
In the Matter of the Compensation of
CHRIS MANOFF, Claimant
Own Motion No. 05-0133M
OWN MOTION ORDER ON RECONSIDERATION REFERRING FOR A FACT
FINDING HEARING
Gayle A Shields, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

On June 7, 2005, we withdrew our May 9, 2005 Own Motion Order that declined to reopen claimant's 1993 claim for a "worsening" of his previously accepted conditions. *See* ORS 656.278(1)(a) (2001). We took this action to consider claimant's assertion that he was in the work force on the date of his disability. Having received the parties' submission, we conclude that this matter should be referred to the Hearings Division for a fact finding hearing.

Claimant sustained a compensable knee injury on July 28, 1993. Claimant's aggravation rights have expired. Sometime thereafter, the SAIF Corporation also accepted "displaced bucket handle tear medial meniscus left knee." In September 2004, claimant sought treatment for left knee complaints. Dr. Cashmore, claimant's attending physician, diagnosed osteoarthritis and recommended surgery. In April 2005, SAIF accepted as a "post-aggravation rights" new medical condition "left knee medial compartment osteoarthritis." It is this condition for which claimant apparently needs additional surgery. SAIF also voluntarily reopened the claim for the "post-aggravation rights" new medical condition.

SAIF also submitted an Own Motion Recommendation, referring to a "worsening" claim for a previously accepted medical condition. SAIF opposed reopening on the grounds that claimant was not in the work force at the time of the current disability. *See* ORS 656.278(1)(a) (2001).

In our May 9, 2005 order, we declined to reopen claimant's "worsened" condition claim, finding that he was not in the work force at the time of disability. Thereafter, in response to claimant's reconsideration request, we withdrew our prior order and established a supplemental briefing schedule.

Claimant's subsequent submission included an affidavit, attesting to his work history including assertions that may conflict with his prior statements.

For instance, in a January 2005 statement given to a SAIF investigator, claimant stated that he had not worked since 1993. Yet, in his affidavit, claimant asserts that, in 2004, he tried to work as a pig farmer, worked for several months framing houses and, in January 2005, started working as an independent contractor. As a result, SAIF contends that claimant has not established that he is in the work force, citing the irreconcilable inconsistencies between his recent affidavit and statements made in January 2005 and the answers in his work history form.

Under these circumstances, we conclude that, contrary to our initial characterization of this claim as one for a “worsening” of claimant’s previously accepted left knee contusion and left knee displaced bucket handle tear, this Own Motion claim actually pertains to claimant’s entitlement to temporary disability benefits under a reopened “post-aggravation rights” new medical condition claim. Consequently, the issue before us for resolution is not claim reopening for a worsening condition. Instead, the disputed issue is claimant’s entitlement to temporary disability for a reopened “post-aggravation rights” new medical condition claim. *See William N. Alford, 57 Van Natta 1670 (2005)*. (A request for temporary disability benefits based on a voluntarily reopened “post-aggravation rights” new medical condition claim denied because the claimant was not in the work force).

As noted above, with his request for reconsideration, claimant submits an affidavit attesting that he was willing to work and had been working and seeking work at the time of his current disability. In response, SAIF argues that claimant’s affidavit is not persuasive evidence that he was in the work force at the time of his current disability.

Considering the parties’ contrasting positions on this “work force” issue and the conflicting evidence on this issue arising from claimant’s pending Own Motion claim, we conclude that it is appropriate to refer this matter to the Hearings Division for an evidentiary hearing. OAR 438-012-0040(3); *James H. Lake, 56 Van Natta (2004)*; *Richard A. Schiel, 50 Van Natta 2356 (1998)* (“Work force” issue referred to the Hearings Division when the carrier challenged assertions made by a claimant in his affidavit). At the hearing, the documentary and testimonial record can be further developed regarding the parties’ contentions. The hearing may be conducted in any manner that the ALJ determines will achieve substantial justice.

Following the hearing, the ALJ shall issue a recommendation to the Board within 30 days. In that recommendation, the ALJ shall make findings of fact and

conclusions of law regarding the issues arising from claimant's request for Own Motion relief. Those findings and conclusions shall be contained in an unappealable recommendation, which the ALJ shall forward to the Board. After issuance of the recommendation (or settlement document), the parties should advise the Board of their respective positions regarding the Own Motion matters. Thereafter, the Board would proceed with its review.

IT IS SO ORDERED.

Entered at Salem, Oregon on August 10, 2005