
In the Matter of the Compensation of
JAMES T. PHILLIPS, Claimant
Own Motion No. 05-0090M
OWN MOTION ORDER
Unrepresented Claimant
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer has submitted claimant's request to reopen his claim for a worsening of his accepted L5-S1 herniated disc condition. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. Based on the following reasoning, we find that his claim does not qualify for reopening.

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

In our Order on Review, we have found that claimant's medical services claim for his 1979 low back injury was not compensable. (WCB Case No. 03-03148). Nevertheless, even if those medical services were compensable, there is no medical evidence that claimant sustained a worsening of his compensable injury 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 April 2002, claimant sought treatment from Dr. Wenner, orthopedist, for low back pain. (Ex. 228).¹ Dr. Wenner opined that claimant was not a candidate for surgery and recommended an aerobic conditioning program, a smoking cessation program, and anti-inflammatory medication. (Ex. 228-1). At claimant's request, Dr. Wenner referred claimant to Dr. O'Sullivan, orthopedist. (Ex. 231).

¹ The exhibits referenced are from the record in WCB Case No. 03-03148.

Dr. O’Sullivan did not recommend surgery and, instead, referred claimant to Dr. Greenberg for possible injection therapy. (Ex. 234). Although Dr. Greenberg discussed the possibility of diagnostic facet injections, because claimant was not in pain at that time, which he stated was a prerequisite for effective facet injections, he did not perform the facet injections. (Ex. 235). Instead, claimant underwent a discogram. Following that test, Dr. Greenberg concluded that claimant was not a candidate for surgery, a conclusion with which Dr. O’Sullivan agreed. (Ex. 239). On October 31, 2003, Dr. Greenberg stated that claimant “might at some point require further surgery on that L5/S1 disc;” however, he did not recommend surgery at that time. (Ex. 244).

We cannot infer that a compensable condition worsened requiring 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. *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (“[t]he Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”). Instead, the record must include persuasive medical evidence that claimant’s compensable L5-S1 herniated disc condition worsened, requiring such medical treatment. *Carolyn B. Kayate*, 57 Van Natta 2012, 2013 (2005); *Larry D. Little*, 54 Van Natta 2536, 2543 (2002).

Here, as summarized above, there is no medical evidence that claimant sustained a worsening of his compensable injury 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. See *Theron W. Stiehl*, 56 Van Natta 2267 (2004) (injections and possibility of surgery insufficient; no medical evidence that treatment constituted surgery, hospitalization or “other curative treatment prescribed in lieu of hospitalization” that was “necessary to enable the injured worker to return to work”); *Edwin L. Irwin*, 56 Van Natta 2195 (2004) (medication and possibility of surgery insufficient).

Under these circumstances, we conclude that this Own Motion claim for a worsened compensable L5-S1 herniated disc condition does not satisfy the requisite medical treatment criteria required under ORS 656.278(1)(a) (2001).²

² In light of our conclusion, we need not address the employer’s “compensability/responsibility,” “inability to work” and “work force” contentions. In this particular case, these matters need not be addressed because even if the “compensability/responsibility,” “medical treatment” and “work force” 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).

Accordingly, we are not authorized to reopen this Own Motion claim for a worsening of claimant's previously accepted condition (L5-S1 herniated disc).³

IT IS SO ORDERED.

Entered at Salem, Oregon on November 23, 2005

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