

In the Matter of the Compensation of  
**ROBERT W. FAIR, Claimant**  
Own Motion No. 06-0164M  
OWN MOTION ORDER  
Unrepresented Claimant  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The SAIF Corporation has submitted an Own Motion Recommendation against the reopening of claimant's 1975 claim for a "worsening" of his previously accepted condition. *See* ORS 656.278(1)(a). Claimant's aggravation rights have expired. SAIF opposed reopening, contending that claimant's compensable condition does not require any medical treatment that qualifies for claim reopening. Based on the following reasoning, we find that the claim does not qualify for reopening.

Pursuant to ORS 656.278(1)(a), among the requirements for the reopening of an Own Motion claim for a worsening of a compensable injury is a requirement that 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. *Health A. Wiltfong*, 57 Van Natta 3108 (2005).

In *Larry D. Little*, 54 Van Natta 2536 (2002), we concluded that if any one of the three qualifying medical treatments listed in ORS 656.278(1)(a) is satisfied, a "worsening condition" claim meets the medical treatment requirement for reopening in Own Motion. In *Little*, 54 Van Natta at 2542, we defined the three qualifying medical treatments listed in ORS 656.278(1)(a) in the following manner: (1) "Surgery" is defined as an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker; and (2) "hospitalization" is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility.

We also found that the third type of qualifying treatment required 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 (directed or ordered by a doctor) in lieu of (in the place of or instead of) hospitalization; and (3) that is necessary (required or essential) to enable (render able or make possible) the injured worker to return to work. *Little*, 54 Van Natta at 2546.

Whether a worsening of the compensable injury requires hospitalization, 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” presents a medical question that must be answered by persuasive medical evidence. In other words, we cannot infer that a treatment involves hospitalization, 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.” *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (“the Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”); *Terry L. Smith*, 55 Van Natta 2763 (2003).

Here, in November 2006, claimant sought treatment for low back pain. Diagnosing an acute exacerbation of chronic back pain, Dr. Dubrow, claimant’s primary care physician, recommended medications and referral to a specialist. (Ex. 8).

On December 4, 2006, claimant sought treatment with Dr. Streitz, who diagnosed “lumbosacral strain without evidence of herniated nucleus pulposus.” Dr. Streitz recommended exercise and prescribed medications. He also took claimant off from work “for 2 to 6 weeks.” (Ex. 13).

In response to an inquiry from SAIF, Dr. Streitz reported that the recommended treatment plan was back care, exercise and palliative care. He opined that there was no “obvious worsening that meet any of the three criteria, *i.e.*, requiring (1) surgery, (2) hospitalization, (3) curative care in lieu of surgery to enable his return to work.” Dr. Streitz did not “anticipate surgery,” but was uncertain how long claimant would be off work. (Ex. 14).

Based on our review of the aforementioned reports, the record does not establish that claimant’s conditions required hospitalization, surgery or other curative treatment that was prescribed in lieu of (instead of or in place of) hospitalization that was necessary to enable her to return to work. ORS 656.278(1)(a); *Larry D. Little*, 54 Van Natta at 2546. In other words, no physician recommended surgery or hospitalization. Nor is there any evidence that there was any medical treatment prescribed that 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).<sup>1</sup> Consequently, we are unable to authorize reopening of the Own Motion claim.

Accordingly, the request for claim reopening is denied. Claimant's entitlement to medical expenses pursuant to ORS 656.245 regarding his accepted conditions is not affected by this order.<sup>2 3</sup>

IT IS SO ORDERED.

Entered at Salem, Oregon on February 6, 2007

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<sup>1</sup> Additionally, SAIF contended that claimant was not in the work force at the time of the current worsening. 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.

<sup>2</sup> If a party obtains medical evidence that addresses the statutorily required medical treatment (*i.e.*, hospitalization, surgery or curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work) component, that party may request reconsideration of our decision. However, because our authority to reconsider this decision expires within 30 days after the mailing of the Own Motion Order, the reconsideration request must be filed within that 30-day period. OAR 438-012-0065(2).

<sup>3</sup> 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