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In the Matter of the Compensation of  
**ALBERT NACOSTE JR., Claimant**  
Own Motion No. 05-0059M  
OWN MOTION ORDER  
Unrepresented Claimant  
SAIF Corporation, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The SAIF Corporation has submitted claimant's request for claim reopening for his "worsening" claim for previously accepted low back conditions. *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 he was not in the work force at the time of the current disability.

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).<sup>1</sup> *Id.* If a claimant meets these requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

Here, claimant's "work force" status has been challenged. Thus, claimant must provide evidence, such as copies of paycheck stubs, income tax forms, unemployment compensation records, a list of employers where claimant looked for work and dates of contact, a letter from the prospective employer, or a letter from a doctor stating that a work search would be futile because of claimant's compensable condition for the period in question. *Stuart T. Valley*, 55 Van Natta 475 (2003). Where, as here, such evidence is absent from the record, we are

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<sup>1</sup> 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.

unable to authorize claim reopening.<sup>23</sup> ORS 656.278(1)(a) (2001); *Stuart T. Valley*, 55 Van Natta at 478-79.<sup>4</sup>

Accordingly, the request for reopening of claimant's "worsening" claim is denied.<sup>5</sup> Claimant's entitlement to medical expenses pursuant to ORS 656.245 is not affected by this order.<sup>6</sup>

IT IS SO ORDERED.

Entered at Salem, Oregon on May 4, 2005

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<sup>2</sup> In his requests, claimant seeks "redetermination" because his condition has worsened and requests temporary disability. Benefits, such as temporary disability, are only available in reopened claims. However, a claim must meet the statutory requirements to be reopened. *See Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990). Here, because the record does not establish that claimant is in the work force, his claim does not meet those requirements. Consequently, temporary disability benefits are not available.

<sup>3</sup> Claimant's request for "redetermination" has been interpreted as a request for benefits under this Own Motion "worsening" claim. The dispute over the entitlement to such benefits in an Own Motion claim arises out of a claim reopening which is under our Own Motion jurisdiction. ORS 656.278. Consequently, we have addressed the dispute regarding Own Motion claim reopening issues in this order.

<sup>4</sup> Additionally, SAIF contended that claimant's compensable conditions had not worsened requiring the requisite medical treatment or resulted in an "inability to work." ORS 656.278(1)(a) (2001). In this particular case, these matters need not be addressed because even if the "medical treatment" and "inability to work" issues were found in claimant's favor, the record would still be insufficient to support a claim reopening under ORS 656.278(1)(a) (2001) for the reasons expressed above.

<sup>5</sup> If a party obtains evidence that addresses the "work force," "medical treatment," and "inability to work" components of the statutory standard that are lacking from the current record, that party may request reconsideration of our decision. 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).

<sup>6</sup> 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