
In the Matter of the Compensation of
VERNON E. MARSHALL, Claimant
Own Motion No. 04-0128M
OWN MOTION ORDER REFERRING FOR CONSOLIDATED HEARING
Welch Bruun & Green, Claimant Attorneys
Larry D Schucht, SAIF Legal Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The SAIF Corporation has submitted a “Carrier’s Own Motion Recommendation,” indicating that claimant seeks reopening of his 1984 injury claim for: (1) a worsening of his previously accepted conditions (right distal tibia and fibula fracture); and (2) a “post-aggravation rights” new medical condition (left knee requiring full knee replacement). ORS 656.278(1)(a), (b) (2001). SAIF recommends against reopening the “worsening” claim, contending, among other issues, that claimant is not in the work force.

Claimant sustained a compensable right ankle and foot injury on August 6, 1984. Claimant’s aggravation rights have expired. Subsequently, claimant requested that SAIF accept “left knee requiring full knee replacement.” SAIF recommended against reopening the “post-aggravation rights” new medical condition contending that the condition was not compensably related to the accepted conditions.

In addition, SAIF issued a Notice of Denial under OAR 438-012-0024 and OAR 438-012-0070 on which claimant requested a hearing with the Hearings Division. (WCB Case No. 04-02582). A hearing is set for June 28, 2004 before an Administrative Law Judge (ALJ).

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 “work force” at the time of disability as defined under the criteria in *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989).¹ *Id.* If a claimant meets these requirements, his or

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

her Own Motion claim qualifies for reopening either by the Board or the carrier.

Here, SAIF opposes the reopening of claimant's 1984 injury claim for the worsening of his previously accepted right distal tibia and fibula fracture. *See* ORS 656.278(1)(a) (2001). SAIF contends that claimant's accepted conditions have not worsened requiring any of the requisite medical treatment and that he is not in the work force.

Considering the legal, medical and factual complexity of some of the disputed issues regarding claimant's "worsening" claim under ORS 656.278(1)(a) (2001), we conclude that it would be appropriate to consolidate those issues with the pending litigation. *See Dennis C. Gross*, 56 Van Natta 133 (2004); *Phyllis M. Morris*, 55 Van Natta 3807 (2003).

At the hearing, the record can be further developed regarding the parties' contentions. In submitting their respective positions, the parties are requested to address the effect, if any, the following points and authorities have on their disputes in this worsening claim: ORS 656.278(1)(a) (2001); *Steven F. Schmunk*, 56 Van Natta 809 (2004); *Everett H. Rishel*, 55 Van Natta 4169 (2003); *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

In addition to an order in WCB Case No. 04-02582, the ALJ is directed to forward to the Board a separate, unappealable recommendation with respect to any Own Motion matters and a copy of the order issued in WCB Case No. 04-02582.² In that recommendation, the ALJ shall make findings of fact and conclusions of law regarding whether claimant's compensable condition qualifies for reopening

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 "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).

² If SAIF subsequently issues a Form 3501, announcing that it is voluntarily reopening this currently disputed claim, the parties should notify the Board. In the event that the issuance of the voluntary claim reopening form comes to our attention, we will consider dismissal of this Own Motion matter. *See Jesse C. Day*, 55 Van Natta 2366, 2369-70 (2003).

under ORS 656.278(1)(a) (2001).³ In addition, if the matter is resolved by stipulation or Disputed Claim Settlement, the ALJ is directed to submit a copy of the settlement document to the Board. After issuance of the recommendation and order (or settlement document), the parties should advise the Board of their respective positions regarding the Own Motion matters.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 12, 2004

³ Our review of the claim reopening question for the “post-aggravation rights” new medical condition under ORS 656.278(1)(b) (2001) will be deferred to await the eventual issuance of the ALJ’s recommendation regarding the “medical treatment and work force issues” for the “worsening” claim, as well as any appeal from the ALJ’s Proposed and Final Own Motion Order.