
In the Matter of the Compensation of
TINA M. MILLER, Claimant
Own Motion No. 04-0306M
OWN MOTION ORDER ON RECONSIDERATION
Cary et al, Claimant Attorneys
Reinisch Mackenzie Healey et al, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

On November 26, 2004, we declined to authorize the reopening of claimant's 1995 claim for a "worsening" of her previously accepted left shoulder condition. We took this action because the record did not establish that claimant was in the work force at the time of disability. *Tina M. Miller*, 56 Van Natta 3757 (2004). Claimant requested reconsideration and submitted documentation in support of her work force status. On reconsideration, we withdraw our prior order and issue the following order in its place.¹

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 an inability of the worker to work. *See James J. Kemp*, 54 Van Natta 491 (2002). Second, the worsening must require hospitalization, surgery (either inpatient [**3] 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). *Id.* If a claimant meets these requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

Here, claimant's "work force" status was challenged. A claimant is in the work force at the time of disability if he or she is: (1) engaged in regular gainful employment; (2) not employed but willing to work *and* is seeking work; or (3) not working but willing to work, *and* is not seeking work because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258.

¹ Because claimant's request for reconsideration was filed within 30 days of our November 26, 2004 order, we are authorized to proceed with our reconsideration. *See OAR 438-012-0065(2); Gladys Biggs*, 55 Van Natta 1094, 1098 (2003).

Thus, claimant must provide evidence, such as copies of paycheck stubs, income tax forms, unemployment compensation records, a list of employers where claimant looked for work and dates of contact, a letter from the prospective employer, or a letter from a doctor stating that a work search would be futile because of claimant's compensable condition for the period in question. *Stuart T. Valley*, 55 Van Natta 475 (2003).

Claimant submits copies of her earnings history, as well as an affidavit attesting to her continual employment. Claimant's submission establishes that claimant has worked for remuneration since January 2004 until present.² Furthermore, claimant representations are un rebutted.³ In light of such circumstances we are persuaded that, at the time of her current disability, claimant was engaged in regular gainful employment and remained in the work force.

Accordingly, we withdraw our November 26, 2004 order. On reconsideration, we authorize the reopening of the claim for the insurer to process the claim in accordance with law. When claimant's condition is medically stationary, the insurer 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 the insurer directly to claimant's attorney.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 5, 2005

² In our prior order, we found that, as of April 19, 2004, claimant's compensable condition worsened pursuant to ORS 656.278(1)(a) (2001); *i.e.*, the worsening resulted in an inability to work and required surgery. Therefore, April 19, 2004 is the "date of disability" for the purpose of determining whether claimant was in the work force. As such, the relevant period for which claimant must establish she was in the work force is the time prior to April 19, 2004, when her compensable condition worsened resulting in an inability to work and requiring surgery. *See generally Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *SAIF v. Blakely*, 160 Or App 242 (1999); *Paul M. Jordan*, 49 Van Natta 2094 (1997).

³ Although given an opportunity to respond, the insurer chose not to offer further comment on this matter.