

In the Matter of the Compensation of
DAVID TOKAY, Claimant
Own Motion No. 05-0033M
OWN MOTION ORDER
Unrepresented Claimant
Crawford & Co Ins Adj Inc, Insurance Carrier

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer has submitted claimant's request for reopening of his "worsening" claim for his previously accepted right wrist, left ankle, right foot and low back conditions. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. The employer opposed reopening, contending that claimant's compensable conditions do not require any medical treatment that qualifies his claim for reopening. Based on the following reasoning, we deny claim reopening.

FINDINGS OF FACT

Claimant was compensably injured on June 20, 1994. The employer accepted a fracture right wrist, left ankle, right foot, and L-2 vertebra. Claimant's aggravation rights have expired.

In November 2004, Dr. Casey, claimant's attending physician, discussed claimant's current conditions. Noting the injuries claimant incurred in his right wrist, left ankle and right foot, Dr. Casey expected that claimant would develop some posttraumatic arthritis, requiring further pain treatment.

Dr. Casey also described some arthritic changes in claimant's lumbar spine, suggestive of objective evidence of a worsening. However, reporting that claimant remained employed, Dr. Casey concluded that the mild progression of claimant's symptoms had not increased his level of disability.

CONCLUSIONS OF LAW AND OPINION

Among the requirements for claim reopening under ORS 656.278(1)(a) (2001), there must be a worsening that requires 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.

In *Larry D. Little*, 54 Van Natta 2536 (2002), we concluded that if any one of the three qualifying medical treatments listed in ORS 656.278(1)(a) (2001) is satisfied, a “worsening condition” claim meets the medical treatment requirement for reopening in Own Motion. In *Little*, we defined the three qualifying medical treatments listed in ORS 656.278(1)(a) (2001) in the following manner: (1) “Surgery” is defined as an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker; and (2) “hospitalization” is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility. *Id.* at 2542. The third type of qualifying treatment requires establishment of three elements: (1) curative treatment (treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery); (2) prescribed (directed or ordered by a doctor) in lieu of (in the place of or instead of) hospitalization; and (3) that is necessary (required or essential) to enable (render able or make possible) the injured worker to return to work. *Id.* at 2546.

Whether a worsening of the compensable injury requires 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” presents a medical question that must be addressed by medical evidence. In other words, we cannot infer that a treatment involves 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.” *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (“the Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”); *Terry L. Smith*, 55 Van Natta 2763 (2003). This question must be answered by persuasive medical evidence.

Based on our review, the record does not establish that claimant’s conditions worsened requiring hospitalization, surgery or other curative treatment that was prescribed in lieu of (instead of or in place of) hospitalization that was necessary to enable him to return to work. ORS 656.278(1)(a) (2001); *Little*, 54 Van Natta at 2546. Although Dr. Casey noted that claimant’s wrist, ankle and foot conditions required medical treatment, there has not been a recommendation for any of the requisite medical treatments described above.¹

¹ Additionally, the employer contends that claimant’s compensable condition has not worsened resulting in an “inability to work.” ORS 656.278(1)(a) (2001). In this particular case, this matter need not be addressed because even if the “inability to work” issue was found in claimant’s favor, the claim would still not qualify for reopening under ORS 656.278(1)(a) (2001) for the reasons expressed above.

Under these circumstances, we conclude that this Own Motion claim for a worsening of claimant's previously accepted conditions (fracture right wrist, left ankle, right foot, and L-2 vertebra) does not satisfy the criteria set forth in ORS 656.278(1)(a) (2001) to qualify this worsening claim for reopening.²

Consequently, we deny the reopening of the Own Motion claim.³

IT IS SO ORDERED.

Entered at Salem, Oregon on March 9, 2005

² If a party obtains medical evidence that addresses the requisite medical treatment and "inability to work" components, that party may request reconsideration of our decision. ORS 656.278(1)(a) (2001). However, because our authority to reconsider this decision expires within 30 days after the mailing date of the Own Motion Order, the reconsideration request must be filed within that 30-day period. OAR 438-012-0065(2).

³ Finally, inasmuch as claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. He may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405