
In the Matter of the Compensation of
VALERIE A. UPHAM, Claimant
Own Motion No. 04-0099M
OWN MOTION ORDER
Claimant Unrepresented
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The SAIF Corporation has submitted claimant's request to reopen her compensable right shoulder claim for a worsened condition. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. SAIF opposes reopening the claim, contending that claimant was not in the work force at the time of disability. Based on the following reasoning, we authorize the reopening of claimant's claim.

There are three requirements for reopening 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 as defined under the criteria in *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989). *James J. Kemp*, 54 Van Natta 491, 503 (2002).

Under the *Dawkins* criteria, a claimant is in the work force at the time of disability if he or she is: (1) engaged in regular gainful employment; or (2) not employed, but willing to work and is making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258; *Kemp*, 54 Van Natta at 502-03.

Finally, the "date of disability" for the purpose of determining work force status for a worsened condition claim in Own Motion status is the date the claimant's claim worsened: (1) resulting in a partial or total inability to work; and (2) requiring (including a physician's recommendation for) hospitalization or inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work. *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

Here, claimant meets the first two requirements for the reopening of an Own

Motion claim for a worsening of a compensable injury. In this regard, on October 17, 2003, claimant sought treatment from Dr. Noall, claimant's attending physician, for right shoulder pain. Dr. Noall released claimant to modified work, noting specifically "minimal use of the right arm."

On December 4, 2003, claimant was seen by Dr. Switlyk, on a referral by Dr. Noall. Dr. Switlyk diagnosed advanced degenerative arthritis in the right shoulder, noting "status post prior history of instability and major shoulder reconstructive surgery." He recommended a total shoulder arthroplasty because of claimant's severe degree of disability. Dr. Switlyk noted that claimant was to return to her primary care physician, Dr. Houle, for pre-operative pain control.

Thus, as of December 4, 2003, claimant's compensable condition worsened pursuant to ORS 656.278(1)(a) (2001); *i.e.*, by that date, the worsening required surgery and resulted in at least a partial inability to work. Therefore, December 4, 2003 is the "date of disability" for the purpose of determining whether claimant was in the work force.

As summarized above, under the *Dawkins* criteria, a claimant is in the work force at the time of disability if he or she is: (1) engaged in regular gainful employment; or (2) not employed, but willing to work and is making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258; *Kemp*, 54 Van Natta at 502-03.

In support of this assertion, claimant submits copies of an Employment Department payment record demonstrating receipt of unemployment benefits beginning in October 2003 through at least March 15, 2004. The receipt of unemployment benefits is *prima facie* evidence that claimant is willing to work and is making reasonable efforts to obtain employment. *William M. Trusty*, 53 Van Natta 611 (2001); *Carol L. Conaway*, 43 Van Natta 2261 (1991); *John T. Seiber*, 43 Van Natta 136 (1991).

On this record, we conclude that claimant was in the work force at the time of her disability (December 4, 2003). *Thurman M. Mitchell*, 54 Van Natta at 2616. Accordingly, we authorize the reopening of claimant's claim under ORS 656.278(1)(a) (2001) for SAIF to provide benefits in accordance with law.¹

¹ As we have found, claimant has established a worsening of her compensable injury under ORS 656.278(1)(a), and SAIF is directed to reopen the Own Motion claim. As for the requirements

When claimant is medically stationary, SAIF shall close the claim pursuant to OAR 438-012-0055.²

IT IS SO ORDERED.

Entered at Salem, Oregon on April 14, 2004

regarding payment of benefits on such a reopened claim, the worker may receive temporary disability benefits under ORS 656.210, 656.212(2) and 656.262(4) from the time the attending physician authorizes such benefits for the hospitalization, surgery, or other curative treatment until the worker becomes medically stationary, provided that the worker is in the work force during the period for which such benefits are sought. ORS 656.005(30) (2001); ORS 656.278(1)(a); ORS 656.278(2)(b); *Kemp*, 54 Van Natta at 505.

² Finally, inasmuch as claimant is unrepresented, she may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. She may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405