

In the Matter of the Compensation of
TREBA V. RUTHERFORD, Claimant
Own Motion No. 03-0332M
OWN MOTION ORDER
Merkel & Associates, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys
Vavrosky Maccoll Olson et al, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

On July 31, 2003, the insurer submitted a “Carrier’s Own Motion Recommendation,” recommending against reopening the 1986 claim for a “worsening” of the claimant’s left knee injury. *See* ORS 656.278(1)(a) (2001). On January 26, 2004, the insurer submitted a “Carrier’s Own Motion Recommendation,” recommending reopening of the 1986 claim for a “post-aggravation rights” new medical condition (post-traumatic osteoarthritis in the medial compartment of the left knee).¹ *See* ORS 656.278(1)(b) (2001). For the following reasons, we reopen the claim for “post-aggravation rights” new medical condition, but deny reopening with respect to the claim for “worsening.”

FINDINGS OF FACT

We adopt the “Findings of Fact” set forth in our Order on Review in WCB Case No. 03-05569 (entered on this date) as supplemented below.

On January 26, 2004, the insurer submitted a “Carrier’s Own Motion Recommendation,” recommending reopening based on a claim for a “post-aggravation rights” new medical condition (post-traumatic osteoarthritis in the medial compartment of the left knee).²

¹ We have not assigned a second Own Motion case number to claimant’s “post-aggravation rights” new medical condition claim. Instead, in the factual and procedural context of this matter, we treat the insurer’s January 26, 2004 submission as a supplemental filing in WCB 03-0332M. Thus, claims for both “worsening” and “post-aggravation rights” new medical condition are considered under case number WCB 03-0332M.

² By typed strikes, the insurer’s January 26, 2004 “Carrier’s Own Motion Recommendation” indicated that: (1) claimant did not submit a claim for worsening (box B-1); (2) claimant made a claim for post-traumatic osteoarthritis in the medial compartment of the left knee as a “post-aggravation rights” new or omitted medical condition (boxes C-1, C-2); (3) claimant’s new medical condition was causally related to the accepted condition (box C-3); and (4) the insurer was responsible for the “post-aggravation rights” new medical condition (box C-4). The insurer made no recommendation with respect to reopening for claimant’s new medical condition (box C-8), but entered a handwritten strike

CONCLUSIONS OF LAW AND OPINION

ORS 656.278(1)(a) (2001) establishes three requirements for the reopening of an Own Motion claim for a “worsening” of a compensable injury. First, the worsening must result in the partial or total inability of the worker to work. Second, the worsening must require hospitalization, surgery (either inpatient or outpatient), or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the worker to return to work. Third, the worker must be in the work force at the time of disability. *James J. Kemp*, 54 Van Natta 491, 505 (2002).

ORS 656.278(1)(b) (2001) establishes two requirements regarding claim reopening for a “post-aggravation rights” new or omitted medical condition. First, the new or omitted medical condition claim must be initiated after the expiration of the claimant’s aggravation rights under ORS 656.273. Second, the new or omitted medical condition must be accepted or compensable. *James J. Kemp*, 54 Van Natta at 507-08.

We conclude that claimant has met the requirements for the reopening of her claim for a “post-aggravation rights” new medical condition under ORS 656.278(1)(b) (2001). Our conclusion relies on the following reasoning.

Here, claimant’s aggravation rights expired in 1993. The parties have stipulated that on October 27, 2003 claimant presented a new medical condition claim for post-traumatic osteoarthritis in the medial compartment of the left knee. The insurer recommends claim reopening for the new medical condition, agreeing that the claim for such condition was initiated after expiration of claimant’s aggravation rights and is compensable. Moreover, based on the opinions authored by Drs. Grewe and Woodward, we are persuaded that claimant’s accepted condition was the major contributing cause of the new medical condition claimed.

recommending reopening for a “worsened condition” claim (box B-8). In the cover letter that accompanied the January 26, 2004 recommendation, the insurer requested “that the Board issue a formal Order reopening for Own Motion benefits to process the newly requested post-traumatic osteoarthritis in the medial compartment of the left knee but NOT reopen for a worsened condition.” In the unique factual and procedural context of this case, it is apparent that the insurer intended to recommend reopening for claimant’s “post-aggravation rights” new medical condition claim rather than for a worsened condition but, as the result of clerical error, checked “yes” in box B-8 instead of C-8. Under such circumstances, we interpret the January 26, 2004 “Carrier’s Own Motion Recommendation” as a recommendation that the 1986 claim be reopened based solely on a “post-aggravation rights” new or omitted medical condition (post-traumatic osteoarthritis in the medial compartment of the left knee).

Under these circumstances, we conclude that claimant meets the requirements for the reopening of her Own Motion claim under ORS 656.278(1)(b) (2001). *See Clarence C. Murray, 55 Van Natta 1917 (2003)* (where the insurer recommended reopening, acknowledged that a claim for a new or omitted medical condition was received after expiration of the claimant's aggravation rights, and agreed that the new/omitted medical condition was compensable, requirements for reopening under ORS 656.278(1)(b) (2001) were satisfied).

Because our review of the record does not establish that the requirements for a reopening based on a "worsening" of the accepted condition have been met, we conclude that a reopening under ORS 656.278(1)(a) (2001) is unwarranted.³

Accordingly, we authorize the reopening of claimant's new medical condition claim under ORS 656.278(1)(b) (2001) for the insurer to provide benefits in accordance with law. When claimant is medically stationary, the insurer shall close the claim pursuant to OAR 438-012-0055, including payment of any permanent disability award for the new medical condition determined under ORS 656.278(1)(b) and (2)(d) (2001).

Claimant's attorney is allowed an out-of-compensation fee in the amount of 25 percent of any increased temporary disability compensation resulting from this order not to exceed \$1,500, payable by the insurer directly to claimant's attorney. *See OAR 438-012-0080(1).*⁴

IT IS SO ORDERED.

Entered at Salem, Oregon on April 6, 2004

³ The medical opinion evidence authored by Drs. Grewe and Woodward establishes that the accepted left knee strain and torn left medial meniscus conditions have not "worsened." Rather, claimant's inability to work, hospitalization, and required surgery were caused by her "post-aggravation rights" new medical condition (osteoarthritis). *See Gayle Kovalski, 56 Van Natta 435 n1 (2004)*.

⁴ Claimant's entitlement to an assessed attorney fee award for services at the hearing level pursuant to OAR 438-015-0080(5) based on the "post-aggravation rights" new medical condition, will be determined in the first instance by the Presiding ALJ in WCB 03-05569. Our Order on Review issued in that case on this date explains the process to be employed in reaching that determination.