
In the Matter of the Compensation of
JAMES BOND, Claimant
Own Motion No. 03-0487M
OWN MOTION ORDER
Claimant Unrepresented
Curtis Morley, Liberty NW Ins Corp, Insurance Carrier

Reviewing Panel: Members Biehl and Lowell.

The insurer submitted claimant's request for reopening of his Own Motion claim for a worsening of his compensable lumbar strain and L5-S1 herniated disc conditions. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired.

Although the insurer agreed that claimant's current condition was causally related to the accepted condition and that it was responsible for the current condition, it recommended against reopening claimant's 1991 claim. The insurer contended that the proposed surgery for claimant's compensable condition was inappropriate medical treatment, and, as such, his claim did not qualify for reopening under ORS 656.278(1)(a) (2001). Pursuant to ORS 656.327, the insurer also requested the Director to review the requested medical treatment. We deferred action on the Own Motion matter to await resolution of the Director's review. OAR 438-012-0050(2).

By order dated January 21, 2004, the Director's Medical Review Unit (MRU) determined that the insurer was liable for payment of the proposed laminectomy and foraminotomy to decompress S1 and possible L5 nerve roots. No party requested administrative review of that decision, which has become final by operation of law.

Following the issuance of the Director's order, the parties were granted an opportunity to present their positions regarding the effect, if any, the Director's order had on claimant's request for Own Motion relief.

In response, the insurer initially contended that claimant was no longer seeking authorization for surgery. In support of this contention, the insurer submitted a February 13, 2004 chart note from Dr. Makker, claimant's attending physician, that indicated that claimant wanted to defer surgery.

However, on May 26, 2004, Dr. Makker noted that surgery was going to be scheduled in mid-July and claimant would be released from work for

approximately three weeks following the surgery. In response to this information, the insurer continued to oppose claim reopening, contending that claimant had not scheduled the proposed surgery. In a June 25, 2004 letter, claimant reported that he had discussed the proposed surgery with Dr. Makker, whose staff was in the process of scheduling that surgery.

Pursuant to ORS 656.278(1)(a) (2001), there are 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 as defined under the criteria in *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989).¹ *James J. Kemp*, 54 Van Natta 491 (2002). If a claimant meets these requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

There is no dispute that claimant remains in the work force. In addition, Dr. Makker's release from work following the proposed surgery satisfies the "inability to work" requirement to reopen the worsened condition claim for Own Motion relief. ORS 656.278(1)(a) (2001); *Alan G. Jones*, 55 Van Natta 429 (2003). The determinative issue is whether claimant's previously accepted condition has worsened requiring 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. ORS 656.278(1)(a) (2001); *James J. Kemp*, 54 Van Natta at 501. Based on the following reasoning, we find that claimant satisfies this "medical treatment" requirement.

Here, on June 16, 2003, Dr. Makker requested authorization for a lumbar laminectomy. In September 2003, Dr. Makker explained that because of claimant's pain and numbness, which are "clearly in an S1 distribution and possibly an L5 distribution," a laminectomy and foraminotomy to decompress these roots was appropriate. Although claimant indicated in February 2004 that he wished to defer surgery, by May 2004, he had decided to undergo the recommended surgery, which was being scheduled for mid-July 2004.

¹ Pursuant to the Court's reasoning in *Dawkins*, 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 seeking work; or (3) not employed, but willing to work and is not seeking work because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258.

The insurer contends that, in order to satisfy this “worsened condition” medical treatment requirement, the medical treatment must be actually scheduled or performed. However, we have previously determined that a medical recommendation, request, or statement that a claimant needs one of the three medical treatments listed in ORS 656.278(1)(a) (2001) is sufficient to satisfy the requisite treatment requirement for a “worsening” under that statute. *Thurman M. Mitchell*, 54 Van Natta 2607, 2615 (2002). In other words, “a worsening of a compensable injury that * * * requires 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” is satisfied by a physician’s recommendation that the claimant undergo such treatment. ORS 656.278(1)(a) (2001); *Mitchell*, 54 Van Natta at 2615. It is not necessary that the claimant actually undergo (or be scheduled to undergo) one of the listed treatments in order to establish that the compensable condition worsened “requiring” such treatment.

Here, Dr. Makker requested authorization for low back surgery. On May 26, 2004, Dr. Makker noted that surgery would be scheduled “mid July.” In June 2004, following a medical examination, claimant noted that “Dr. Makker and I feel that surgery is necessary and is to be done in mid July 2004.” The medical treatment recommended (*i.e.*, surgery) qualifies as one of the three required medical treatments under ORS 656.278(1)(a) (2001). Furthermore, there is no evidence that the surgery recommendation was withdrawn or that claimant has decided not to proceed with the recommended surgery. *See Corey A. Otterson*, 56 Van Natta 363 (2004); *compare Karen T. Mariels*, 44 Van Natta 2452, 2453 (1993) (where the claimant's medically stationary status is contingent upon undergoing recommended surgery, claim is not prematurely closed if the claimant refuses the surgery); *Stephen L. Gilcher*, 43 Van Natta 319, 320 (1991) (same).

Thus, this medical record establishes that claimant’s compensable condition worsened requiring surgery. Under these circumstances, we conclude that this Own Motion claim for a worsening of claimant’s previously accepted low back condition satisfies the criteria set forth in ORS 656.278(1)(a) (2001).

Accordingly, we authorize the insurer to reopen the claim and process it in accordance with law. When claimant is medically stationary, the insurer shall close the claim pursuant to OAR 438-012-0055.²

IT IS SO ORDERED.

Entered at Salem, Oregon on July 22, 2004

² Finally, inasmuch as claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. He 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