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In the Matter of the Compensation of  
**EDWARD L. IRWIN, Claimant**  
Own Motion No. 03-0449M  
INTERIM OWN MOTION ORDER  
Merkel & Associates, Claimant Attorneys  
Reinisch Mackenzie Healey et al, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

On October 23, 2003, the insurer submitted a “Carrier’s Own Motion Recommendation,” indicating that claimant had not submitted a “worsened condition” claim under ORS 656.278(1)(a) (2001) or a “post-aggravation rights” new or omitted medical condition claim under ORS 656.278(1)(b) (2001). Claimant contends that he has submitted a “worsened condition” claim. Based on the following reasoning, the insurer is directed to submit a fully completed “Carrier’s Own Motion Recommendation” within 14 days from the date of this order.

Claimant sustained a compensable left eye injury on September 7, 1982, while working for his current employer. The insurer accepted the claim, which was closed October 25, 1988, with an award of 5 percent unscheduled permanent disability for loss of vision in the left eye.<sup>1</sup> Claimant’s aggravation rights have expired.

Due to a childhood injury, claimant lost the sight in his right eye; therefore, his left eye provides his only vision. Dr. Prendergast, M.D., has treated claimant’s compensable left eye injury since 1982. On August 5, 2003, Dr. Prendergast submitted an 827 form that reported an “aggravation of original injury” and claimant’s inability to work due to loss of vision. (Ex. 76).

On August 18, 2003, Dr. Prendergast provided a report to the insurer regarding claimant’s condition. (Ex. 77). He stated that claimant’s left eye injury resulted in “inflammation, Herpes simplex keratitis, anterior uveitis and subsequent low grade chronic inflammation with corneal scarring.” (Ex. 77-1). He noted that claimant’s condition worsened beginning in 2003, and his vision was failing due to

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<sup>1</sup> Question A-17 on the recommendation form asks the insurer to list the “[c]onditions accepted prior to current request for Own Motion relief.” The insurer responded by listing the “condition” as “left eye corneal abrasion & keratitis” and the “date accepted” as “acceptance letters weren’t required in 1982.”

gradual accumulation of a considerable amount of corneal scarring, vascularization and opacity over the intervening years since 1982. (Ex. 77-2). He stated that claimant was developing a cataract, which could be considered a direct consequence of claimant's chronic inflammation and inflammatory treatment, and would eventually need to be dealt with. (Ex. 77-2-3). Dr. Prendergast noted that the current treatment plan was to proceed conservatively in an attempt to reduce the inflammation and clear claimant's cornea. He stated that, if and when surgery is necessary, it would likely be a corneal transplant. (Ex. 77-3). Finally, Dr. Prendergast opined that, due to claimant's loss of visual function, he was not able to perform any occupation, including his current job of working in a warehouse. (*Id.*).

On October 28, 2003, in response to the insurer's incomplete October 23, 2003 recommendation, Board staff directed the insurer to submit an amended, fully completed "Carrier's Own Motion Recommendation," along with its written response whether claimant's request for Own Motion relief involved a worsening of an accepted condition and/or a "post-aggravation rights" new or omitted medical condition.

Although much correspondence has been received from the parties, the insurer has not yet submitted a fully completed recommendation. The insurer continues to maintain that claimant has not submitted a "worsened condition" claim. Further, in response to claimant's statement that it was his understanding that the insurer contested reopening only on the basis of the medical treatment requirement under ORS 656.278(1)(a), and that the insurer agreed with medical causation, that claimant was in the workforce at the time of disability, and was currently unable to work, the insurer stated that it makes no concessions regarding medical causation, workforce status, or inability to work.

Claimant has not made any claim for a "post-aggravation rights" new or omitted medical condition. ORS 656.267(3) (2001); ORS 656.278(1)(b) (2001). However, he contends that Dr. Prendergast's August 18, 2003 report, as summarized above, establishes that he has made a claim for a "worsened condition" under ORS 656.278(1)(a) (2001). The insurer disagrees, contending that, because the requisite medical treatment factor under ORS 656.278(1)(a) (2001) is not satisfied by Dr. Prendergast's report, that report does not constitute a "worsened condition" claim. Based on the following reasoning, we find that the insurer had notice of claimant's "worsened condition" claim.

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We have adopted rules that explain when an insurer is deemed to have notice of an Own Motion claim. OAR 438-012-0020(3)<sup>2</sup> concerns notice of a “worsened condition” claim and provides:

“(3) An insurer is deemed to have notice of an own motion claim for a worsened condition when one of the following documents is submitted to the insurer by or on behalf of the claimant:

“(a) A written request for temporary disability compensation or claim reopening regarding a compensable injury for which aggravation rights have expired; or

“(b) Any document submitted to the insurer after the expiration of aggravation rights that reasonably notifies the insurer that the compensable injury results in the claimant’s inability to work and requires hospitalization or inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the claimant to return to work.”

Focusing on OAR 438-012-0020(3)(b), the insurer argues that it has not yet received a “worsened condition” claim from claimant because there is no document submitted that notifies it that the compensable injury “requires hospitalization or inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the claimant to return to work.” We need not address whether Dr. Prendergast’s August 18, 2003 report meets this requirement because we find that claimant has made a claim for a “worsened condition” under OAR 438-012-0020(3)(a).

Specifically, in his January 16, 2004 response to the insurer, claimant requested that his claim be reopened for time loss benefits. This satisfies OAR 438-012-0020(3)(a). Therefore, at least by January 16, 2004, claimant had made a claim for a “worsened condition.”

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<sup>2</sup> OAR 438-012-0020 was amended effective September 1, 2003 and those amendments apply to all Own Motion claims filed or initiated on or after September 1, 2003. WCB Admin. Order 2-2003, eff. 9/1/03, Order of Adoption, page 21. However, the text of the amended rule regarding notice of a “worsened condition” claim remained the same in relevant part. In this order, we quote and use the amended version of OAR 438-012-0020(3).

The insurer is responsible for processing Own Motion claims in the first instance. ORS 656.262(1); OAR 438-012-0020(1). For a “worsened condition” claim under ORS 656.278(1)(a) (2001), such Own Motion claim processing includes either voluntarily reopening the claim or submitting a fully completed "Carrier's Own Motion Recommendation" form that recommends for or against reopening, accompanied by supporting documentation. ORS 656.278(5) (2001); OAR 438-012-0030(1)(a), (b).

Such processing informs the claimant about the insurer’s position regarding the “worsened condition” claim. In this regard, the recommendation form asks the insurer’s position regarding each element of a worsened condition claim under ORS 656.278(1)(a) (2001), including whether the insurer agrees that the current “worsened condition” is compensable and the responsibility of the insurer and whether it agrees that the medical treatment is reasonable and necessary.<sup>3</sup> Furthermore, if the insurer disagrees that these elements are satisfied, the recommendation form instructs it to issue a denial under ORS 656.262 (compensability) and/or ORS 656.308(2) (responsibility) and/or request Director review of the medical treatment under ORS 656.245, ORS 656.260, and/or ORS 656.327. *Eva M. Tucker*, 55 Van Natta 2577 (2003). Moreover, if the insurer is contesting medical causation, it must issue a denial under ORS 656.262. *Id.* at 2581. Thus, completion of the recommendation provides notice to claimant regarding the status of his claim and what he needs to do to pursue reopening of that claim.

The current record demonstrates the problems that can occur if the aforementioned rule and procedures are not followed. As addressed above, claimant has made a “worsened condition” claim. The insurer contends that the claim should not be reopened; yet it has not submitted a fully completed recommendation form. Furthermore, although the insurer focuses on whether the medical treatment requirement under ORS 656.278(1)(a) (2001) is satisfied, it denies that this is the only basis of its dispute, contending that it makes no concessions regarding medical causation, workforce status, or inability to work. This leaves claimant in the untenable position of not knowing how to further pursue his claim. It also creates the possibility of inefficiencies to the parties and this agency; *e.g.*, it proposes the satisfactory completion of each requirement to

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<sup>3</sup> The recommendation form also asks the insurer whether it agrees the current “worsened condition” resulted in an inability to work, required hospitalization or inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the claimant to return to work, and that the claimant was in the workforce at the time of disability.

reopen a “worsened condition” claim before the initiation of a carrier’s claim processing obligations, as well as the resolution of disputes regarding such requirements in a separate, piecemeal fashion.<sup>4</sup> Such an inefficient process is precisely what the Board’s procedural rules and Own Motion recommendation form are attempting to avoid.

Accordingly, we direct the insurer to submit a fully completed “Carrier’s Own Motion Recommendation” within 14 days from the date of this order. Thereafter, the Board will take the matter under advisement.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 12, 2004

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<sup>4</sup> 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 a partial or total inability of the worker to work. *See James J. Kemp*, 54 Van Natta 491, 505 (2002). 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. *Id.* Third, the worker must be in the “workforce” at the time of disability as defined under the criteria in *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989). *Id.*

The three qualifying medical treatments listed in ORS 656.278(1)(a) (2001) are defined as follows: (1) “Surgery” is defined as an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker; and (2) “hospitalization” is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility. *Larry D. Little*, 54 Van Natta 2536 (2002). The third type of qualifying treatment requires establishment of three elements: (1) curative treatment (treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery); (2) prescribed in lieu of (in the place of or instead of) hospitalization; and (3) that is necessary (required or essential) to enable the injured worker to return to work. *Id.* at 54 Van Natta 2542, 2546.