In the Matter of the Compensation of
GERALD D. DUREN, Claimant
Own Motion No. 06-0061M
OWN MOTION ORDER ON RECONSIDERATION
Robert D. Carlson, AAL, Kryger et al, Claimant Attorneys
State Farm Insurance Co, Insurance Company

Reviewing Panel: Members Kasubhai and Lowell.

The insurer requests reconsideration of our June 14, 2006 Own Motion Order that declined to reopen claimant's 1981 injury claim for a "worsening" of his previously accepted lumbar conditions. *See* ORS 656.278(1)(a). Because we determined that the record did not establish that claimant's compensable conditions required any medical treatment that qualified the claim for reopening, we did not address the insurer's contention that claimant was not in the work force at the time of the current worsening. On reconsideration, the insurer submits May 2006 documents regarding a recommendation for lumbar fusion surgery. Nevertheless, the insurer continues to recommend against claim reopening based on its contention that claimant has not established that he was in the work force at the time of the current worsening.[1]

Because the aggravation rights on claimant's April 14, 1981 injury claim expired in September 1987, the claim is within our Own Motion jurisdiction. *Miltenberger v. Howard's Plumbing*, 93 Or App 475 (1988). Pursuant to ORS 656.278(1)(a), 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

[1] It is not clear whether claimant is represented. The insurer did not indicate whether claimant was represented on its "Carrier's Own Motion Recommendation" and the record does not contain a copy of any retainer agreement. However, the letter attached to the insurer's submittal on reconsideration indicates that a copy of that correspondence was sent to an attorney, presumably claimant's counsel. There is no indication that a copy of the insurer's correspondence was sent to claimant. In case claimant is not represented, we are sending a copy of the insurer's correspondence to claimant with a copy of this order.

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.[2]

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.

The "date of disability" for the purposes 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 injured worker to return to work. *David L. Hernandez*, 55 Van Natta 30 (2003); *Thurman M. Mitchell*, 54 Van Natta 2607 (2002). The "date of disability" is the date on which *both* of these factors are satisfied. *Robert J. Simpson*, 55 Van Natta 3801 (2003).

Here, on April 25, 2006, Dr. Maxwell, claimant's attending physician, reported that the prescribed steroid blocks were palliative in nature. He noted that surgical intervention would be the only curative procedure for claimant's conditions. Subsequently, on May 22, 2006, Dr. Maxwell reported that the steroid blocks only provided temporary relief and recommended lumbar fusion surgery. In addition, on May 30, 2006, Dr. Maxwell requested authorization for lumbar surgery ("decompression laminectomy with instrumented fusion L4/5-S1"). Based on these May 2006 documents, we find that claimant's compensable lumbar injury worsened requiring surgery.

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[2] As for the requirements regarding payment of benefits, where such a worsening is established, the worker may receive temporary disability benefits under ORS 656.210, ORS 656.212(2) and ORS 656.262(4) from the time the attending physician authorizes such benefits for the hospitalization, surgery, or other curative treatment until the worker becomes medically stationary, provided that the worker is in the work force during the period for which such benefits are sought. ORS 656.005(30); ORS 656.278(1)(a); ORS 656.278(2)(b); *Kemp*, 54 Van Natta at 505.

However, as addressed above, claimant must also prove that the worsening resulted in an inability to work and that he was in the work force under the *Dawkins* criteria. As developed, the record does not establish either of these requirements.

The medical evidence does not satisfy the "inability to work" statutory requirement. Dr. Maxwell has recommended surgery. However, no portion of the record addresses whether claimant's worsening (which requires surgery) resulted in a total or partial inability to work. Standing alone, claimant's recommended surgery is insufficient to establish an "inability of the worker to work" under ORS 656.278(1)(a). The resolution of the inability to work issue is a medical question that must be answered by medical evidence. In other words, we cannot infer that a worsening (or a particular medical treatment) will result in an inability to work. *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) ("the Board is not an agency with specialized knowledge"); *Andrew J. Duby*, 57 Van Natta 833 (2005). Instead, for claimant to prevail, he must obtain and submit medical evidence, such as an opinion from his physician, that claimant's compensable lumbar conditions worsened resulting in an inability to work. ORS 656.278(1)(a).[3]

In addition, claimant has not proved that he remained in the work force under the *Dawkins* criteria, as summarized above. In an April 5, 2006 letter, claimant stated that he worked at a recreational vehicle resort until February 2006, when he began working for a security company. Claimant also submitted a copy of a November 2005 paycheck stub from the recreational vehicle resort. However, this 2005 paycheck stub copy does not establish that claimant remained employed by the security company at the "date of disability" or, if not, whether he remained willing to work and was making reasonable efforts to obtain employment or was not making reasonable efforts to obtain employment because a work-related injury made such efforts futile.[4] *Dawkins*, 308 Or at 258.

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[3] Medical evidence includes, but is not limited to, a copy of a medical statement, chart note or report from claimant's attending physician establishing that claimant's compensable condition worsened: (1) requiring one of the medical treatments listed above; and (2) resulting in a partial or total inability to work.

[4] Medical evidence is required to prove the third *Dawkins* criteria; *i.e.*, whether the work-related injury has made reasonable efforts to obtain employment futile. *Stuart T. Valley*, 55 Van Natta 2521 (2003); *Janet F. Berhorst*, 50 Van Natta 1578 (1998) (Board cannot infer futility).

For the reasons addressed above, claimant has not established that his compensable lumbar conditions worsened resulting in an inability to work and that he was in the work force at the date of disability. Therefore, we are not authorized to reopen this Own Motion claim for a worsening of claimant's accepted lumbar conditions under ORS 656.278(1)(a).[5]

Accordingly, we withdraw our June 14, 2006 order. On reconsideration, as supplemented herein, we republish our June 14, 2006 Own Motion Order. The parties' rights of reconsideration and appeal shall begin to run from the date of this order.[6]

IT IS SO ORDERED.

Entered at Salem, Oregon on July 13, 2006

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[5] If a party obtains evidence that addresses the "inability to work" and "work force" components of the statutory standard, 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 on Reconsideration, the reconsideration request must be filed within that 30-day period. OAR 438-012-0065(2).

[6] Finally, as addressed above, it is unclear whether claimant is represented. If he 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