

In the Matter of the Compensation of
MARGARET DEGARLAIS, Claimant

Own Motion No. 03-0026M

OWN MOTION ORDER

John C DeWenter, Claimant Attorneys

Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Liberty Northwest Insurance Corporation, as the insurer for Willamette Poultry Company (Liberty/Willamette), has submitted claimant's request for reopening of her Own Motion claim for a "worsening" of her low back condition under ORS 656.278(1)(a) (2001).¹ Claimant's aggravation rights under her 1986 claim have expired. Liberty/Willamette recommends against reopening the claim, contending that claimant does not meet the requirements for reopening. Based on the following reasoning, we reopen the claim for a "worsened condition" under ORS 656.278(1)(a) (2001).

FINDINGS OF FACT

We adopt the "Findings of Fact" contained in the ALJ's Own Motion Recommendation. In addition, we offer the following summary of the procedural history of the case.

On October 1, 1986, claimant sustained a compensable low back injury that was accepted by Liberty/Willamette. Claimant's aggravation rights on that claim have expired.

Subsequent to claimant's compensable low back injury with Liberty/Willamette, claimant was employed by the Crook County School District, which was insured by the SAIF Corporation (SAIF/Crook County). In December 2001, claimant sustained a compensable low back injury that SAIF/Crook County initially accepted as a disabling lumbar strain. Subsequently, SAIF/Crook County

¹Claimant initially requested acceptance of several L4-L5 and L5-S1 conditions as compensable under her 1986 claim. (Exs. 133A, 137A-4). However, at hearing, the Administrative Law Judge (ALJ) found that claimant made it clear that she was *not* asserting a claim for a "post-aggravation rights" new or omitted medical condition against the insurer. Instead, the ALJ found that claimant argued that she was entitled to relief for a "worsened condition" under ORS 656.278(1)(a) (2001) related to her L4-5 and L5-S1 spondylosis condition, which she contended Liberty/Willamette accepted as part of her 1986 injury claim. These findings are undisputed. Therefore, we find that claimant's Own Motion claim is for a "worsened condition" under ORS 656.278(1)(a) (2001).

amended its acceptance to include a disabling cervical strain and a combined condition consisting of claimant's lumbar strain and her L4-5 synovial cyst. However, SAIF/Crook County denied the compensability of that combined condition beginning June 28, 2002.

In November 2002, claimant asked SAIF/Crook County to accept L4-5 and L5-S1 degenerative disc disease, spondylosis, degenerative arthritis and facet arthropathy/arthritis, synovial cysts, spondylolisthesis, and L5 pedicle edema. At the same time, claimant asked Liberty/Willamette to accept the same conditions. SAIF/Crook County denied compensability of and responsibility for these conditions. On January 20, 2003, Liberty/Willamette denied responsibility for these conditions. Claimant requested a hearing on these denials. (WCB Case Nos. 02-06665, 03-01608). Liberty/Willamette also made a recommendation to the Own Motion Board that it not reopen claimant's 1986 claim pursuant to ORS 656.278.

On April 2, 2003, we referred claimant's request for Own Motion relief to the Hearings Division for a consolidated hearing. Following the consolidated hearing, we directed the ALJ to make findings of fact and conclusions of law and a recommendation as to whether Own Motion relief should be granted under claimant's October 1, 1986 claim.

The consolidated hearing was held on February 5, 2004. On March 4, 2004, the ALJ issued an Opinion and Order that found, in part, that Liberty/Willamette accepted claimant's L4-5 and L5-S1 spondylosis as part of her 1986 injury claim and failed to establish that claimant sustained a new compensable injury after 1986 that involved her L4-5 and L5-S1 spondylosis. The ALJ concluded that claimant's L4-L5 and L5-S1 spondylosis² was compensable, as was the consequential L4-5 spondylolisthesis, and Liberty/Willamette remained responsible for medical services for those conditions. The ALJ's order was not appealed and became final by operation of law.

On March 4, 2004, the ALJ also issued an "Own Motion Recommendation," recommending that we reopen claimant's October 1, 1986 claim with Liberty/Willamette pursuant to ORS 656.278(1)(a) (2001). In making this recommendation, the ALJ found that claimant's L4-5 and L5-S1 spondylosis was accepted by Liberty/Willamette as part of her 1986 injury claim and that this

² The ALJ found that the record established that claimant's L4-5 and L5-S1 spondylosis, degenerative arthritis, facet arthropathy/arthritis, L5 pedicle edema and degenerative osteoarthritis were referred to cumulatively as L4-5 and L5-S1 spondylosis.

compensable condition worsened resulting in an inability to work and requiring surgery. The ALJ also found that claimant remained in the work force at the time of disability.

CONCLUSIONS OF LAW AND OPINION

Liberty/Willamette contests the ALJ's recommendation, stating that claimant "has not shown that she meets the necessary requirements for an Own Motion reopening." We disagree.

Pursuant to ORS 656.278(1)(a) (2001), there are three requirements for reopening of an Own Motion claim for a worsening of a compensable injury: (1) the worsening must result in the partial or total inability of the worker to work; (2) 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; and (3) 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). *James J. Kemp*, 54 Van Natta 491 (2002).

On the merits, we adopt the reasoning and conclusions contained in the ALJ's "Own Motion Recommendation." In other words, we conclude that claimant's L4-5 and L5-S1 spondylosis was accepted by Liberty/Willamette as part of her 1986 injury claim, this compensable condition worsened resulting in an inability to work and requiring surgery, and claimant remained in the work force at the time of disability. Consequently, claim reopening under ORS 656.278(1)(a) (2001) is warranted.

Accordingly, we authorize the reopening of claimant's 1986 injury claim for Liberty/Willamette to provide benefits in accordance with law. When claimant's condition is medically stationary, Liberty/Willamette shall close the claim pursuant to OAR 438-012-0055.

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 Liberty/Willamette directly to claimant's attorney. *See* OAR 438-015-0080(1).

IT IS SO ORDERED.

Entered at Salem, Oregon on September 10, 2004