

In the Matter of the Compensation of
RICHARD L. SMITH, Claimant
Own Motion No. 04-0457M
OWN MOTION ORDER
Juli Upton, Claimant Attorneys
SAIF Corporation, Defense Attorneys

Reviewing Panel: Members Kasubhai and Lowell.

The SAIF Corporation has submitted claimant's request for claim reopening for worsening of his right knee condition ("right knee strain, tricompartmental osteoarthritis of the right knee").¹ See ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. SAIF opposes the reopening of the claim, contending, among other issues, that claimant has withdrawn from the work force. Based on the following reasoning, we authorize the reopening of claimant's claim for a "worsening" of his previously accepted conditions.

FINDINGS OF FACT

On December 16, 1980, claimant sustained a compensable right knee injury. Claimant's 1980 claim was first closed on October 20, 1982. (Ex. 6). Claimant's aggravation rights expired five years later, on October 20, 1987.

On September 20, 2004, claimant sought treatment with Dr. Brazer, his primary care physician, for right knee pain. Dr. Brazer diagnosed an acute right knee strain and released claimant from work. (Ex. 10).

On October 5, 2004, claimant was examined by Dr. Whitney, his attending surgeon. Dr. Whitney noted that claimant was suffering from severe right knee pain, had been on crutches the last couple of weeks, and had not been able to work. (Ex. 11). Dr. Whitney injected claimant's right knee with cortisone, hoping to avoid arthroscopic surgery. (Ex. 11-3). Dr. Whitney released claimant to light duty work. (Exs. 11-3, 12).

On October 19, 2004, Dr. Whitney examined claimant and noted that the injection provided little relief. He reported that claimant had to give up his job because of his right knee pain. Dr. Whitney opined that claimant was unable to

¹ SAIF has voluntarily reopened claimant's 1980 claim for a "post-aggravation rights" new medical condition ("tricompartmental osteoarthritis of the right knee"). ORS 656.278(5) (2001); ORS 656.278(1)(b) (2001).

work due to his right knee condition. Dr. Whitney requested authorization for a right knee arthroscopy. (Ex. 13, 14).

Claimant submitted a partially complete work history form, noting that he last worked in January 2004. (Ex. 17).

In November 2004, claimant underwent an insurer-arranged medical examination (IME) with Dr. Smith. Claimant reported that, despite seeking treatment in April 2003 for right knee pain, he continued working as a logger until September 2004. Dr. Smith observed that, due to claimant's degenerative right knee changes, his right knee had "decompensated." Concluding that claimant was unable to return to work as a logger, Dr. Smith believed that claimant would eventually require a total knee arthroplasty. (Ex. 18).

In a November 22, 2004, written statement, claimant noted that he had been working for Cotter Mechanical and Pat's Tree Service. He also represented that another employer had agreed to "put [him] to work," but had rescinded the offer when it learned of his surgery request. Claimant asserted that he was still looking for odd jobs and attempting self-employment. (Ex. 19).

According to a written statement from Pat's Tree Service, claimant had been employed from August 1, 2004 until the early September 2004. Pat's Tree Service also noted that claimant had worked for Cotter Mechanical. (Ex. 20). In a completed work history form, claimant reported that he last worked in September 2004. (Ex. 21-2).

CONCLUSIONS OF LAW AND OPINION

There are three requirements for the reopening of an Own Motion claim for a worsening of a compensable injury. *See* ORS 656.278(1)(a) (2001). 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.

Here, claimant meets the first two reopening requirements. In this regard, Dr. Whitney recommended surgery and released claimant from work due to a worsening of his compensable right knee condition. Thus, claimant's compensable right knee condition worsened resulting in the inability to work and requiring surgery. However, claimant must also establish that he was in the work force at the "time of disability" as defined under the *Dawkins* criteria.

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 or 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).

On October 19, 2004, claimant sought right knee treatment from Dr. Whitney, who recommended surgery and noted that he was unable to work due to the "worsening" of his right knee condition. Based on Dr. Whitney's comments, we conclude that claimant sustained an inability to work and was in need of surgery for his compensable right knee condition as of October 19, 2004. In other words, as of October 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, October 19, 2004 is the "date of disability" for the purpose of determining whether claimant was in the work force. *Thurman M. Mitchell*, 54 Van Natta at 2616. The relevant time period for which claimant must establish he was in the work force is the time prior to October 19, 2004, when his 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); *Tina M. Miller*, 57 Van Natta 38 (2005).

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 at 258; *Kemp*, 54 Van Natta 502-03.

SAIF contends that claimant was not in the work force because he has not submitted any proof of earnings. Claimant responds that he was in the work force because he continued working until his compensable condition worsened requiring surgery. In support of his contentions, claimant's employer's letter verified that he was employed until early September 2004. SAIF has not rebutted this submission. Under such circumstances, we are persuaded that claimant was in the work force at least until early September 2004. See *Thomas H. Tenpas*, 50 Van Natta 2050 (1998); *Mark C. Brunson*, 49 Van Natta 1170 (1997); *Michael C. Batori*, 49 Van Natta 535 (1997).

However, the "date of disability" is October 19, 2004. Thus, claimant must establish that he was in the work force in the time period prior to October 19, 2004. See *Jeffrey L. Coefield*, 53 Van Natta 614 (2001) (seven to nine week period between prior claim closure/medically stationary date and worsening not so brief so as to relieve the claimant of the burden of proving "work force" issue); *Robert D. Peck*, 45 Van Natta 2202 (1993) (same -- five to seven week period).

Inasmuch as claimant acknowledged that he last worked in early September 2004, he must establish that he was in the work force under the second or third *Dawkins* criteria. In his written statement, claimant represented that, although he required surgery, he was trying to find work and attempting self-employment. However, claimant does not submit corroborating evidence demonstrating his work search. Although claimant's statement does not satisfy the requirement of proving a reasonable work search under the second *Dawkins* criteria, we find that it does demonstrate his willingness to work.

Having established the "willingness" part of the third *Dawkins* criterion, claimant must also establish that his compensable condition made it futile for him to work. Based on the following reasoning, we concluded that claimant has satisfied this requirement.

On September 20, 2004, Dr. Brazer released claimant from full work. On October 5, 2004, although noting that claimant was on crutches and out of work because of right knee pain, Dr. Whitney released claimant to light duty after injecting the right knee. (Ex. 11, 12). However, within two weeks, Dr. Whitney reexamined claimant, noted that the prior injection provided little relief, and stated

that he was unable to work due to his compensable right knee conditions. (Ex. 13). When read as a whole, we are persuaded that the medical evidence establishes that it was futile for claimant to work and/or seek work due to a worsening of his compensable conditions prior to the date of disability, *i.e.* October 19, 2004. *Susie Fimbres*, 51 Van Natta 1917 (1999); *Bethel A. Lamping*, 50 Van Natta 883 (1998).

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 conditions. ORS 656.278(1)(a) (2001); *Jeffrey C. Davis*, 56 Van Natta 3279 (2004). Accordingly, we authorize the reopening of the claim for SAIF to process the claim in accordance with law. When claimant’s condition is medically stationary, SAIF 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 SAIF directly to claimant's attorney. See OAR 438-015-0010(4); 438-015-0080.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 15, 2005