In the Matter of the Compensation of
MARC W. MCGUIRE, Claimant
Own Motion No. 06-0013M
OWN MOTION ORDER
Unrepresented Claimant
Employers Ins Of Wausau, Insurance Carrier

Reviewing Panel: Members Langer and Biehl.

The insurer has submitted claimant's request for claim reopening for a worsening of his right knee condition. *See* ORS 656.278(1)(a). Claimant's aggravation rights have expired. The insurer opposes the reopening of the claim, contending that claimant was not in the work force at the time of his disability. Based on the following reasoning, we reopen claimant's "worsening" claim.

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.

Under the *Dawkins* criteria, 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 making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258; *Kemp*, 54 Van Natta at 502-03.

Here, claimant meets the first two claim reopening requirements. In this regard, Dr. Cook, claimant's attending physician, recommended a total knee replacement. In addition, Dr. Cook noted that following the surgery, claimant would be hospitalized for 4 to 5 days.

Based on Dr. Cook's opinion, we find that claimant's compensable right knee condition worsened, requiring surgery and resulting in the inability to work. However, the insurer contends that claimant was not in the work force at the time of his current disability. Based on the following reasoning, we conclude that the *Dawkins* requirements have been satisfied.

On December 12, 2005, Dr. Cook sought authorization for a proposed surgery. On January 4, 2006, Dr. Cook noted that claimant would be hospitalized for several days following the surgery. Under such circumstances, we conclude that January 4, 2006 is the "date of disability" for the purpose of determining whether claimant was in the work force.[1]

The insurer argues that it has not received any documentation regarding claimant's "workforce" status. However, with its recommendation, the insurer submitted Dr. Laycoe's November 2005 reports, which noted that claimant either currently owned and/or operated his own construction company. Furthermore, two former employers reported that claimant had worked for them intermittently as an independent contractor from November 2003 through May 2005.

Finally, in a July 11, 2006 statement, claimant reported that he had been working in remodeling from November 2004 throughout 2005. He also noted that he tried selling automobiles until his surgery in January 2006. Claimant submitted copies of his 2005 W-2 forms.

Based on the references regarding claimant's current work activities in Dr. Laycoe's reports and the former employers' statements (along with claimant's uncontested statements and submissions), we are persuaded that claimant was in the work force on January 4, 2006. *Mark Evoniuk*, 57 Van Natta 1245 (2005) (the claimant was found to be in the work force based on work references incorporated in the record); *Larry Gibson*, 55 Van Natta 3866 (2003) (same). Consequently, the statutory criteria necessary for claim reopening under ORS 656.278(1)(a) has been satisfied.

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[1] 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 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 worker to return to work. *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

Accordingly, we authorize the reopening of the claim for the insurer to process in accordance with law. ORS 656.278(1)(a). When claimant's condition is medically stationary, the insurer shall close the claim pursuant to OAR 438-012-0055.

Claimant's attorney is allowed an approved fee in the amount of 25 percent of any increased temporary disability compensation resulting from this order, not to exceed $1,500, payable by the insurer directly to claimant's attorney. *See* OAR 438-015-0080(1).

IT IS SO ORDERED.

Entered at Salem, Oregon on August 11, 2006