

In the Matter of the Compensation of
ROBERT WHITTON, Claimant
Own Motion No. 04-0015M
OWN MOTION ORDER
Martin L Alvey, Claimant Attorneys
Special Districts Assoc Of Ore, Insurance Carrier

Reviewing Panel: Members Biehl and Langer.

The self-insured employer has submitted a “Carrier’s Own Motion Recommendation” form, indicating that claimant seeks reopening of his 1978 low back injury claim on two grounds: (1) a worsening of his previously accepted condition; and (2) a “post-aggravation rights” new medical condition (“L3-4 disc herniation”). *See* ORS 656.278(1)(a), (b) (2001). The employer recommends that the claim be reopened on both grounds.

Based on our review of this record, we find that claimant’s 1978 claim has satisfied the statutory requirements for reopening under both ORS 656.278(1)(a) and (1)(b) (2001).¹

Accordingly, we authorize the reopening of claimant’s “worsened condition” claim and the “post-aggravation rights” new medical condition claim (“L3-4 disc herniation”) under ORS 656.278(1)(a) and (1)(b) (2001) for the employer to provide benefits in accordance with law. When claimant is medically stationary, the employer shall close the claim pursuant to OAR 438-012-0055, including payment of any permanent disability award determined under ORS 656.278(1)(b)

¹ Regarding claimant’s “post-aggravation rights” new medical condition claim, we note that there are two requirements that must be satisfied for the reopening of an Own Motion claim for a “post-aggravation rights” new or omitted medical condition claim under ORS 656.278(1)(b) (2001). First, the new or omitted medical condition claim must have been initiated after the expiration of 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 491 (2002).

Here, claimant requested acceptance of his “L3-4 disc herniation” after his aggravation rights under ORS 656.273 had expired. By a May 1, 2000 Modified Notice of Acceptance, the employer accepted the new medical condition (“L3-4 disc herniation”) as a compensable component of claimant’s 1978 injury claim. However, the employer did not process the new medical condition under ORS 656.262 and ORS 656.268. Thus, because claimant’s aggravation rights have expired and his 2000 new medical condition was not processed to finality before January 1, 2002, jurisdiction for claimant’s “post-aggravation rights” new medical condition claim resides exclusively within the Board’s Own Motion authority as of January 1, 2002. *See Jerry W. Breazeale*, 55 Van Natta 2051 (2003).

and (2)(d) for the “post-aggravation rights” new medical conditions.

Claimant’s attorney is allowed an approved 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 employer directly to claimant’s attorney. *See* OAR 438-015-0080(1).

IT IS SO ORDERED.

Entered at Salem, Oregon on February 26, 2004