary. (Ex. 63). He and claimant discussed the possibility of surgical intervention, which "would likely improve his radiating left lower extremity pain and numbness, but not his low back discomfort." (Ex. 64-1). Claimant did not elect to undergo surgery that would not significantly benefit his low back. (*Id.*) Dr. Rosenbaum did not recommend treatment for the L5-S1 disc herniation. (Ex. 64-2).

On December 16, 2014, Dr. Rosenbaum opined that 50 percent of claimant's impairment was due to the accepted conditions, and 50 percent of the impairment was due to a denied lumbar spondylosis condition. (Ex. 66-1).

SAIF issued a Notice of Closure on December 30, 2014. (Ex. 67). Based on Dr. Rosenbaum's examination, the Notice of Closure awarded 19 percent whole person impairment (a 1 percent increase) and 44 percent work disability (a 1 percent increase). (Ex. 67-2). Claimant requested reconsideration, seeking the appointment of a medical arbiter. (Ex. 72-1).

On April 3, 2015, Dr. Tatsumi, a medical arbiter, examined claimant and made impairment findings. (Ex. 70). He opined that claimant "would benefit from another spine surgery." (Ex. 70-3). He declined to comment on claimant's residual functional capacity "as [claimant] has neurologic compromise and would benefit from a surgical procedure." (Ex. 70-4).

Dr. Tatsumi was then asked to evaluate the impairment that claimant would have had, due to the L5-S1 condition, if he had undergone surgery. (Ex. 71). Dr. Tatsumi opined that if claimant had undergone surgery, he would have had none of the reported range of motion loss, strength loss, sensation loss, repetitive use limitation (*i.e.*, chronic condition impairment), or work limitations due to the L5-S1 herniation. (*Id.*)

A May 7, 2015 Order on Reconsideration concluded that claimant's condition was medically stationary and found that the claim closure was not premature. (Ex. 72-2). The Order on Reconsideration further reasoned that claimant's impairment due to the L5-S1 herniation was not permanent, because Dr. Tatsumi had opined that there would not be permanent impairment after surgical intervention.

Accordingly, the Order on Reconsideration modified the December 2014 Notice of Closure to award no additional permanent disability beyond the previously-granted 18 percent whole person impairment and 43 percent work disability awards. Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The ALJ reasoned that the medical evidence did not support a reasonable expectation of material improvement of claimant's compensable L5-S1 condition from medical treatment or the passage of time. Accordingly, the ALJ concluded that the claim was not prematurely closed. *See* ORS 656.005(17); ORS 656.268(1)(a).

The ALJ also reasoned that claimant unreasonably refused surgery that would significantly reduce his disability. Citing *Clemons v. Roseburg Lumber Co.*, 43 Or App 135 (1978), the ALJ concluded that claimant was not entitled to any additional permanent impairment. Consequently, the ALJ affirmed the Order on Reconsideration.

On review, claimant contends that his claim was prematurely closed or, alternatively, that the Notice of Closure's permanent disability award should be reinstated. We adopt and affirm the ALJ's reasoning regarding the premature closure issue, but agree with claimant's contentions regarding his permanent disability award. We reason as follows.

On reconsideration, where a medical arbiter is used, impairment is established by the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or with which the attending physician concurred, are more accurate and should be used. OAR 436-035-0007(15); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666, 670 (1994). When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's permanent impairment to the compensable condition, "the medical arbiter's report provides the default determination of a claimant's impairment." *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146, 152 (2004). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

As explained below, we conclude that the findings of claimant's attending physician, Dr. Rosenbaum, are more accurate than those of Dr. Tatsumi.

To begin, we note that Dr. Tatsumi measured impairment, but the Order on Reconsideration and the ALJ's order used different rationales to conclude that Dr. Tatsumi's opinion, that claimant's impairment would be resolved by surgery, supported no additional impairment award.<sup>1</sup> The Order on Reconsideration reasoned that Dr. Tatsumi's impairment findings were not "permanent," but the ALJ reasoned that claimant's refusal to undergo surgery was unreasonable. SAIF asserts both rationales, which we address in turn.

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<sup>1</sup> The Notice of Closure's increased work disability award was based on the increased impairment award. (Ex. 67-2).

A worker's eligibility for a permanent impairment award depends on whether the impairment findings establish a permanent loss caused by the compensable injury. OAR 436-035-0007(1)(a)(A); *see also* ORS 656.214(1). An opinion that impairment is not permanent will not support an impairment award, and we must interpret an arbiter's opinion if it is ambiguous as to whether impairment is permanent. *See Hicks*, 196 Or App at 151; *Khrul v. Foremans Cleaners*, 194 Or App 125, 132 (2004).

Here, Dr. Tatsumi made impairment findings, but opined that claimant would not have such impairment if he underwent surgery. SAIF contends that this opinion establishes that the impairment findings are not permanent. We disagree with SAIF's contention.

As discussed above, we have concluded (and SAIF does not dispute) that claimant's condition is medically stationary; *i.e.*, there is no reasonable expectation of material improvement with medical treatment or the passage of time. *See* ORS 656.005(17). Further, neither Dr. Tatsumi nor Dr. Rosenbaum explicitly opined that their impairment findings were not permanent. To the contrary, Dr. Tatsumi's impairment findings specifically responded to a request to identify "objective findings of permanent impairment resulting from the accepted condition(s)." (Ex. 70-6). Moreover, Dr. Rosenbaum opined that claimant had "reached maximum improvement." (Ex. 63-2). Although Drs. Tatsumi and Rosenbaum indicated that surgery, if performed, would improve claimant's impairment, such surgery did not occur and was not planned. (Ex. 64-1).

Such circumstances are similar to those presented in *Ray L. Straws*, 61 Van Natta 2314 (2009), and *Todd M. Resseguie*, 56 Van Natta 3489 (2004). In those cases, we concluded that impairment findings were permanent despite medical evidence that future surgery could improve the claimants' conditions.

In *Straws*, the medical arbiter made impairment findings that were valid and due solely to the accepted condition, but the medical arbiter also "anticipat[ed] that [the claimant] will require reconstructive surgery to improve the function of the right knee related to this injury." 61 Van Natta at 2314. We interpreted the medical arbiter's opinion to mean that improvement in the claimant's condition was contingent on the prospect of future surgical intervention. *Id.* at 2318. Considering that the claimant's condition was medically stationary,<sup>2</sup> that the

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<sup>2</sup> In *Straws*, the medical arbiter stated that the claimant's condition was not medically stationary because of the prospect of future surgical intervention. *Id.* at 2315. Because the expected improvement in the claimant's condition was contingent on the potential of future surgery, we concluded that the claimant's condition was medically stationary. *Id.* at 2318; *see also Karen T. Mariels*, 44 Van Natta 2452

impairment findings were deemed valid and due solely to the accepted condition, and that the medical arbiter had *not* opined that the impairment findings were *not* permanent, we concluded that the impairment findings were permanent. *Id.* at 2319. Accordingly, the impairment findings were used to rate the claimant's permanent disability. *Id.*

In *Resseguie*, the medical arbiter opined that the claimant's impairment would likely be significantly affected by surgery, but the arbiter's "report could suffice as an impairment rating for disability determination" if further intervention were not recommended or elected. 56 Van Natta at 3492. Because the arbiter's opinion that the claimant's impairment would improve was contingent on a specific event, and the record did not establish the occurrence of that event, we concluded that the impairment rated by the arbiter was permanent. *Id.* at 3493.

Here, as in *Straws* and *Resseguie*, there is medical evidence that surgery would improve claimant's impairment, but that his impairment is permanent without such surgery. Because claimant has elected against the surgery, we conclude that his impairment is permanent.<sup>3</sup>

We turn to SAIF's contention that claimant is not entitled to an additional award of permanent impairment because his impairment resulted from an unreasonable refusal to submit to recommended treatment. If a claimant refuses

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(1992) (where the medical evidence indicated that the claimant would be medically stationary if she did not undergo the forearm surgery, the claimant was "medically stationary" and claim closure was not premature because she elected against the surgery); *cf. Bill H. Davis*, 47 Van Natta 219 (1995) (where postponement of surgery was beyond the claimant's control and the surgery was medically necessary for the compensable condition, claim closure was premature because there was still a reasonable expectation of material improvement based on the surgery recommendation).

<sup>3</sup> SAIF cites *Gorden L. Atkins*, 52 Van Natta 284 (2000), *aff'd Atkins v. Allied Systems, Ltd.*, 175 Or App 487 (2001), *Zoya M. Khrul*, 55 Van Natta 1176 (2003), *aff'd Khrul v. Foreman's Cleaners*, 194 Or App 125 (2004), *Susan Moorehead*, 55 Van Natta 3545 (2003), and *Gary L. Gilbert*, 40 Van Natta 562 (1988), as cases in which awards were not granted for impairment that was not permanent. In those cases, the medical evidence indicated that the claimants' impairment would improve. *Moorehead*, 55 Van Natta at 3547 (where claim was administratively closed and the claimant's condition was not

necessarily medically stationary, a medical opinion that impairment was likely reversible with further treatment did not establish that impairment was permanent); *Khrul*, 55 Van Natta at 1178 (impairment related to claim-related stress likely to resolve after claim closure); *Atkins*, 52 Van Natta at 285 (impairment due to lack of exercise likely to improve with further treatment); *Gilbert*, 40 Van Natta at 563 (physician opined that no permanent impairment would result from the compensable condition, although the claimant continued to have symptoms while eschewing the recommended use of a respiratory mask at work). Here, by contrast, the medical evidence establishes that claimant's impairment will not improve because he has elected against surgical intervention.

recommended treatment to which an ordinarily prudent and reasonable person would submit if compensation were not at issue, the claimant should not be compensated for the consequences of the refusal. *Clemons*, 43 Or App at 135. The carrier bears the burden to establish that a refusal of treatment is unreasonable. *Nelson v. EBI Cos.*, 296 Or 246, 252 (1983). To find a refusal of treatment unreasonable, it is not enough to determine that we would ourselves choose to undergo the treatment, or that a different worker would do so; rather, a refusal of treatment is only unreasonable if no reasonable person would refuse. *Sarantis v. Sheraton Corp.*, 69 Or App 575, 578 (1984).

In *Dale E. VanBibber, Jr.*, 59 Van Natta 1962, *recons*, 59 Van Natta 2174 (2007), *aff'd SAIF v. VanBibber*, 234 Or App 68 (2010), we declined to apply the *Clemons* rationale to reduce a permanent disability award based on the claimant's noncompliance with treatment. We reasoned that ORS 656.325 provides a distinct statutory mechanism to reduce compensation to the extent that a worker's refusal to participate in treatment increases the worker's disability, and that it was the Director, not the Board, who had authority to reduce benefits under such circumstances. The question before us in *Van Bibber*, we reasoned, was simply whether the disability resulted from the compensable injury. 59 Van Natta at 1965; 59 Van Natta at 2174-75.

In reaching our decision in *Van Bibber*, we distinguished *Nelson* because the claimant's impairment in that case resulted from a preexisting nonindustrial condition. 59 Van Natta at 2176. Because, in *VanBibber*, the claimant's permanent disability resulted from the compensable injury (regardless of whether compliance with treatment would have reduced the disability), we did not reduce his permanent disability benefits based on his noncompliance with treatment. The court affirmed our reasoning. 234 Or App at 78-79.

In this case, as in *VanBibber*, claimant's permanent impairment was due to the compensable injury, not to his preexisting condition.<sup>4</sup> The question before us is the measurement of his permanent disability under the Director's standards, not any reduction in compensation under ORS 656.325.<sup>5</sup>

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<sup>4</sup> As noted above, Dr. Rosenbaum apportioned claimant's impairment between the compensable condition and the denied preexisting condition. As explained below, we conclude that Dr. Rosenbaum's findings are most accurate and should be used. Thus, the measurement of claimant's impairment already excludes any impairment due to a preexisting nonindustrial injury.

<sup>5</sup> SAIF notes that ORS 656.325(3) and (4), which both apply to existing permanent disability awards, provide for the reduction of a permanent disability award based on a worker's failure to reduce his or her disability. However, SAIF does not contend that ORS 656.325 applies in this case.

In any event, SAIF has not established that claimant's refusal of further surgery was "unreasonable." When claimant elected against such surgery, Dr. Rosenbaum had informed him that the surgery "would likely improve his radiating left lower extremity pain and numbness, but not his low back discomfort." (Ex. 64-1). He did not opine that claimant's decision not to elect surgery was unreasonable, and did not recommend further treatment. (Ex. 64-1-2).

Under such circumstances, the record supports a conclusion that a reasonable person would have refused the surgery. Accordingly, we do not find claimant's refusal unreasonable.

Finally, we consider Dr. Rosenbaum's discussion to reflect a better reasoned consideration of the permanent impairment due to claimant's compensable injury. Moreover, neither party contends that claimant's permanent impairment should be based on Dr. Tatsumi's examination findings. Accordingly, we conclude that Dr. Rosenbaum's impairment findings are more accurate than Dr. Tatsumi's and should be used. Based on those findings, we reinstate the Notice of Closure's permanent disability awards.

Because our order results in increased permanent disability compensation, for services at hearing and on review, claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order (*i.e.*, the 1 percent increase between the Order on Reconsideration's and ALJ's 18 percent whole person impairment and 43 percent work disability awards and our 19 percent whole person impairment and 44 percent work disability awards), not to exceed \$6,000, payable by SAIF directly to claimant's counsel. ORS 656.386(5); OAR 438-015-0055(2). In the event that all or a portion of the substantively increased permanent disability award has already been paid to claimant, his attorney may seek recovery of the fee in the manner prescribed in *Jane A. Volk*, 46 Van Natta 681 (1994), *recons*, 46 Van Natta 1017 (1994), *aff'd on other grounds Volk v. America West Airlines*, 135 Or App 565 (1995), *rev den*, 322 Or 645 (1996).

### ORDER

The ALJ's order dated December 3, 2015 is affirmed in part and modified in part. That portion of the ALJ's order that affirmed the May 7, 2015 Order on Reconsideration is modified. The December 30, 2014 Notice of Closure's awards of a total of 19 percent whole person impairment and 44 percent work disability are reinstated and affirmed. Claimant's attorney is awarded an "out-of-

compensation” attorney fee equal to 25 percent of the increased compensation created by this order (the 1 percent whole person and 1 percent work disability difference between the Order on Reconsideration’s and ALJ’s awards and this award), not to exceed \$6,000, payable directly by SAIF to claimant’s counsel. If all or a portion of this substantively increased permanent disability has already been paid to claimant, his attorney may seek recovery of the fee in the manner prescribed by *Volk*. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on August 3, 2016