
In the Matter of the Compensation of
ANNE APPLGATE, Claimant
Own Motion No. 05-0391M
OWN MOTION ORDER
Edward J Hill AAL, Claimant Attorneys
VavRosky MacColl Olson et al, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer has submitted claimant's request for claim reopening based on a worsening of her previously accepted right ankle condition ("Pilon-type fracture of the right distal tibia and fibula"). ORS 656.278(1)(a). Claimant's aggravation rights have expired. The employer recommends against reopening claimant's worsened condition claim on two grounds. First, it contends that claimant's accepted right ankle condition has not worsened requiring one of the requisite medical treatments under ORS 656.278(1)(a). Second, it contends that claimant was not in the work force at the time of disability. Based on the following reasoning, we find that claimant's claim does not qualify for Own Motion "claim reopening" under ORS 656.278(1)(a).¹

FINDINGS OF FACT

Claimant sustained a compensable foot injury on November 26, 1999. The employer accepted a Pilon-type fracture of the right distal tibia and fibula. (Ex. 15). The claim was first closed on August 3, 2000, and claimant's aggravation rights expired on August 3, 2005. ORS 656.273. (Ex. 44).

On August 24, 2005, claimant sought treatment for foot pain. Diagnosing pes planus and closed fracture of the right ankle involving the tibia and fibula, Dr. Coleman, one of claimant's treating physicians, recommended physical therapy, special orthotics and medication. (Ex. 70).

On November 22, 2005, the employer submitted a "Carrier's Own Motion Recommendation" against the reopening for a "worsening" of claimant's accepted condition. The employer opposed reopening, contending, among other issues, that claimant's condition had not worsened requiring one of the statutorily required medical treatments.

¹ Because we agree with the employer's first contention, we need not address claimant's work force status regarding her entitlement to Own Motion relief under ORS 656.278(1)(a).

On November 23, 2005, Dr. Bookwalter, claimant's attending podiatrist, concurred that claimant's accepted condition had not worsened requiring a statutorily required medical treatment. (Ex. 83).

Claimant attended an insurer-arranged medical examination (IME) with Dr. Gripekoven on December 6, 2005. Dr. Gripekoven diagnosed the following conditions: (1) fracture, distal right tibia and fibular; (2) mild posttraumatic arthritis, right ankle; (3) partial sensory neuropraxia, sural nerve right; (4) mild developmental pes planus, right greater than left; and (5) degenerative disc disease of the spine. He opined that the accepted fracture had not worsened requiring any of the statutorily required medical treatments. Although agreeing that the arthritis was probably associated with the compensable fracture, Dr. Gripekoven reported that the compensable condition was medically stationary. (Ex. 85).

Dr. Bookwalter concurred with the IME's findings and conclusions. Specifically, he concurred that claimant's compensable Pilon-type fracture of the distal tibia and fibula had not worsened requiring any of the statutorily required medical treatments. (Ex. 88).

In January 2006, Dr. Coleman also concurred that claimant's compensable Pilon-type fracture of the distal tibia and fibula had not worsened requiring any of the requisite medical treatments. (Ex. 89).

On January 16, 2006, Dr. Coleman noted that as a medical sequelae of claimant's compensable fracture, she had developed an "acquired fallen arch and leg length discrepancy with a shortening of the right leg." He also noted that these conditions had worsened and required medical treatment. (Ex. 90).

On May 19, 2006, the employer issued an Amended Notice of Acceptance to include: "right pes planus, spurring of the distal right tibia, right posterior tibialis tendonitis and partial sensory neuropraxia of the right sural nerve." (Ex. 98). On June 15, 2006, the employer voluntarily reopened claimant's claim for these "post-aggravation rights" new/omitted medical conditions. (Ex. 105). ORS 656.278(1)(b); ORS 656.278(5).

CONCLUSIONS OF LAW AND OPINION

Based on Drs. Coleman's, Bookwalter's and Gripekoven's opinions, claimant's recently accepted new or omitted medical conditions may require medical treatment. Nonetheless, the previously accepted condition ("Pilon-type

fracture of the right distal tibia and fibula”), which is the condition on which this worsened condition claim is based, has not worsened requiring surgery or any other requisite medical treatment under ORS 656.278(1)(a).

Among the requirements for claim reopening under ORS 656.278(1)(a), 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. *Harold B. Hamilton*, 58 Van Natta 1338 (2006). Satisfaction of any one of these three requisite medical treatments meets the medical treatment requirement under ORS 656.278(1)(a). *Larry D. Little*, 54 Van Natta 2536 (2002).

“Surgery” is defined as an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker. *Id.* at 54 Van Natta 2542. “Hospitalization” is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility. “Other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work” 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 in lieu of (in the place of or instead of) hospitalization; and (3) that is necessary (required or essential) to enable the injured worker to return to work. *Little*, 54 Van Natta at 2546.

After conducting our review of the record, we find that no physician recommended surgery or hospitalization for the previously accepted condition. Nor is there any evidence that the physical therapy, orthotics or medication constituted “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” *See Stephen Jackson*, 55 Van Natta 2421, 2422 (2003); *Mark R. Gescher*, 55 Van Natta 1956 (2003) (ORS 656.278(1)(a) not satisfied where, although treatment (prescription medication) was arguably curative and necessary to enable the claimant to return to work, there was no evidence that the treatment was prescribed in lieu of hospitalization).² Consequently, we are unable to authorize a reopening of the Own Motion claim.³

² As noted above, the employer also contended that claimant was not in the work force at the time of disability. ORS 656.278(1)(a). In this particular case, this matter need not be addressed because even if the “work force” issue was found in claimant’s favor, the record would still be insufficient to support a claim reopening under ORS 656.278(1)(a) for the reasons expressed above.

³ Nevertheless, as noted above, the employer has already reopened claimant’s claim for “post-aggravation rights” new/omitted medical conditions (“right pes planus, spurring of the distal right tibia, right posterior tibialis tendonitis and partial sensory neuropraxia of the right sural nerve”) under

Here, the sole issue before us is whether claimant's "worsened condition" claim qualifies for claim reopening. As explained above, it does not. However, the reopened claim for the newly accepted "post-aggravation rights" new medical conditions must be processed to closure. *Duane L. Leafdahl*, 54 Van Natta 1796, 1799 (2002). Thus, if claimant subsequently disagrees with the employer's future processing of the "post-aggravation rights" new/omitted medical condition claim (for example, if the employer declines to pay temporary disability benefits and claimant disagrees with that action), she may raise her concerns to the Board at that time.

Accordingly, the request for claim reopening is denied. Claimant's entitlement to medical expenses pursuant to ORS 656.245 regarding her accepted conditions is not affected by this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on August 31, 2006

ORS 656.278(1)(b). As such, the employer is also required to process that claim to closure. Such processing may also include the payment of temporary disability compensation when the statutory requirements for such payment are satisfied. *Jennifer D. Gill*, 56 Van Natta 1617 (2004); *Delinda S. French-Davis*, 55 Van Natta 4285 (2003); *James J. Kemp*, 54 Van Natta 491 (2002). In other words, an Own Motion claim may qualify for reopening, but a claimant may not necessarily be entitled to temporary disability compensation. Furthermore, the payment of benefits on a reopened Own Motion claim is a claim processing issue, which is the responsibility of the carrier in the first instance. If a claimant disagrees with the carrier's processing of the claim, the claimant may raise his or her concerns to the Board at that time. *Duane L. Leafdahl*, 54 Van Natta 1796 (2002).