

In the Matter of the Compensation of  
**BRIAN G. MCVICKER, Claimant**

Own Motion No. 08-0088M

OWN MOTION ORDER

J Michael Casey, AAL, Claimant Attorneys  
Andersen & Nyburg, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

The insurer has submitted claimant's request for reopening of his Own Motion claim for a "post-aggravation rights" new medical condition ("herniated disc at L5-S1 on the right"). ORS 656.278(1)(b). Claimant's aggravation rights have expired. The insurer recommends reopening of claimant's 1994 claim.

On May 28, 2008, the insurer issued a Modified Notice of Acceptance to include the aforementioned "post-aggravation rights" new/omitted medical condition. Thus, claimant's "post-aggravation rights" new/omitted medical condition ("herniated disc at L5-S1 on the right") has been determined to be compensable.

There are two requirements that must be satisfied for the reopening of an Own Motion claim for a "post-aggravation rights" new or omitted medical condition claim under ORS 656.278(1)(b). First, the new or omitted medical condition claim must have been initiated after the expiration of claimant's aggravation rights under ORS 656.273. ORS 656.267(3) (2005). Second, the new or omitted medical condition must be "determined to be compensable." *Id.*

Based on our review of this record, we find that claimant's 1994 claim has satisfied the statutory requirements for reopening under ORS 656.278(1)(b).<sup>1</sup>

---

<sup>1</sup> The insurer also recommended reopening for a "worsened condition" claim. Among the requirements for claim reopening under ORS 656.278(1)(a), there must be a worsening of a previously accepted condition 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. *Mary L. Streckel*, 58 Van Natta 3046 (2006); *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, 2542 (2002).

Here, the record does not establish that claimant's current need for medical treatment was due to a worsening of his previously accepted "lower back strain" condition. Instead, according to Dr. Rosenbaum, the medical treatment concerned "herniated lumbar disk, lumbosacral right." That condition is claimant's "post-aggravation rights" new/omitted medical condition.

---

Accordingly, we authorize the reopening of the “post-aggravation rights” new/omitted medical condition claim (“herniated disc at L5-S1 on the right”) under ORS 656.278(1)(b) for the insurer to provide benefits in accordance with law. When claimant’s condition is medically stationary and there is sufficient information to determine permanent disability, the insurer shall close the claim pursuant to OAR 438-012-0055, including the payment of permanent disability compensation, if any, determined to be due under ORS 656.278(1)(b) and (2)(d) for the new/omitted medical condition.<sup>2</sup>

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.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 24, 2008

---

Under these circumstances, the record does not satisfy the criteria set forth in ORS 656.278(1)(a) required to reopen a “worsened condition” claim for claimant’s previously accepted “lower back strain” condition. Accordingly, we decline to authorize the reopening for a “worsened condition” claim.

<sup>2</sup> In its letter accompanying its recommendation, the insurer represents that this reopening includes surgical intervention or curative treatment. As such, the insurer contends that the request for reopening is for the rating and payment of “possible further permanent disability award and time loss benefits from 11/29/07 – 1/14/2008.” However, the sole issue before us is whether claimant’s “post-aggravation rights” new/omitted medical condition claim should be reopened. Based on the above reasoning, we have determined that the claim should be reopened. In reaching that conclusion, we have not addressed claimant’s entitlement to any temporary and/or permanent disability benefits which may arise from this reopening. Instead, such issues are claim processing matters that may later arise and are the insurer’s responsibility in the first instance. *Stacy Thompson*, 60 Van Natta 1085 (2008); *Tamara Kramer-Fischer*, 58 Van Natta 1456 (2006); *Duane L. Leafdahl*, 54 Van Natta 1796, 1799 (2002).

If claimant subsequently disagrees with the insurer’s future processing of the claim (for example, if the insurer declines to pay temporary disability benefits and claimant disagrees with such an action), he may raise his concerns with the Board at that time.