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

Reviewing Panel: Members Lanning and Johnson.

The SAIF Corporation requests review of those portions of Administrative Law Judge (ALJ) Brown's order that: (1) found that claimant's accepted right hip conditions were medically stationary on July 6, 2015; and (2) found that his right hip claim had been prematurely closed. On review, the issues are medically stationary date and premature closure and, potentially, temporary disability, and extent of permanent disability (work disability). We reverse in part and affirm in part.

FINDINGS OF FACT

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

On March 3, 2011, claimant, a dump truck driver, was compensably injured in a head-on motor vehicle accident. (Ex. 8). SAIF accepted a lumbar strain and right hip strain. (Exs. 10, 49).

On September 28, 2011, SAIF denied claimant's new/omitted medical condition claims for acute post-traumatic stress disorder, right hip medial capsular tear, and right hip adductor muscle tendon tear. (Ex. 67).

On December 1, 2011, Dr. Kane, claimant's attending physician, declared the lumbar and right hip strains medically stationary without permanent impairment. (Exs. 75, 76). A December 19, 2011 Notice of Closure did not award permanent disability for the accepted strains. (Ex. 78). That closure notice became final by operation of law.<sup>1</sup>

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<sup>1</sup> Claimant requested reconsideration of the December 2011 Notice of Closure and the appointment of a medical arbiter. (Ex. 82). After a March 9, 2016 Order on Reconsideration did not award permanent disability benefits for the lumbar strain and right hip strain, claimant requested a hearing (WCB Case No. 16-01511). (Tr. 3). At the hearing, which was consolidated with the case before us (WCB Case No. 16-01418), claimant withdrew his challenge to the March 9, 2016 reconsideration order. (Tr. 4-6). On July 18, 2016, the ALJ dismissed the request for hearing in WCB Case No. 16-01511, which is not disputed on review.

On January 23, 2012, Dr. Wagner performed a right hip arthroscopy with labral debridement, chondroplasty of acetabular cartilage, and acetabular rim trimming. (Ex. 85).

In May 2012, pursuant to an approved settlement stipulation, SAIF accepted claimant's claim for right hip internal derangement diagnosed as a labral tear, labral calcification, and acetabular cartilage delamination. (Exs. 96-2, 97, 98). The stipulation noted the parties' agreement that the right hip medial capsular and adductor muscle tendon tears remained denied because claimant did not have the claimed conditions. (Ex. 96-2).<sup>2</sup>

On January 27, 2014, Dr. Kane declared claimant's right hip conditions medically stationary with permanent loss of motion, and released him to his job at injury. (Ex. 150-1-2). In doing so, Dr. Kane noted that claimant's subjective complaints had been impeached by the discussion of inconsistencies in a January 22, 2014 work capacity evaluation (WCE). (See Exs. 149, 150-2). In a March 14, 2014 letter to SAIF, Dr. Kane adhered to his opinion. (Ex. 154).

Meanwhile, claimant underwent a second two-day WCE. (Ex. 151). Claimant continued to seek treatment for right hip complaints. (See Exs. 152, 155).

In an April 29, 2014 summary letter from claimant's attorney, Dr. Wagner stated that he referred claimant to physical therapy (which he was currently attending) to rehabilitate his right hip through curative strength and motion exercises, and for training in the correct use of his cane to promote proper gait. (Ex. 156-2-3).<sup>3</sup> He did not consider claimant's conditions to be medically stationary. (Ex. 156-3). In a June 10, 2014 summary letter to SAIF, Dr. Wagner confirmed that the physical therapy was ordered to improve or cure claimant's condition and, therefore, he was not medically stationary. (Ex. 160-2-3).

In October 2014, Dr. Wagner found no pathology in claimant's hip to explain his symptoms and recommended that he be evaluated for a hernia. (Ex. 166-2). On December 23, 2014, claimant underwent a right inguinal hernia

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<sup>2</sup> The stipulation also indicated that SAIF's denial of the acute posttraumatic stress disorder had been resolved by way of a Disputed Claim Settlement. (Ex. 96-1).

<sup>3</sup> Dr. Wagner prescribed the above-referenced physical therapy on March 21, 2014. (Ex. 155).

repair surgery. (Ex. 172). In April 2015, Dr. Kane noted that claimant had been attending physical therapy and that his mobility improved such that he was no longer dependent on the use of his cane. (Ex. 173).

On July 6, 2015, Dr. Kane opined that claimant's right hip lateral tear and calcification, articular cartilage delamination, and sports hernia had resolved. (Ex. 176). He declared claimant's conditions medically stationary with permanent impairment related to his work injury. (*Id.*) Dr. Kane stated that claimant was unable to climb, jump, or ambulate on uneven ground, and was restricted in bending and lifting over 40 pounds as a result of his accepted conditions. (*Id.*)

In an October 13, 2015 concurrence letter to SAIF, Dr. Kane stated that claimant's accepted right hip internal derangement diagnosed as a labral tear, labral calcification, and acetabular cartilage delamination were medically stationary with permanent impairment as indicated in his January 27, 2014 report. (Ex. 178-2-3).

On October 26, 2015, SAIF issued a Notice of Closure related to the newly accepted right hip conditions. (Ex. 181). The closure notice listed claimant's medically stationary date as January 27, 2014, awarded temporary disability benefits 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 award "work disability" on the basis that claimant had been released to return to regular work. (*Id.*)

Claimant requested reconsideration of the October 2015 closure notice, asserting that his claim was prematurely closed because he was not yet medically stationary, seeking additional temporary disability benefits for the same reason, and seeking additional permanent disability benefits and the appointment of a medical arbiter. (Ex. 186-2).

On February 8, 2016, Dr. Harris, the medical arbiter, found decreased right hip ranges of motion (ROM). (Ex. 192-5). Dr. Harris attributed the right hip ROM findings to the newly accepted right hip conditions and resultant surgery, and considered the examination findings to be valid for the purposes of rating claimant's permanent impairment. (Ex. 192-6).

On March 2, 2016, Dr. Kane responded to a summary letter from claimant's attorney exclusively addressing the accepted right hip internal derangement, labral tear, labral calcification, and acetabular cartilage delamination. (Ex. 193-1). After

reviewing Dr. Wagner's April 29, 2014 concurrence letter regarding the purpose of the physical therapy,<sup>4</sup> Dr. Kane opined that claimant's condition was not medically stationary in January 2014 because the physical therapy he was prescribed and received was for the improvement of the underlying hip pathology, and not a palliative measure. (Ex. 193-2-3). According to Dr. Kane, claimant's condition "for the work-related hip surgery and non-compensable sports hernia, in combination, were medically stationary [on July 6, 2015] because all care for both conditions, including surgery and subsequent physical therapy had been completed." (Ex. 193-3). While acknowledging that physical therapy was provided after the hernia surgery, Dr. Kane explained that the post-surgical physical therapy for the sports hernia likely had the benefit of improving the work-related injury and, therefore, claimant's work-related injury was not medically stationary until the conclusion of all therapies. (*Id.*)

Dr. Kane further noted that claimant had undergone two WCEs. (*Id.*) Addressing whether claimant could be released to the job-at-injury of a dump truck driver, and after further consideration of his hip condition related to the newly accepted conditions, Dr. Kane opined that claimant could not return to truck driving or commercial driving of any kind. (*Id.*) Dr. Kane agreed that the second WCE may be the more reliable WCE, but opined that claimant could not return to truck driving because he was limited to lifting 40 pounds, which exceeded his job requirements, and because the loss of motion and strength in his right leg prevented him from moving his leg from the gas to the brake pedal quickly in a sudden or emergency situation. (Ex. 193-4).

In a March 14, 2016 Order on Reconsideration, the Appellate Review Unit (ARU) admitted Dr. Kane's March 2016 report into the record, but concluded that, because his opinion did not take into consideration the denied conditions, his report did not persuasively relate to the claim closure pertaining to the newly accepted right hip conditions. (Ex. 195-2). Finding that Dr. Kane declared claimant's newly accepted conditions to be medically stationary and reported permanent impairment findings on January 27, 2014, the Order on Reconsideration affirmed the October 26, 2015 Notice of Closure's medically stationary date and found that the claim closure was not premature. (*Id.*) Concluding that Dr. Kane authorized temporary disability from January 23, 2012 through January 27, 2014, the reconsideration order modified the temporary disability dates accordingly. (Ex. 195-2-3).

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<sup>4</sup> Although the March 2016 letter referred to Dr. Wagner's concurrence letter of "April 29, 2016," the correct date is "April 29, 2014." (*See* Ex. 156).

The Order on Reconsideration reduced claimant's whole person impairment award to 7 percent based on Dr. Harris's medical arbiter findings. (Ex. 195-3-4). Finding that claimant was released to return to regular work, the reconsideration order did not award any "work disability." (Ex. 195-4). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

#### "Medically Stationary" Date/Premature Closure

Finding reasonable explanations for Dr. Kane's March 2016 change of opinion, the ALJ determined that claimant's accepted right hip conditions were medically stationary on July 6, 2015. Concluding that the ARU erred in finding claimant medically stationary as of January 27, 2014, the ALJ set aside the March 14, 2016 Order on Reconsideration and October 26, 2015 Notice of Closure as premature.

On review, SAIF argues that claimant's accepted conditions were medically stationary on January 27, 2014 because Dr. Kane's March 2016 report was an unexplained change of opinion. Alternatively, it contends that even if claimant was medically stationary on July 6, 2015, the Order on Reconsideration and Notice of Closure should not have been rescinded as premature because he was medically stationary at the time of the October 26, 2015 claim closure.

We agree with the ALJ's determination that claimant's newly accepted right hip conditions were medically stationary on July 6, 2015. However, we reverse that portion of the ALJ's order that rescinded the reconsideration order and closure notice. We reason as follows.

ORS 656.268(1)(a) authorizes claim closure when the worker has become medically stationary and there is sufficient information to determine permanent impairment. As the party challenging the Order on Reconsideration, claimant must establish error in the reconsideration process. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000). Claimant also bears the burden of proving that he was not medically stationary at claim closure. *Berliner v. Weyerhaeuser Corp.*, 54 Or App 624 (1981).

"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 term "medically stationary" does not mean that there is no longer a need for continuing medical care. *Maarefi v. SAIF*, 69 Or App 527,

531 (1984); *Pennie Richerd-Puckett*, 61 Van Natta 336 (2009). The issue of a claimant's medically stationary status is primarily a medical question to be decided based on competent medical evidence, and is not limited to the attending physician's opinion. *Harmon v. SAIF*, 54 Or App 121, 125 (1981); *Theresa M. Kiger*, 60 Van Natta 733, 734 (2008). When determining whether claim closure was premature, we consider the medically stationary status of only the accepted conditions at the time of claim closure and any direct medical sequelae. *Manley v. SAIF*, 181 Or App 431, 438 (2002); *Katherine A. Lapraim*, 68 Van Natta 39, 40 (2016).

Here, Dr. Kane initially declared claimant's right hip conditions medically stationary on January 27, 2014. (Ex. 150). He adhered to that opinion in his March 2014 and October 2015 summary letters to SAIF. (Exs. 154, 178). However, in his March 2016 summary letter to claimant's counsel, Dr. Kane opined that claimant's conditions were not medically stationary in January 2014 based on Dr. Wagner's April 29, 2014 letter explaining that the physical therapy claimant was prescribed and received was curative treatment to improve his underlying pathology and not a palliative measure. (Ex. 193-3). In doing so, Dr. Kane commented that he "recognize[d] Dr. Wagner's expertise & opinion as such." (*Id.*) Referring to his July 6, 2015 chart note, Dr. Kane stated that claimant's work-related conditions were not medically stationary until the conclusion of all physical therapies (*i.e.*, on July 6, 2015, when he performed the closing examination). (*Id.*)

Although Dr. Kane's March 2016 opinion changed from his previous opinions, we do not consider it an unexplained change of opinion. Specifically, before his March 2016 opinion, we find no evidence that Dr. Kane reviewed Dr. Wagner's April 29, 2014 (or June 10, 2014) summary letter, in which Dr. Wagner described the purpose of the physical therapy and stated that claimant's condition was not medically stationary. (*See* Exs. 154, 156, 160, 178). In particular, we note that Dr. Kane's October 2015 letter referred to and described, in pertinent part, Dr. Wagner's March 21, June 10, August 11, and October 10, 2014 chart notes. (Ex. 178-1-3). In contrast, it was not until his March 2016 opinion that Dr. Kane first indicated that he reviewed Dr. Wagner's April 29, 2014 letter.<sup>5</sup> (Ex. 193-2-3).

Under these particular circumstances, we find that Dr. Kane's March 2016 opinion was based on new information and, because Dr. Kane provided a thorough explanation, do not discount its persuasiveness for having changed. *See Kelso v.*

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<sup>5</sup> See note 4, *supra*.

*City of Salem*, 87 Or App 630, 633 (1987) (changed opinion persuasive where there was a reasonable explanation for the change); *Donna C. Miller*, 61 Van Natta 836, 838-39 (2009) (physician's changes of opinion reasonably explained where the subsequent opinions were based on new information obtained after the physician's earlier opinions).<sup>6</sup> Accordingly, based on the foregoing reasons, we conclude that the medical evidence persuasively establishes that claimant's accepted right hip conditions were medically stationary on July 6, 2015. ORS 656.005(17); *Harmon*, 54 Or App at 125; *Kiger*, 60 Van Natta at 734.

Because we find that claimant's accepted conditions were medically stationary on July 6, 2015, the October 26, 2015 Notice of Closure was not premature. ORS 656.268(1)(a); *Manley*, 181 Or App at 438; *Berliner*, 54 Or App at 628. Therefore, we reverse the ALJ's order and reinstate the March 14, 2016 Order on Reconsideration, with the "medically stationary" date modified to July 6, 2015.

Because the ALJ set aside the Order on Reconsideration as premature, the issues of temporary disability and extent of permanent disability (work disability), which claimant raised at the hearing level, were not addressed. Inasmuch as we have reinstated the Order on Reconsideration, we proceed with our review of those disputed issues.

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<sup>6</sup> We also disagree with SAIF's arguments that Dr. Wagner's April 29 and June 10, 2014 summary letters stating that claimant was not medically stationary in January 2014 are unpersuasive because they are inconsistent with his contemporaneous chart notes. We acknowledge Dr. Wagner's November 2013 chart note indicating that he did not have more treatment to offer claimant other than conservative care with potential injections. (Ex. 147). However, on March 21, 2014, Dr. Wagner examined claimant for increased right hip pain, noted that he had "failed every other conservative option" (including injections), and referred him to physical therapy. (Ex. 155).

Moreover, on May 29, 2014, a physician who evaluated claimant at Dr. Wagner's referral suspected that claimant had neuropathic pain that may be attributed to a nerve injury from the trauma to his hip and referred him to another specialist for further consultation and treatment. (Ex. 158-4). On July 3, 2014, the consulting specialist opined that claimant did not have neurological or neuropathic pain and recommended that he continue with physical therapy and rehabilitation. (Ex. 163-2). Dr. Wagner's August and October 2014 chart notes indicating that there was no other treatment to offer because there was no organic pathology in claimant's hip joint, and that his hip had been ruled out as a source of ongoing symptoms, were based on that specialist's report. (Exs. 164, 165, 166). Therefore, we find Dr. Wagner's 2014 letters and chart notes explaining the purpose of the prescribed physical therapy to be based on new information obtained during subsequent examinations, and do not consider his "medically stationary" opinions to be inconsistent or unexplained. *Carol L. Simmons*, 61 Van Natta 528, 531 (2009) (changed opinion persuasive where a physician's ultimate opinion was based on new information obtained during subsequent examinations of the claimant).

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### Temporary Disability

Temporary disability compensation is due and payable only when authorized by an attending physician or nurse practitioner. ORS 656.262(4)(g), (h). Moreover, temporary disability compensation is not due and payable after the worker's attending physician ceases to authorize temporary disability or for any period of time not authorized by the attending physician. ORS 656.262(4)(g). When an objectively reasonable carrier would understand contemporaneous medical reports to excuse an injured worker from work, a carrier is obligated to pay temporary disability benefits. *Lederer v. Viking Freight, Inc.*, 193 Or App 226, 234, *recons*, 195 Or App 94 (2004); *Brian Courchesne*, 57 Van Natta 1593, 1596 (2005).

Here, Dr. Kane initially declared claimant's right hip conditions medically stationary on January 27, 2014, and released him to his job at injury. (Ex. 150-2).<sup>7</sup> As explained above, we have found that claimant's conditions were medically stationary on July 6, 2015. Nevertheless, because Dr. Kane did not authorize temporary disability benefits or modified work restrictions between January 27, 2014 and July 6, 2015, claimant is not entitled to additional temporary disability benefits beyond January 27, 2014. (*See* Exs. 154, 161, 170, 173). Consequently, we do not award claimant the requested additional temporary disability benefits.

### Permanent Disability (Work Disability)

On reconsideration, where a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, 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).<sup>8</sup> We evaluate claimant's permanent disability as of the date of the issuance of the March 14, 2016 reconsideration order. ORS 656.295(5).

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<sup>7</sup> The parties did not dispute the March 14, 2016 Order on Reconsideration's finding that Dr. Kane was claimant's attending physician at the time of claim closure. (Ex. 195-1).

<sup>8</sup> Because claimant's claim was closed by an October 26, 2015 Notice of Closure, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). *See* OAR 436-035-0003(1).

At the hearing level, claimant agreed that his whole person impairment award should be 7 percent, based on Dr. Harris's medical arbiter findings. (Tr. 11, 14). Therefore, we turn to the work disability issue.

Claimant is entitled only to impairment, but not to work disability, if he “has been released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 or has returned to regular work at the job held at the time of injury.” ORS 656.214(2)(a) (Or Laws 2007, ch 274, §§ 1, 8); ORS 656.726(4)(f)(E) (Or Laws 2007, ch 274, §§ 2, 8); OAR 436-035-0007(2); OAR 436-035-0009(4). Absent such a release or return to regular work, he is entitled to work disability as well as impairment. ORS 656.214(2)(b); OAR 436-035-0009(6). “Regular work” means the job the worker held at the time of injury. ORS 656.214(1)(d); OAR 436-035-0005(14).<sup>9</sup>

Here, Dr. Kane initially released claimant to his regular work at the job at injury, noting that his subjective complaints were impeached by the January 22, 2014 WCE. (Ex. 150-2). He reiterated that opinion in his October 2015 letter to SAIF. (Ex. 178-2-3). In his March 2, 2016 opinion, Dr. Kane stated that claimant was unable to return to his job-at-injury as a dump truck driver because he was limited to lifting 40 pounds, which exceeded his job requirements, and because the loss of motion and strength in his right leg prevented him from moving his leg from the gas to the brake pedal quickly in a sudden or emergency situation. (Ex. 193-3-4).

We acknowledge that Dr. Kane's March 2016 opinion changed from his previous opinions. However, as with his “medically stationary” opinion, we likewise do not consider Dr. Kane's change of opinion to be unexplained because it was based on new information obtained after his earlier opinions, including the second WCE (which he considered to be more reliable than the first). (See Exs. 151, 193-3-4). In particular, Dr. Kane stated that his previous opinion that claimant could be released to his job as a dump truck driver was based on the first WCE. (Ex. 193-3). After further consideration and discussion of claimant's work-related hip condition and limitations (*e.g.*, lifting, ROM, weakness), Dr. Kane explained that claimant could not return to his job-at-injury. (Ex. 193-3-4).

Under these particular circumstances, we do not discount the persuasiveness of Dr. Kane's March 2, 2016 opinion for having changed. *Kelso*, 87 Or App at 633; *Miller*, 61 Van Natta at 838-39. Accordingly, we find that

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<sup>9</sup> There is no dispute that claimant has not returned to his regular work to the job held at the time of injury.

claimant was not released his “regular work” by his attending physician as of the date of the March 14, 2016 Order on Reconsideration. ORS 656.214(2)(b); ORS 656.726(4)(f)(E); OAR 436-035-0005(14); OAR 436-035-0009(6). Therefore, he is entitled to a work disability award. *Id.*

Based on Dr. Kane’s work restrictions, we agree with claimant’s arguments at the hearing level that he is entitled to a 17 percent work disability award (based on his 7 percent whole person impairment value added to his 10 percent “social-vocational” value). (Tr. 14-16). The March 14, 2016 Order on Reconsideration is modified accordingly.

### Attorney Fees

Because we reverse that portion of the ALJ’s order that set aside the Order on Reconsideration and Notice of Closure as premature, we likewise reverse the ALJ’s \$5,000 attorney fee award. However, because our order results in increased compensation as a result of claimant’s request for hearing on the extent of permanent disability issue, 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.*, his 17 percent work disability award) for services at the hearing level. ORS 656.386(5); OAR 438-015-0040(1); *see Jesus M. Zarzosa*, 56 Van Natta 1683, *recons*, 56 Van Natta 1958 (2004).<sup>10</sup>

### ORDER

The ALJ’s order dated July 18, 2016 is reversed in part and affirmed in part. The March 14, 2016 Order on Reconsideration is reinstated, except that claimant’s “medically stationary” date is modified to “July 6, 2015,” and he is awarded 17 percent “work disability.” Claimant’s counsel is awarded an “out-of-compensation” attorney fee equal to 25 percent of the increased compensation created by this order (*i.e.*, his 17 percent work disability award) for services at the hearing level. The ALJ’s \$5,000 assessed attorney fee award is reversed. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on March 1, 2017

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<sup>10</sup> Because SAIF did not seek a reduction in the permanent disability awarded by the reconsideration order at the hearing level or in its request for Board review, and because claimant did not file a brief on review, his counsel is not entitled to an assessed attorney fee for services at the hearing level or on review under ORS 656.382(2). *See Sean Mecham*, 61 Van Natta 259 (2009); *Shirley M. Brown*, 40 Van Natta 879 (1988).