
In the Matter of the Compensation of
VERNON B. KONRAD, Claimant
Own Motion No. 04-0331M
OWN MOTION ORDER REFERRING FOR CONSOLIDATED HEARING
Gloria D Yates, Claimant Attorneys
SAIF Corporation, Insurance Carrier

Reviewing Panel: Members Kasubhai and Langer.

The SAIF Corporation has submitted a “Carrier’s Own Motion Recommendation,” indicating that claimant seeks reopening of his 1975 injury claim for a worsening of his compensable left knee injury. *See* ORS 656.278(1)(a) (2001). SAIF recommends against reopening, contending that: (1) claimant’s current condition does not require the statutory medical treatment; (2) claimant was not in the work force at the time of the disability; (3) claimant’s current condition is not causally related to the compensable injury; (4) it is not responsible for claimant’s current condition; and (5) the recommended medical treatment is not reasonable and necessary for claimant’s compensable condition.

Claimant sustained a compensable left knee injury on January 4, 1975. His aggravation rights have expired. SAIF issued a denial regarding claimant’s current condition on which claimant requested a hearing. (WCB Case No. 04-06274). A hearing is pending 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.¹ *Id.* Third, the worker must be in the “work force” at

¹ If any one of the three qualifying medical treatments listed in ORS 656.278(1)(a) (2001) is satisfied, a “worsening condition” claim meets the medical treatment requirement for reopening in Own Motion. *Larry D. Little*, 54 Van Natta 2536 (2002). 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. The third type of qualifying treatment requires establishment of three elements: (a) 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); (b) prescribed in lieu of (in the place of or instead of) hospitalization; and (c) that is necessary (required or essential) to enable the injured worker to return to

the time of disability as defined under the criteria in *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989).² *Id.* If a claimant meets these requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

Here, SAIF opposes the reopening of claimant's 1975 injury claim for the worsening of his previously accepted left knee injury. See ORS 656.278(1)(a) (2001). SAIF contends, among other issues, that claimant's accepted condition has not worsened requiring any of the requisite medical treatment and that he is not in the work force.

In light of the legal, medical and factual complexity of some of the disputed issues pending, we consider it appropriate to consolidate the Own Motion matter with the pending litigation. OAR 438-012-0040(3). *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 also 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); *Theron W. Stiehl*, 56 Van Natta 2267 (2004); *Steven F. Schmunk*, 56 Van Natta 809 (2004); *Everette H. Rishel*, 55 Van Natta 4169 (2003); *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

In addition to an order in WCB Case No. 04-06274, the ALJ is directed to forward to the Board a separate, unappealable recommendation with respect to any

work. *Little*, 54 Van Natta at 2542, 2546. Finally, the issue of whether a worsening of the compensable injury requires hospitalization, 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" presents a medical question that must be addressed by persuasive medical evidence in the record. *Little*, 54 Van Natta at 2542-43.

² 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 "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).

Own Motion matters and a copy of the order issued in WCB Case No. 04-06274.³ In that recommendation, the ALJ shall make findings of fact and conclusions of law regarding the Own Motion issues. 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 November 17, 2004

³ 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).