

In the Matter of the Compensation of  
**YVONNE M. GARCIA , Claimant**

Own Motion No. 02-0322M

FINAL OWN MOTION ORDER AND OWN MOTION ORDER

Westmoreland & Mundorff, Claimant Attorneys

Vavrosky Maccoll Olson et al, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

The self-insured employer has submitted claimant's request for reopening of her Own Motion claim for a "post-aggravation rights" new or omitted medical condition (left shoulder impingement) or for a worsening of her accepted left forearm tendinitis condition. *See* ORS 656.278(1)(a), (b) (2001). Claimant's aggravation rights under her 1996 injury claim have expired. The employer opposes the reopening of the claim, contending that claimant's accepted condition has not worsened and her new or omitted medical condition is not related to the previously accepted claim. We deny reopening of the claim.

FINDINGS OF FACT

On February 26, 2003, we referred claimant's request for Own Motion relief to the Hearings Division for an Administrative Law Judge (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 27, 1996 claim.

A hearing convened on May 5, 2003. On September 9, 2004, ALJ Riechers issued an "Own Motion Recommendation,"<sup>1</sup> recommending that we deny claimant's request for "Own Motion" reopening of the claim.<sup>2</sup>

---

<sup>1</sup> In *Fitch v. Solesbee Cutting*, 196 Or App 632 (December 15, 2004), the court held that OAR 438-012-0090 (WCB Admin. Order 2-2003, eff. September 1, 2003) applied to "post-aggravation rights" new medical condition claims initiated before September 1, 2003, the effective date of that rule. Therefore, pursuant to OAR 438-012-0090 (WCB Admin. Order 2-2003), we treat that portion of the ALJ's decision that addressed claimant's "post-aggravation rights" new medical condition as a "Proposed and Final Own Motion Order." *See June J. Holmes*, 57 Van Natta 136 (2005).

<sup>2</sup> After receiving the ALJ's Own Motion Recommendation, the Board implemented a briefing schedule. Having received the parties' briefs, we proceed with our review based on the parties' arguments and the record developed at the hearing level.

We adopt those portions of the ALJ's "Findings of Fact" contained in the ALJ's Own Motion Recommendation, which found that claimant's accepted 1996 "left forearm tendinitis" is not compensably related to her current left shoulder condition.

### CONCLUSIONS OF LAW AND OPINION

#### Worsening

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 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.

We adopt those portions of the reasoning and conclusions contained in the ALJ's "Own Motion Recommendation" that conclude that claimant's accepted left forearm tendinitis condition has not worsened.

#### New or Omitted Medical Condition

There are two requirements that must be satisfied for the reopening of an Own Motion claim for a "post-aggravation rights" new or omitted medical condition claim under ORS 656.278(1)(b) (2001). First, the new or omitted medical condition claim must have been initiated after the expiration of claimant's aggravation rights under ORS 656.273. Second, the new or omitted medical condition must be accepted or compensable. *James J. Kemp*, 54 Van Natta 491 (2002).

We adopt those portions of the reasoning and conclusion contained in the ALJ's "Own Motion Recommendation" that address the relationship between claimant's current left shoulder condition and her accepted 1996 injury.<sup>3</sup> We find

---

<sup>3</sup> However, we find that claimant's left shoulder impingement is properly analyzed as a "new medical condition" (rather than an "omitted condition") because it was not diagnosed until after the

that the record does not establish a compensable connection between the accepted 1996 left forearm injury and claimant's current left shoulder condition. (See Exs. 16, 17, 19, 20, 26-2, 29; see also Exs. 22, 23, 24-6-7, 31-2; compare Tr. 12). See ORS 656.005(7)(a). See *Albany General Hospital v. Gasperino*, 113 Or App 411 (1992) (condition or need for treatment that is directly caused by an industrial accident is analyzed under a material contributing cause standard); see *Terry L. Toureen*, 56 Van Natta 2574, 2475 (2004) (medical opinion insufficient to establish material causation, because it failed to adequately address the claimant's particular circumstances, even though *weighing* of competing causes not required).

In reaching this conclusion, we reject that portion of the ALJ's recommendation that the employer be directed to *accept* claimant's left shoulder impingement condition. We reason as follows.

On October 31, 2002, the employer received claimant's written request for acceptance of a "left shoulder injury, as diagnosed by Dr. Neitling in the enclosed chartnotes." The chartnote in question diagnosed claimant's left shoulder condition as "chronic left shoulder impingement." It is dated June 19, 2002 and refers to claimant's then-current condition and diagnosis. (See Ex. 20).

Similarly, the December 23, 2002 denial in question acknowledges receipt of the above request, for acceptance of "the left shoulder injury, as diagnosed by Dr. Neitling in the enclosed chartnotes." (Ex. 25-1). The denial asserts that "this condition \* \* \* is not related to the injury of October 27, 1996. (*Id.*) Thus, the denial refers to the same then-current condition and diagnosis as did the request for acceptance. Under such circumstances, the denied claim pertains to claimant's left shoulder condition ("as diagnosed" by Dr. Neitling's June 2002 chartnote).

This conclusion about the nature of the claim is confirmed by the hearing transcript. At the outset of the hearing, the ALJ asked claimant's counsel, "And what are the issues today \* \* \*?" (Tr. 4).

Claimant's counsel replied, "We have an omitted condition claim. Actually, there were two issues raised by the Denial, which is at Exhibit 25, a December 23, '02 Denial for a left shoulder impingement condition, as an omitted condition, and also an aggravation Denial for an accepted left forearm tendinitis condition."

---

employer's January 27, 1997 acceptance of claimant's left forearm tendinitis. (See Exs. 7, 8). See *Kimberly R. Rice*, 52 Van Natta 138 (2000).

---

(*Id.* at 5). Counsel agreed that the claim is “Own Motion status,” noting that the “Denial was appealed to the Board, who then remanded it [to the ALJ] for a – evidentiary fact-finding hearing. (*Id.*)

The ALJ then reasoned that she “was being asked to issue a recommendation to the Board, and the way I see this file there are no separate issues other than the Own Motion new or omitted medical condition aggravation issues.” The parties agreed with the ALJ’s statement of issues. (*Id.* at 6).

Considering the written claim, the denial, and the statement of issues at hearing, we conclude that the “left shoulder issue” pertained to claimant’s then-current left shoulder condition (as diagnosed in June 2002) and whether that condition was compensably related to her 1996 accepted injury. For the reasons expressed in the ALJ’s recommendation and supplemented in this order, that condition is not compensable.

In sum, we have determined that claimant’s accepted condition has not worsened and her new medical condition is not compensable. Consequently, claim reopening of claimant’s 1996 claim under ORS 656.278(1)(a) or (b) (2001) is not warranted. Accordingly, we deny claimant’s request for Own Motion relief.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 4, 2005