In the Matter of the Compensation of
EDWARD J. FIX, Claimant
Own Motion No. 04-0474M
OWN MOTION ORDER
Unrepresented Claimant
Liberty NW Ins Corp, Insurance Carrier

Reviewing Panel: Members Lowell and Biehl.

The insurer has submitted claimant's request for reopening of his Own Motion claim for a worsened condition. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. Although the insurer recommends reopening of claimant's 1991 claim, it contends that he has withdrawn from the work force. *See Clarence Hawelu*, 56 Van Natta 3010 (2004). Based on the following reasoning, we authorize the reopening of claimant's claim.

There are three requirements for reopening an Own Motion claim for a worsening of a compensable injury. First, the worsening must result in the partial or total inability of the worker to work. 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. 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); *James J. Kemp*, 54 Van Natta 491, 503 (2002).

Under the *Dawkins* criteria, 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 making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258; *Kemp*, 54 Van Natta at 502-03.

Finally, 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, 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).

Here, claimant meets the first two requirements for the reopening of an Own Motion claim for a worsening of a compensable injury. In this regard, on September 17, 2004, Dr. Gay, his attending physician, recommended hernia repair surgery, noting that he would be able to return to modified work after recovery from the surgery.

Thus, as of September 17, 2004, claimant's compensable condition worsened pursuant to ORS 656.278(1)(a) (2001); *i.e.*, by that date, the worsening required surgery and resulted in an inability to work. Therefore, September 17, 2004, is the "date of disability" for the purpose of determining whether claimant was in the work force.

As summarized above, under the *Dawkins* criteria, 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 making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258; *Kemp*, 54 Van Natta at 502-03.

The insurer contends that claimant was not in the work force at the time of the current disability. However, with its recommendation form, the insurer submits claimant's October 10, 2004 work/educational history form. In that form, claimant reports that he has been drawing unemployment benefits, as well as substitute teaching. These representations are uncontested.

The receipt of unemployment benefits is *prima facie* evidence that claimant is willing to work and is making reasonable efforts to obtain employment. *See Kenneth F. Pierce*, 52 Van Natta 367 (2000) ("work force" requirement satisfied when the insurer did not dispute that the claimant was receiving unemployment benefits); *Carol L. Conaway*, 43 Van Natta 2267 (1991) ("work force" requirement satisfied when the claimant's attending physician noted that the claimant was receiving unemployment benefits and the insurer did not dispute the physician's contentions).

Here, as previously discussed, the insurer does not contest claimant's representations that he has been receiving unemployment benefits and has been a substitute teacher. Under such circumstances, we find that claimant was in the work force at the time of his current disability.

Thus, based on the record, we are persuaded that claimant meets the criteria

necessary for his claim to be reopened for a "worsening" of his accepted condition ("umbilical hernia"). ORS 656.278(1)(a) (2001); *Jeffrey C. Davis*, 56 Van Natta 3279 (2004). Accordingly, 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.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 5, 2005