

In the Matter of the Compensation of  
**GEORGE M. MORGAN, Claimant**  
WCB Case Nos. 16-01511, 16-01418  
**ORDER ON RECONSIDERATION**  
Scott M Supperstein PC, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

On March 27, 2017, we abated our March 1, 2017 order that, in part: (1) reversed an Administrative Law Judge's (ALJ's) order that had found that claimant's right hip claim was prematurely closed; (2) reinstated a March 14, 2016 Order on Reconsideration, with the "medically stationary" date modified to July 6, 2015; (3) declined to award additional temporary disability benefits after January 27, 2014; and (4) awarded 17 percent work disability for claimant's right hip/pelvis conditions. We took this action to consider claimant's motion for reconsideration of our "temporary disability" decision, as well as our conclusion that the claim was not prematurely closed. Having received the parties' supplemental arguments, we proceed with our reconsideration.<sup>1</sup>

On reconsideration, claimant argues that the issue of temporary disability authorization after January 27, 2014 was not raised by the SAIF Corporation in its request for review, and that the "actual dates of authorized time loss subsequent to January 27, 2014, were not an issue raised by any party at any time." Alternatively, he contends that he is entitled to temporary disability benefits beginning on January 27, 2014, because Dr. Wagner was his attending physician during the disputed period and authorized such benefits.<sup>2</sup> SAIF responds that, because

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<sup>1</sup> The SAIF Corporation moves to strike claimant's reply brief (due May 22, 2017) as untimely filed. *See* OAR 438-011-0020(2). Claimant does not dispute that his brief was untimely filed, but requests its acceptance because SAIF would not be prejudiced. In doing so, claimant's counsel represents that he was "embroiled" with other time-sensitive cases when he realized that the filing date for the reply brief had been "missed." However, when "extension/waiver" motions are contested, calendaring errors do not constitute "extraordinary circumstances" beyond the control of the requesting party justifying the extension/waiver. *See* OAR 438-011-0030; *Craig Schommer*, 68 Van Natta 1856, 1857 n 2 (2016), *recons*, 69 Van Natta 352 (2017); *Mary C. Green-Kilburn*, 57 Van Natta 2822 (2005); *Peter A. Roy*, 52 Van Natta 2075, 2076 (2000). Accordingly, claimant's reply brief on reconsideration has not been considered.

<sup>2</sup> Regarding the premature closure issue, we adhere to our determination that claimant's accepted conditions were medically stationary on July 6, 2015, and that the October 26, 2015 Notice of Closure was not premature. On reconsideration, we find no persuasive reason to alter our prior analysis in reinstating the March 14, 2016 Order on Reconsideration, with modifications as explained in our prior order.

claimant raised entitlement to substantive temporary disability benefits among the issues at hearing, it was an issue to be decided on review by virtue of our reversal of the ALJ's order (which had found claimant's claim to be prematurely closed and rescinded the closure notice and reconsideration order) as a result of SAIF's request for review, and that claimant has already had the opportunity to address the issue.<sup>3</sup> For the following reasons, we adhere to our previous decision.

Claimant requested reconsideration of the October 26, 2015 Notice of Closure related to his newly accepted right hip conditions, raising the issues of premature claim closure, dates of temporary disability benefits (asserting that his conditions were not medically stationary), and permanent disability benefits. (Ex. 186-2).<sup>4</sup>

In its March 14, 2016 Order on Reconsideration, the Appellate Review Unit (ARU) found Dr. Kane to be claimant's attending physician at the time of claim closure. (Ex. 195-1). Relying on Dr. Kane's January 27, 2014 report that declared claimant medically stationary and provided permanent impairment findings, the ARU found that the claim closure was not premature and affirmed the Notice of Closure's medically stationary date. (Ex. 195-2). Finding that temporary disability benefits were authorized from January 23, 2012 through January 27, 2014, the reconsideration order modified the Notice of Closure's temporary disability dates (which had granted temporary disability benefits beginning on November 4, 2011). (Ex. 195-2-3). The Order on Reconsideration also reduced claimant's whole person permanent impairment award (from 10 percent to 7 percent) based on the medical arbiter's findings, and did not award any "work disability" based on Dr. Kane's opinion that claimant was released to return to regular work. (Ex. 195-3-4).

Thereafter, claimant filed a request for hearing challenging the reconsideration order. (Hearing File). In that hearing request, he raised the issues of premature closure, "Substantive Temporary Disability" from March 4, 2011 through March 30, 2016, and permanent partial disability. (*Id.*) At the hearing,

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<sup>3</sup> SAIF did not seek a reduction in the permanent disability awarded by the March 14, 2016 Order on Reconsideration either at the hearing level or in its request for Board review. On review, it challenged the ALJ's "medically stationary" date and premature closure findings.

<sup>4</sup> The closure notice listed claimant's medically stationary date as January 27, 2014, found temporary disability benefits authorized from November 4, 2011 through January 27, 2014 (less time worked), awarded 10 percent whole person impairment for the right hip/pelvis, and did not grant "work disability" because claimant had been released to return to regular work. (Ex. 181).

claimant identified the issues as premature closure, permanent disability, attorney fees, and time loss if the claim closure was “found not to be premature.” (Tr. 6). Claimant’s arguments at the hearing level were based on Dr. Kane being his attending physician, and he did *not* otherwise contest Dr. Kane’s status as “attending physician,” as found by the Order on Reconsideration. (Tr. 8-14, 22-24).

The ALJ found that Dr. Kane’s opinion established that claimant’s right hip conditions were medically stationary on July 6, 2015 (rather than on January 27, 2014, as found by the ARU). However, rather than simply awarding additional temporary disability benefits, the ALJ also erroneously found the claim prematurely closed and set aside the Notice of Closure and Order on Reconsideration. Based on the erroneous premature closure finding, the ALJ did not address the permanent disability issue.

SAIF requested review, challenging the ALJ’s “medically stationary” date and premature closure findings. In doing so, it contended that the closure notice and reconsideration order should not have been rescinded because claimant was medically stationary before the October 26, 2015 Notice of Closure, and that “the ALJ should have, at most, adjusted the medically stationary date and affirmed the permanent impairment award.” (Appellant’s Brief at 9). Claimant did not file a brief on review.

After conducting our review, we agreed with the ALJ’s determination that claimant’s newly accepted right hip conditions were medically stationary on July 6, 2015. However, because the record established that claimant’s accepted conditions were medically stationary on July 6, 2015, we concluded that the October 26, 2015 Notice of Closure was not premature. Accordingly, we reinstated the March 14, 2016 Order on Reconsideration, with the “medically stationary” date modified to July 6, 2015. *George M. Morgan*, 69 Van Natta 370 (2017).

We further noted that the ALJ had not addressed the issues of temporary disability and extent of permanent disability (work disability), which claimant raised at the hearing level, because the Order on Reconsideration had been set aside. Because we reinstated the Order on Reconsideration, we proceeded with our review of those disputed issues.

Reasoning that Dr. Kane<sup>5</sup> did not authorize temporary disability benefits or modified work restrictions between January 27, 2014 and July 6, 2015, we found that claimant was not entitled to additional temporary disability benefits beyond January 27, 2014. Therefore, we declined to award claimant the requested additional temporary disability benefits.

Based on Dr. Kane's work restrictions, we further agreed with claimant's arguments at the hearing level that he was entitled to a 17 percent work disability award (based on his undisputed 7 percent whole person impairment value added to his 10 percent "social-vocational" value). Accordingly, we modified the March 14, 2016 Order on Reconsideration's permanent disability award (which did not award "work disability").

Thus, the substantive issues raised by claimant at hearing were premature claim closure, and, if the claim was not prematurely closed, his entitlement to additional temporary disability benefits and permanent disability benefits beyond those awarded in the Order on Reconsideration. (Tr. 3, 6). Because the ALJ found the claim to be prematurely closed, the ALJ did not address claimant's entitlement to additional temporary and permanent disability benefits beyond those awarded in the Order on Reconsideration. However, because we found that the claim was not prematurely closed, and because the record was sufficiently developed to resolve the remaining disputed issues raised by claimant at the hearing level, it was proper for us to proceed with our review of those issues. *See Kevin W. McClellan*, 65 Van Natta 560, 563 (2013) (when an ALJ's premature closure determination was reversed, Board addressed temporary disability issue that was also raised by the claimant at hearing); *see also Jesus M. Zarzosa*, 56 Van Natta 1683, 1685, *recons*, 56 Van Natta 1958 (2004) (after reversing an ALJ's premature closure finding, Board reviewed a permanent disability issue raised by the claimant at the hearing level).

Claimant has the burden of proving the extent of any disability resulting from his compensable injury. ORS 656.266(1). As the party challenging the Order on Reconsideration, he also has the burden of establishing error in the reconsideration process's temporary disability award. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000).

Moreover, temporary disability compensation is not due and payable pursuant to ORS 656.268 after the worker's attending physician ceases to authorize temporary disability or for any period of time not authorized by the attending

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<sup>5</sup> In doing so, we noted that the parties did not dispute the reconsideration order's finding that Dr. Kane was claimant's attending physician at the time of claim closure.

physician. ORS 656.262(4)(g); *see* ORS 656.268(4)(d). Consequently, claimant's entitlement to additional temporary disability benefits required us to determine whether temporary disability benefits were authorized by his attending physician.

In conducting this analysis, we do not consider claimant's lack of a respondent's brief on review to amount to a "waiver" of his right to seek additional substantive temporary disability benefits on reconsideration. Specifically, he expressly raised the issue in his request for hearing, he identified it at the hearing as an issue if the claim closure was "found not to be premature," and the ALJ's order stated that "claimant seeks temporary disability benefits and an increased award of permanent disability if the claim is not found to have been prematurely closed." (Hearing File; Tr. 6; Opinion and Order at 1). *Cf. Joe E. Arment*, 62 Van Natta 1305, 1308-09 (2010) (the claimant had waived additional issues when he raised them in a hearing request, but neither party identified them as issues on the written record and the ALJ's order did not identify them as issues).

At the hearing level, while claimant noted that the attending physician at the time of claim closure was "either Kane or Wagner, it's hard to exactly tell," he sought increased temporary disability and work disability awards (and raised premature closure) based on Dr. Kane's status as his attending physician, and did not otherwise contest the ARU's finding that Dr. Kane was his attending physician. (Tr. 8-14, 22-24). Additionally, in asserting entitlement to substantive temporary disability benefits after January 27, 2014 *if* it was found that his claim was not prematurely closed, claimant neither disputed the ARU's finding that Dr. Kane was his attending physician at the time of claim closure, nor contended that Dr. Wagner (rather than Dr. Kane) was his attending physician who authorized temporary disability benefits during the disputed period. *See* ORS 656.262(4)(g); ORS 656.268(4)(d). Moreover, on review, claimant did not file a brief in response to SAIF's challenge to the ALJ's premature closure finding, the issue upon which his entitlement to additional temporary disability and permanent disability benefits was dependent.

Now, in his motion for reconsideration, claimant argues for the first time that *Dr. Wagner*, and not *Dr. Kane*, was his attending physician for the purposes of establishing his entitlement to additional temporary disability benefits.<sup>6</sup> SAIF objects to that argument as untimely. Under these particular circumstances, especially considering claimant's opportunities to establish his entitlement to temporary disability benefits (as raised in his request for hearing of the ARU's

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<sup>6</sup> Claimant does not take issue with our finding that he was entitled to a 17 percent work disability award as a result of our reversal of the ALJ's premature closure finding. This award was based on a determination that Dr. Kane was his attending physician at claim closure.

order) at the hearing level and on review, we decline to consider his new arguments on reconsideration that Dr. Wagner was his attending physician for the purposes of determining his temporary disability benefits after January 27, 2014. *See Vogel v. Liberty N.W. Ins. Corp.*, 132 Or App 7, 13 (1994) (Board has discretion not to address issues raised for the first time on reconsideration); *William A. Hedger*, 58 Van Natta 2382 (2006) (Board declined to consider a new legal theory/argument raised for the first time on reconsideration).

Consequently, based on the aforementioned reasoning, we continue to reach the conclusions expressed in our previous decision.

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our March 1, 2017 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 June 16, 2017