

In the Matter of the Compensation of
ARMANDO MORIN, Claimant
WCB Case Nos. 16-02220, 16-01778
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Lipton's order that affirmed a temporary disability award granted by an Order on Reconsideration. In his respondent's brief, claimant seeks an increased award of temporary disability benefits. On review, the issue is temporary disability. We modify.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," except for the first sentence of the last paragraph, with the following supplementation.¹

On December 8, 2011, claimant sustained a compensable injury, for which the employer accepted a third degree burn to the right calf. (Exs. 5, 25). On December 15, 2011, Dr. Kemalyan performed a right lower leg excision and autograft burn. (Ex. 12). Claimant was hospitalized and unable to work. (See Exs. 3, 19, 22, 30). On March 8, 2012, Dr. Kemalyan noted that claimant was unable to return to work due to right knee pain, which was being evaluated by orthopedists. (Ex. 35).

On April 5, 2012, Dr. Kemalyan opined that claimant was unable to work due to his right knee conditions. (Ex. 39). On that same date, Dr. Kemalyan released claimant to regular work for the burn condition, which he anticipated to be medically stationary on December 8, 2012. (Exs. 40, 41-1).

In June 2012, the employer denied claimant's new/omitted medical condition claim for right knee osteoarthritis/bone spur and right medial meniscus tear. (Ex. 46). On March 6, 2013, a prior ALJ set aside the employer's denial. (Ex. 50). On April 16, 2013, the employer modified its acceptance to include right knee osteoarthritis/bone spur and right medial meniscus tear. (Ex. 51).

¹ In the first sentence of the fifth paragraph on page 2 of the Opinion and Order, the correct date is "June 7, 2012." (See Ex. 46).

On May 16, 2013, Dr. Kemalyan stated that claimant's burn condition was medically stationary, and recommended that he continue to treat with an orthopedist for his right knee conditions. (Ex. 52).

On June 24, 2013, claimant began treating with orthopedist Dr. Dolan, who recommended right knee replacement surgery. (Ex. 55). Dr. Dolan stated that claimant needed to get his diabetes under control and lose approximately 30 pounds, for a target weight of less than 250 pounds, before pursuing surgery. (Ex. 55-3). At that time, claimant weighed 288 pounds. (Ex. 55-2).

On September 5, 2013, Dr. Dolan reported that claimant had lost seven pounds since his last visit. (Ex. 57-1). Noting that he could technically do the knee replacement surgery but that claimant was at significant risk for postoperative complications given his obesity and diabetes, Dr. Dolan suggested weight loss surgery. (Ex. 57-3).

On September 26, 2013, Dr. Dolan informed the employer that claimant had not reached his target weight for surgery. (Ex. 58). Nevertheless, Dr. Dolan stated that claimant's right knee conditions were not medically stationary because he had chronic pain and was proceeding with the knee replacement surgery. (*Id.*)

On April 7, 2014, Dr. Dolan opined that claimant needed to have a right knee replacement, but was not a candidate because of his extreme obesity. (Ex. 62-1). Noting that claimant weighed 298 pounds and had not shown any progress with respect to his right knee, Dr. Dolan stated that his "claim is stagnant" and that he potentially could be sent to a rehabilitation center for evaluation and to "see if he has reached maximal medical improvement." (*Id.*)²

On June 27, 2014, Dr. Teed, who examined claimant at the employer's request, stated that claimant's burn condition was not medically stationary because he was undergoing further treatment, but that his right knee conditions were medically stationary. (Ex. 64-4). Dr. Teed opined that claimant was restricted to lifting 25 pounds, with no prolonged standing/walking, and no repetitive squatting/bending/kneeling related to the right knee conditions. (*Id.*)

On July 1, 2014, Dr. Kemalyan found a new wound centrally in claimant's skin graft. (Ex. 65). He agreed with a proposed therapy plan made by a wound clinic. (Ex. 66).

² An April 23, 2014 Order on Reconsideration rescinded the employer's March 26, 2014 administrative claim closure as premature. (Exs. 61, 63).

On December 29, 2014, the employer wrote Dr. Kemalyan seeking clarification regarding claimant's burn condition. (Ex. 69). On December 30, 2014, noting that claimant last attended therapy on July 10, 2014, Dr. Kemalyan indicated that no further treatment was recommended for the burn condition. (*Id.*) He agreed that claimant's burn condition was medically stationary. (*Id.*)

On January 7, 2015,³ Dr. Dolan responded to a December 29, 2014 letter from the employer regarding claimant's right knee conditions. (Ex. 70). Noting that claimant declined to schedule an appointment with the rehabilitation center, Dr. Dolan continued to recommend further right knee treatment, specifying "knee replacement when medically appropriate." (Ex. 70-1). Dr. Dolan stated that claimant's right knee conditions were medically stationary. (*Id.*)

In a June 2015 letter from the employer, Dr. Dolan confirmed that he was questioned about claimant's medically stationary status in December 2014, and that he agreed that claimant was "medically stationary at the present time, as the proposed surgery for him is not reasonable, given claimant's weight." (Ex. 71-1). Addressing claimant's right knee permanent impairment, Dr. Dolan agreed with Dr. Teed's descriptions of impairment and recommended work restrictions. (Ex. 71-1-2).⁴

In an October 2015 letter to claimant's counsel, Dr. Dolan noted that claimant had previously been restricted to sedentary work, and was still restricted to sedentary work at the time of his June 24, 2013 examination.⁵ (Ex. 76-1). He indicated that claimant needed a total knee replacement to treat his right knee osteoarthritis, but that it was not medically prudent to do so until he got his diabetes under control and reached the recommended weight. (*Id.*) Dr. Dolan stated that claimant could "perform work as tolerated, although he will be limited by pain, and may only be able to perform sedentary work." (Ex. 76-2).

³ There is no dispute that Dr. Dolan signed that letter on "1/7/15," rather than "1/7/14."

⁴ A September 17, 2015 Order on Reconsideration rescinded a July 7, 2015 Notice of Closure because there was insufficient information to determine permanent impairment due to the compensable injury and accepted burn condition. (Exs. 73, 75).

⁵ On April 6, 2012, a physician assistant evaluated claimant's right knee, and stated that he was capable of sedentary work related to his knee conditions. (Exs. 43, 44, 45).

In November 2015, Dr. Dolan responded to a “check-the-box” concurrence letter from the employer, which noted that he first treated claimant on June 24, 2013, and recommended that claimant lose 30 pounds and get his diabetes under control before pursuing knee replacement surgery. (Ex. 78-1). Dr. Dolan was asked to respond to the following paragraph:

“Claimant has not made any progress toward those goals and you confirmed that he was medically stationary until such time as surgery would have a reasonable chance of success. In light of this status, do you agree that claimant was medically stationary on June 24, 2013?” (*Id.*)

Dr. Dolan checked the “YES” box. (*Id.*)

On November 17, 2015, Dr. Brant, who performed a vascular evaluation at the employer’s request, found no evidence of vascular disease or impairment related to claimant’s work injury. (Ex. 80-5). Dr. Brant deferred to claimant’s treating orthopedists regarding the right knee conditions, noting that claimant was still under the care of his orthopedist (Dr. Dolan) who evaluated him most recently on December 29, 2014. (Ex. 80-2-3). Dr. Kemalyan concurred with Dr. Brant’s report. (Ex. 81).⁶

In January 2016, Dr. Dolan stated that claimant could not return to his regular work at the time of injury due to his accepted right knee conditions. (Ex. 89-1). He also concurred with the work restrictions described in Dr. Teed’s June 2014 report. (*Id.*)

On February 11, 2016, as corrected on March 4, 2016, a prior ALJ awarded temporary disability benefits from April 5, 2012 until properly terminated by law, as well as penalties and related attorney fees for unreasonable claim processing. (Exs. 91, 94-8).⁷

⁶ A December 11, 2015 Notice of Closure was rescinded by a January 11, 2016 Order on Reconsideration as premature on the basis that there was insufficient information to determine claimant’s permanent impairment related to his right knee conditions. (Exs. 85, 87).

⁷ Claimant requested a hearing seeking temporary disability benefits beginning on April 5, 2012, until properly terminated by law, as well as penalties and penalty-related attorney fees, after the employer did not pay temporary disability benefits following its acceptance of the right knee conditions as a result of the prior March 6, 2013 ALJ’s order. *Armando Morin*, 68 Van Natta 1760, 1760 (2016).

On February 16, 2016, the employer closed claimant's claim. (Ex. 93). The Notice of Closure listed claimant's medically stationary date as June 24, 2013, awarded temporary disability benefits from December 8, 2011 through May 5, 2012 (less time worked), and awarded permanent disability benefits (whole person impairment and work disability) for the right knee. (Ex. 93-1).

A March 16, 2016 Order on Reconsideration modified the medically stationary date to July 10, 2014, and awarded temporary disability benefits from December 8, 2011 through the July 10, 2014 medically stationary date (less time worked). (Ex. 95). In determining the medically stationary date for all of claimant's accepted conditions, the Appellate Review Unit (ARU) found that Dr. Dolan established that the accepted right knee conditions were medically stationary on June 24, 2013, and that Dr. Kemalyan established that the accepted burn condition was medically stationary on July 10, 2014 (the date claimant last attended therapy at the wound clinic) pursuant to OAR 436-030-0035(6). (Ex. 95-2-3).

The employer requested a hearing, challenging the reconsideration order's award of temporary disability benefits after June 24, 2013.

On November 3, 2016 (on review of the prior ALJ's February 2016 order), we dismissed claimant's hearing request insofar as it pertained to the first 14-day installment period of temporary disability benefits accruing from the date of another prior March 6, 2013 ALJ's order (*i.e.*, from March 6, 2013 through March 20, 2013) as untimely under ORS 656.319(6), modified the penalty and attorney fee awards accordingly, but otherwise affirmed the remainder of the prior ALJ's order. *Armando Morin*, 68 Van Natta 1760, 1762-64 (2016).

CONCLUSIONS OF LAW AND OPINION

In affirming the March 16, 2016 Order on Reconsideration's temporary disability award, the ALJ found that all of claimant's accepted conditions were medically stationary on July 10, 2014, and that claimant had not been released, or returned, to his regular work for his accepted right knee conditions. In doing so, the ALJ reasoned that, although Dr. Dolan did not specifically authorize temporary disability after June 24, 2013, the authorization as of that date was open-ended.

On review, the employer argues that claimant is not entitled to temporary disability benefits from June 25, 2013, through July 10, 2014, because his accepted conditions were medically stationary on June 24, 2013. In response,

claimant contends that all of his accepted conditions were not medically stationary on July 10, 2014 and, therefore, he is entitled to additional and ongoing temporary disability benefits because he was never released to return to regular work for his accepted right knee conditions. For the following reasons, we find that claimant is entitled to temporary disability benefits through January 7, 2015.

Temporary disability compensation is due and payable only when authorized by an attending physician or nurse practitioner. ORS 656.262(4)(g), (h). 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). A worker is not entitled to any award of temporary disability for any period of time in which the worker is medically stationary. See OAR 436-030-0036(2); *Kevin W. McClellan*, 65 Van Natta 560, 563 (2013) (awarding temporary disability benefits only until the claimant's condition became medically stationary).

Here, it is undisputed that claimant is entitled to temporary disability benefits from December 8, 2011 through June 24, 2013 for his accepted conditions. Moreover, the parties do not assert, and the record does not establish, that claimant was released to return to regular work for his accepted right knee conditions. Therefore, claimant's entitlement to temporary disability benefits after June 24, 2013 depends on the date his accepted right knee conditions became medically stationary.⁸ ORS 656.268(4)(d); OAR 436-030-0036(2), (3); *McClellan*, 65 Van Natta at 563.

⁸ At hearing, the employer stipulated that, "for all pertinent times, once claimant started treating for the knee, time loss was authorized." (Tr. 4, 6). Moreover, as stated in our November 3, 2016 order, it was undisputed that Dr. Kemalyan authorized temporary disability benefits for the accepted right knee conditions. *Morin*, 68 Van Natta at 1761 n 1. We further note that Dr. Kemalyan's April 5, 2012 opinion that claimant was unable to work due to his right knee conditions was an "open-ended" authorization, and neither he nor Dr. Dolan took affirmative steps to put a stop to that authorization. See *Dedera v. Raytheon Engrs. & Constrs.*, 200 Or App 1, 7 (2005); *Tina M. Nattell*, 60 Van Natta 1050, 1052 (2008).

We acknowledge claimant's arguments that his accepted burn condition was medically stationary on November 17, 2015. However, because Dr. Kemalyan released claimant to regular work for his accepted burn condition on April 5, 2012, and did not subsequently excuse him from work for that condition, he is not entitled to temporary disability benefits related to his accepted burn condition after that date. ORS 656.262(4)(g). Therefore, the medically stationary date of claimant's accepted burn condition is not determinative of his entitlement to temporary disability benefits after June 24, 2013.

“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 issue of a claimant’s medically stationary status is primarily a medical question to be decided based on competent medical evidence. *See Harmon v. SAIF*, 54 Or App 121, 125 (1981).

Here, the ARU and the ALJ determined that claimant’s medically stationary date for *all* of his accepted conditions was July 10, 2014, which was the date he last attended therapy at the wound clinic for his burn condition. (*See* Exs. 69, 95-2-3). However, on January 7, 2015, Dr. Dolan stated, for the first time, that claimant’s right knee conditions were medically stationary. (Ex. 70). We acknowledge that, in a November 2015 summary letter to the employer, Dr. Dolan agreed that claimant was medically stationary on June 24, 2013 because he had not progressed toward the goals regarding his weight loss and diabetes. (Ex. 78). Yet, for the following reasons, we are persuaded that the medically stationary date for claimant’s accepted right knee conditions was January 7, 2015.

Dr. Dolan’s November 2015 “retroactive” agreement that claimant was medically stationary on June 24, 2013 conflicts with his “post-June 2013” statements. For instance, in September 2013, noting that claimant lost seven pounds, Dr. Dolan recommended weight loss surgery. (Ex. 57). Additionally, on September 26, 2013, Dr. Dolan expressly stated that claimant’s right knee conditions were *not* medically stationary because of his chronic pain and his recommended knee replacement surgery. (Ex. 58). Finally, in April 2014, while describing claimant’s *claim* as “stagnant,” Dr. Dolan referred claimant to his primary care physician for weight loss, and to a rehabilitation center for further right knee treatment and for claim evaluation/assessment to determine his “medically stationary” status. (Ex. 62).

Given the above, we are not persuaded that claimant’s right knee conditions were medically stationary on June 24, 2013, because the record supports a reasonable expectation of further material improvement for claimant’s right knee conditions beyond that date. *See* ORS 656.005(17). Moreover, based on Dr. Dolan’s express opinion declaring claimant’s right knee conditions medically stationary on January 7, 2015, we find that date to be the “medically stationary” date. OAR 436-030-0035(1)(a).⁹

⁹ OAR 436-030-0035(1)(a) provides that, for initial injury claims, a worker is medically stationary when the attending physician or a preponderance of medical opinion declares that all accepted conditions, direct medical sequelae, and conditions directly resulting from the work injury are either “medically stationary” or “medically stable” or uses other language meaning the same thing. Here,

As previously noted, Dr. Kemalyan's April 5, 2012 temporary disability authorization for claimant's right knee conditions was "open-ended," and neither he nor Dr. Dolan took affirmative steps to put a stop to that authorization. (Ex. 39). It is undisputed that claimant was never released to return to regular work for his accepted right knee conditions. Therefore, he is entitled to temporary disability benefits from December 8, 2011 through January 7, 2015, less time worked and any amounts previously paid. OAR 436-030-0036(2), (3).

Consequently, we modify the March 16, 2016 Order on Reconsideration as follows. Claimant's medically stationary date is modified to January 7, 2015. In lieu of the reconsideration order's temporary disability award, claimant is awarded temporary disability benefits from December 8, 2011 through January 7, 2015 (less time worked and any amounts already paid), with the exception of the period disallowed pursuant to our November 3, 2016 order. *See Morin*, 68 Van Natta at 1765.

Claimant's counsel is entitled to an assessed fee for services at the hearing level and on review for prevailing on the disputed temporary disability issue. ORS 656.383(2). Claimant's counsel is also entitled to an assessed fee for the successful defense against the employer's appeal of the ALJ's temporary disability award. ORS 656.382(2); OAR 438-015-0065(4); OAR 438-015-0070(5). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at the hearing level and on review regarding the temporary disability issues is \$5,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the temporary disability issues (as represented by the record, claimant's respondent's brief, his counsel's fee submission, and the employer's objection), the complexity of the issues, the value of the interest involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.¹⁰

Dr. Dolan's January 7, 2015 medically stationary opinion was made in response to the employer's December 29, 2014 inquiry. (Ex. 70). Dr. Dolan confirmed that, in responding to those questions, he agreed that claimant was medically stationary "at the present time[.]" (Ex. 71-1). Because Dr. Dolan's medically stationary opinion was dated January 7, 2015, we conclude that he has indicated a specific date for claimant's medically stationary status. *See Jon V. Michaels*, 58 Van Natta 1321, 1324 n 3 (2006) (finding the claimant to be medically stationary on the specific date of his physician's letter, made in response to the carrier's inquiry, that expressly stated he was medically stationary "a this point in time").

¹⁰ Claimant also seeks penalties and related attorney fees under ORS 656.262(11)(a) based on *all* of the unreasonably "resisted" temporary disability benefits to which he is entitled in this case, and pursuant to our November 3, 2016 Order on Review. However, because claimant did not raise penalties

ORDER

The ALJ's order dated July 22, 2016, as reconsidered on August 22, 2016, is modified in part and affirmed in part. Claimant's medically stationary date as set forth in the Order on Reconsideration is modified to January 7, 2015. In lieu of the Order on Reconsideration's and the ALJ's temporary disability awards, claimant is awarded temporary disability benefits from December 8, 2011 through January 7, 2015 (less time worked and any amounts previously paid), with the exception of the period of temporary disability benefits disallowed in our November 3, 2016 order. For services at the hearing level and on review, claimant's counsel is awarded an assessed attorney fee of \$5,000, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on March 29, 2017

and attorney fees at the hearing level, we decline to consider those issues on review. *See Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing); *Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing).