In the Matter of the Compensation of
JON C. LOWRY, Claimant
Own Motion No. 06-0125M
OWN MOTION ORDER
Malagon Moore et al, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Kasubhai and Lowell.

The SAIF Corporation has submitted claimant's request for claim reopening based on a worsening of his accepted low back condition. ORS 656.278(1)(a). In addition, claimant seeks a penalty and attorney fee based on SAIF's untimely discovery. Claimant's aggravation rights have expired. SAIF opposes reopening, contending that claimant's compensable condition does not require any medical treatment that qualifies his claim for reopening. Based on the following reasoning, we decline to authorize claim reopening and to assess penalties and attorney fees.

FINDING OF FACTS

On May 19, 1995, claimant sustained a compensable low back injury. Claimant's aggravation rights expired on May 19, 2000.

In June 2006, claimant sought medical treatment for low back pain. Prescribing pain medication and recommending an MRI, Dr. Noonan, claimant's attending physician, referred him to Dr. Kitchel. (Ex. 28).

On July 11, 2006, Dr. Kitchel examined claimant and recommended epidural injections. (Ex. 31). In response to an inquiry from SAIF, Dr. Kitchel agreed that the recommended treatment constituted "palliative" care, which was defined as "medical services rendered to reduce or temporarily moderate the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate a medical condition." (Ex. 36).

On September 22, 2006, SAIF submitted its Carrier's Own Motion Recommendation against reopening for a "worsened condition" claim. SAIF asserted that claimant's compensable condition did not require any medical treatment that qualified his claim for reopening.

On October 17, 2006, in a letter directed to the Board, Dr. Kitchel asserted that:

> "I have treated [claimant] with lumbar epidural injections for his ongoing low back pain and radicular leg pain. I do believe those injections were provided in lieu of hospitalization. Without those, I think he would have required hospitalization for his ongoing low back and leg pain. He seems to have had dramatic relief with those and is slowly returning to his function." (Ex. 37)

CONCLUSIONS OF LAW AND OPINION

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. *Heath A. Wiltfong*, 57 Van Natta 3108 (2005).

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. *Larry D. Little*, 54 Van Natta 2536 (2002). The three qualifying medical treatments listed in ORS 656.278(1)(a) are defined as follows: (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. *Little*, 54 Van Natta at 2542. The third type of qualifying treatment 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 (directed or ordered by a doctor) in lieu of (in the place of or instead of) hospitalization; and (3) 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).

Claimant argues that the prescribed medical treatment (*i.e.*, epidural injections) is one of the three qualifying medical treatments listed in ORS 656.278(1)(a). He proposes two theories. First, that the prescribed epidural injections were an invasive procedure undertaken for a curative purpose in order to enable him to return to work. Thus, he contends that the injections qualify as a surgical procedure. In the alternative, claimant asserts that the epidural injections qualify as "curative treatment," because they were necessary to return claimant to work and Dr. Kitchel opined that they were prescribed in lieu of hospitalization. We reject both arguments.

Claimant's arguments are based on the premise that the medical treatment is curative. Yet, after being provided the definition of "palliative care," Dr. Kitchel agreed that his prescribed treatment of epidural injections was "palliative." ORS 656.005(20);[1] (Ex. 36). Despite his later opinion that the epidural injections were prescribed in lieu of hospitalization and necessary for claimant to return to work, Dr. Kitchel did not retract his "palliative care" opinion. As previously noted, in the absence of a persuasive medical opinion, we cannot infer that claimant's prescribed epidural injections qualify as "curative" treatment. *See Gerald D. Duren*, 58 Van Natta 1454 (2006) (ORS 656.278(1)(a) not satisfied where prescribed steroid blocks were "palliative" and no surgery or hospitalization was recommended); *Michael D. Pickett*, 56 Van Natta 284 (2004) (ORS 656.278(1)(a) not satisfied where arthroscopy was "palliative" and not prescribed in lieu of hospitalization); *Stephen Jackson*, 55 Van Natta 2421, 2422 (2003).

Thus, this medical record does not establish that claimant's condition required hospitalization, surgery or other *curative* treatment that was prescribed in lieu of hospitalization that was necessary to enable him to return to work.

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[1] ORS 656.005(20) provides:

> "'Palliative care' means medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition."

Compare Wiltfong, 57 Van Natta at 3110 (an attending physician's unrebutted opinion that the recommended treatment was curative and prescribed in lieu of hospitalization that was necessary to enable the claimant to work was sufficient to meet the medical services criteria for reopening a "worsened" condition claim); *Shirlette Kenworthy*, 55 Van Natta 2236 (2003) (same).

In conclusion, based on the aforementioned reasoning, we conclude that claimant's Own Motion claim for a worsening of his previously accepted low back condition does not satisfy the criteria for claim reopening set forth in ORS 656.278(1)(a).[2]

Finally, claimant also seeks a penalty and attorney fee based on SAIF's alleged late discovery. We decline to assess a penalty, based on the following reasoning.

In light of our previous determination that "claim reopening" under ORS 656.278(1)(a) is not warrented, there are no "amounts then due" on which to base a penalty pursuant to ORS 656.262(11), and no unreasonable resistance to the payment of compensation to support a penalty-related attorney fee under ORS 656.382(1). *See Wendy Butcher*, 58 Van Natta 243, 246-47 (2006) (no penalty or penalty-related attorney fee for alleged discovery violation assessed where there were no "amounts then due" on which to base a penalty under ORS 656.262(11) and no unreasonable resistance to the payment of compensation to support a penalty-related attorney fee under ORS 656.382(1)); *Clifford P. Randolph*, 57 Van Natta 3181, 3184 (2005) (same).

IT IS SO ORDERED.

Entered at Salem, Oregon on May 23, 2007

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[2] 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) that is lacking from the current record, 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, the reconsideration request must be filed within that 30-day period. OAR 438-012-0065(2).