

In the Matter of the Compensation of  
Own Motion Nos. 04-08212, 03-0446M  
**SHARON Y. HARPER, Claimant**  
FINAL OWN MOTION ORDER AND OWN MOTION ORDER  
Black Chapman et al, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

The insurer requested review of Administrative Law Judge (ALJ) Brazeau's "Proposed and Final Own Motion Order" that set aside its denial of the "post-aggravation rights" new/omitted medical condition ("L5-S1 disc protrusion"). The insurer has also submitted "Carrier's Own Motion Recommendation" forms, indicating that claimant requests that it reopen her 1995 low back injury claim for a "worsened" condition and a "post-aggravation rights" new/omitted medical condition ("L5-S1 disc protrusion"). See ORS 656.278(1)(a), (1)(b) (2001). The insurer recommended against reopening either claim.

Based on the following reasoning, we affirm the ALJ's "Proposed and Final Own Motion Order." In addition, we authorize the reopening of the "post-aggravation rights" new/omitted medical condition claim under ORS 656.278(1)(b) (2001), but not the "worsened" condition claim under ORS 656.278(1)(a) (2001).

#### FINDINGS OF FACT

We adopt the ALJ's findings of fact in the "Proposed and Final Own Motion Order."

#### CONCLUSIONS OF LAW AND OPINION

On February 17, 1995, claimant sustained a compensable injury, which the insurer accepted as disabling right elbow contusion and laceration, right hip contusion and right lumbar strain. In 1995 and 1998, claimant underwent low back surgeries that were paid by the insurer. Claimant's aggravation rights expired on July 1, 2001.

In 2003, claimant complained of significant increase in left leg and low back pain and Dr. Saviers, her attending physician, submitted a Form 827 aggravation claim on her behalf. A March 2003 MRI suggested that there was an "internal left posterolateral disc extrusion extending into the left neural foramen" (Ex. 60).

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On September 30, 2003, Dr. Louie, neurosurgeon, decompressed the left L5 nerve root.

On October 21, 2003, the insurer issued a denial of claimant's medical services claim, denying authorization for the September 2003 surgery and related medical care. Claimant requested a hearing on that denial. That same date, the insurer submitted a "Carrier's Own Motion Recommendation," recommending against reopening for a "worsening" of the previously accepted right lumbar strain condition. *See* ORS 656.278(1)(a) (2001).

On October 27, 2003, claimant initiated a claim for a "post-aggravation rights" new/omitted medical condition for an "L5-S1 disc protrusion." On November 25, 2003, the insurer issued a partial denial, denying that claim. (Ex. 73). Claimant requested a hearing on that denial.

In a November 10, 2003 letter clarifying its position regarding its "Carrier's Own Motion Recommendation," the insurer indicated that it appeared that claimant's request for Own Motion relief involved both a claim for a "worsened" condition and a "post-aggravation rights" new/omitted medical condition.

On December 31, 2003, we deferred further action on claimant's "worsened" condition claim until ALJ resolution of the pending hearing matters and reminded the insurer of its responsibility to process the "post-September 1, 2003" "post-aggravation rights" new/omitted medical condition claim under the Board's Own Motion rules.

In March 2004, a hearing was held regarding the October 21, 2003 medical service denial and the November 25, 2003 partial denial of the "post-aggravation rights" new/omitted medical condition. On April 13, 2004, the ALJ issued an Opinion and Order that purported to set aside both denials. The insurer requested review.

On November 17, 2004, we issued an interim order that vacated that portion of the ALJ's order that purported to address compensability of the "post-aggravation rights" new/omitted medical condition claim for an L5-S1 disc protrusion. In reaching this result, we determined that, because the ALJ did not issue a separate "Proposed and Final Own Motion Order" under OAR 438-012-0090 with the correct appeal rights, that portion of the ALJ's order addressing compensability of the "post-aggravation rights" new/omitted medical condition claim was not final and, therefore, not reviewable. We directed the ALJ to issue a

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Proposed and Final Own Motion Order pursuant to OAR 438-012-0090 regarding the “post-aggravation rights” new/omitted medical condition claim and directed the insurer to process that claim pursuant to ORS 656.278(1)(b) (2001). Finally, we postponed action on the medical service issue.

On November 24, 2004, the ALJ issued a “Proposed and Final Own Motion Order,” finding compensable the “post-September 1, 2003” “post-aggravation rights” new/omitted medical condition claim (L5-S1 disc protrusion). The insurer requested review of that order. In addition, the insurer has processed this claim by issuing a “Carrier’s Own Motion Recommendation” that recommends against reopening the claim under ORS 656.278(1)(b) (2001). We proceed with our review.<sup>1</sup>

We adopt the ALJ’s reasoning and conclusions regarding compensability of the “post-aggravation rights” new/omitted medical condition (L5-S1 disc protrusion), with the exception of the last two sentences of the first paragraph on page 12 of the order. Specifically, with that exception, for the reasons explained by the ALJ, we find that Dr. Saviers’ opinion, especially as explained in his deposition, persuasively established the compensability of that condition.

Claimant is entitled to an assessed attorney fee for her counsel’s services at hearing and before the Board regarding the denied “post-aggravation rights” new/omitted medical condition claim. OAR 438-015-0080(6) and (7).

After considering the factors set forth in OAR 438-015-0010(4), the ALJ awarded a \$5,500 attorney fee, to be paid by the insurer. We adopt that ALJ’s uncontested determination. Furthermore, after considering the aforementioned factors and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services before the Board on review of the ALJ’s decision regarding the L5-S1 condition is \$2,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant’s respondent’s brief), the complexity of the issue, and the value of the interest involved.

We turn to the questions of whether claimant qualifies to have her claim reopened for Own Motion relief under ORS 656.278(1)(a) and/or (1)(b) (2001).

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<sup>1</sup> On today’s date, we issued an Order on Review that addresses the medical service issue.

ORS 656.278(1)(a) (2001) establishes three requirements for the reopening of 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. *James J. Kemp*, 54 Van Natta 491, 505 (2002).

ORS 656.278(1)(b) (2001) establishes two requirements regarding claim reopening for a “post-aggravation rights” new or omitted medical condition. First, the new or omitted medical condition claim must be initiated after the expiration of the 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 at 507-08.

We conclude that claimant has met the requirements for the reopening of her claim for a “post-aggravation rights” new/omitted medical condition under ORS 656.278(1)(b) (2001). Our conclusion relies on the following reasoning.

Here, claimant’s aggravation rights expired in July 2001 and she initiated her new/omitted medical condition claim in October 2003, after the expiration of her aggravation rights. In addition, we have found the “post-aggravation rights” new/omitted medical condition for L5-S1 disc protrusion compensable. Therefore, we conclude that claimant meets the requirements for the reopening of her Own Motion claim under ORS 656.278(1)(b) (2001).

Because our review of the record does not establish that the requirements for a reopening based on a “worsening” of the accepted condition have been met, we conclude that a reopening under ORS 656.278(1)(a) (2001) is unwarranted.<sup>2</sup>

Accordingly, we authorize the reopening of claimant’s new/omitted medical condition claim under ORS 656.278(1)(b) (2001) for the insurer to provide benefits in accordance with law. When claimant is medically stationary, the insurer shall close the claim pursuant to OAR 438-012-0055, including payment of any

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<sup>2</sup> The medical opinions authored by Drs. Saviers and Louie established that the accepted low back strain condition has not “worsened.” Rather, claimant’s inability to work, hospitalization, and required surgery were caused by her “post-aggravation rights” new/omitted medical condition (L5-S1 disc herniation). See *Gayle Kovalski*, 56 Van Natta 435 n1 (2004).

permanent disability award for the new medical condition determined under ORS 656.278(1)(b) and (2)(d) (2001).

IT IS SO ORDERED.

Entered at Salem, Oregon on March 7, 2005