In the Matter of the Compensation of
NANCY K. EDLUND, Claimant
Own Motion No. 04-0215M
OWN MOTION ORDER REFERRING FOR CONSOLIDATED HEARING
Cary et al, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The insurer has submitted a "Carrier's Own Motion Recommendation," indicating that claimant seeks reopening of her 1994 injury claim for a worsening of her compensable cervical and lumbar injury. *See* ORS 656.278(1)(a) (2001). The insurer recommends against reopening for a worsening of claimant's compensable condition, contending that: (1) claimant's current condition is not causally related to the previously accepted condition; (2) it is not responsible for claimant's current condition; (3) the recommended treatment is not reasonable and necessary for claimant's compensable conditions; and (4) claimant was not in the work force at the time of the disability.

Claimant sustained a compensable cervical and lumbar injury on July 17, 1994. Her aggravation rights have expired. Claimant requested a hearing, alleging a *de facto* denial of her current condition. (WCB Case No. 05-02343). A hearing is set before an Administrative Law Judge (ALJ) on July 14, 2005.

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 a partial or total inability of the worker to work. *See James J. Kemp*, 54 Van Natta 491, 505 (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).[1] *Id*. If a claimant meets these

[1] Pursuant to the Court's reasoning in *Dawkins*, 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 seeking work; or (3) not employed, but willing to work and is not seeking work because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258.

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

requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

Here, the insurer opposes the reopening of claimant's 1994 injury claim for the worsening of her previously accepted cervical and lumbar injury. *See* ORS 656.278(1)(a) (2001). The insurer contends, among other issues, that claimant is not in the work force.

In response, claimant requests referral of the Own Motion matter to the Hearings Division for a fact finding hearing. The insurer does not oppose claimant's request.

Under such circumstances, and considering the legal, medical and factual complexity of some of the disputed issues, we consider it appropriate to consolidate the Own Motion matter with the pending litigation. OAR 438-012-0040(3); *Dennis C. Gross*, 56 Van Natta 133 (2004); *Phyllis M. Morris*, 55 Van Natta 3807 (2003).

At the hearing, the record can be further developed regarding the parties' contentions. In submitting their respective positions, the parties are requested to address the effect, if any, the following points and authorities have on their disputes in this worsening claim: ORS 656.278(1)(a) (2001); *Rodney M. Waldrip*, 56 Van Natta 1516 (2004); *Everett H. Rishel*, 55 Van Natta 4169 (2003); *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

In addition to an order in WCB Case No. 05-02343, the ALJ is directed to forward to the Board a separate, unappealable recommendation with respect to any Own Motion matters and a copy of the order issued in WCB Case No. 05-02343.[2] In that recommendation, the ALJ shall make findings of fact and conclusions of law regarding the Own Motion issues. In addition, if the matter is resolved by stipulation or Disputed Claim Settlement, the ALJ is directed to submit a copy of

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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).

[2] If the insurer subsequently issues a Form 3501, announcing that it is voluntarily reopening this currently disputed claim, the parties should notify the Board. In the event that the issuance of the voluntary claim reopening form comes to our attention, we will consider dismissal of this Own Motion matter. *See Jesse C. Day*, 55 Van Natta 2366, 2369-70 (2003).

the settlement document to the Board. After issuance of the recommendation and order (or settlement document), the parties should advise the Board of their respective positions regarding the Own Motion matters.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 19, 2005