
In the Matter of the Compensation of
RONALD R. FUNKE, Claimant
Own Motion No. 09-0135M
OWN MOTION ORDER
Malagon Moore & Jensen, Claimant Attorneys
Liberty NW Ins Corp, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The insurer has submitted claimant's request to reopen his claim for a worsened condition. ORS 656.278(1)(a). Claimant's aggravation rights have expired. The insurer opposes reopening the claim, asserting that claimant is not in the work force at the time of the current disability. Based on the following reasoning, we award temporary disability under claimant's previously reopened Own Motion claim for a "post-aggravation rights" new medical condition.

FINDINGS OF FACT

On October 23, 1989, claimant sustained multiple compensable injuries to his thorax, lungs, diaphragm, pelvis and head. His aggravation rights have expired.

On December 4, 1989, the insurer accepted "multiple trauma, left pulmonary contusion, left diaphragm rupture, left pneumothorax, comminuted fracture of left distal radius, proximal humerus fracture, left iliac acetabular fracture and left olecanon fracture." (Ex. 7). The claim was first closed on October 1, 1991 with both scheduled and unscheduled permanent partial disability (PPD) awards. (Ex. 9).

In April 2009, claimant sought treatment for a "ripping" in an incisional area. This was diagnosed as an "incisional ventral hernia X's 2 and an umbilical hernia." On April 8, 2009, Dr. Wilhite, claimant's attending physician, recommended surgery for the aforementioned conditions. On June 25, 2009, Dr. Wilhite agreed that claimant had an inability to work from the date of surgery. (Ex. 16).

On July 28, 2009, an insurer-arranged medical examination was conducted by Dr. Blumberg, who noted that claimant was "currently working in land use planning." Diagnosing multiple incisional ventral hernias, Dr. Blumberg agreed that the recommended surgery was appropriate treatment for those conditions. He also opined that claimant's conditions were not medically stationary. (Ex. 13).

On August 26, 2009, the insurer issued a modified Notice of Acceptance to include “consequential incisional ventral hernia X’s 2, incarcerated umbilical hernia.” (Ex. 14). On September 16, 2009, we authorized the reopening of claimant’s 1989 Own Motion claim for the aforementioned “post-aggravation rights” new/omitted medical condition. ORS 656.278(1)(b). We further directed the insurer to provide benefits in accordance with law. *Ronald R. Funke*, 61 Van Natta 2216 (2009). This “post-aggravation rights” new/omitted medical condition claim remains in reopened status.

On September 15, 2009, the insurer submitted an Own Motion Recommendation regarding a “worsening” of claimant’s previously accepted conditions. The insurer opposed reopening, contending that claimant was not in the work force at the time of the current disability.

In support of its position, the insurer argues that the issues surrounding its “worsened condition” Own Motion Recommendation is claimant’s entitlement to temporary disability benefits. While claimant may be entitled to additional permanent disability due to the reopened “post-aggravation rights” new/omitted medical condition claim, the insurer asserts that “this does not supersede the workforce requirement under the Board’s Own Motion rules which allows for temporary disability benefits.”

In response, claimant submits information supporting his contention that he was in the work force at the time of his current disability.

CONCLUSIONS OF LAW AND OPINION

This current Own Motion matter arises from the insurer’s “worsened condition” Own Motion Recommendation. Based on the following reasoning, we find that the actual dispute is whether claimant is entitled to temporary disability benefits under the already reopened “post-aggravation rights” new medical 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 3026 (2006); *Harold B. Hamilton*, 58 Van Natta 1338 (2006). Satisfaction of any one of these three requisite medical treatments meets the “medial treatment” requirement under ORS 656.278(1)(a). *Larry L. Little*, 54 Van Natta 2536, 2542 (2002).

Here, the record does not establish that claimant's current need for treatment was due to a worsening of his previously accepted "multiple trauma, left pulmonary contusion, left diaphragm rupture, left pneumothorax, comminuted fracture of left distal radius, proximal humerus fracture, left iliac acetabular fracture and left olecranon fracture." Instead, the physicians unequivocally attribute claimant's current medical treatment to "consequential incisional ventral hernia X's 2, incarcerated umbilical hernia." Those conditions are not claimant's aforementioned previously accepted conditions, but rather his "post-aggravation rights" new/omitted medical conditions. The latter conditions were the basis for our prior order that reopened claimant's Own Motion claim, which currently remains reopened.

Under such 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 "multiple trauma, left pulmonary contusion, left diaphragm rupture, left pneumothorax, comminuted fracture of left distal radius, proximal humerus fracture, left iliac acetabular fracture and left olecranon fracture."

However, this does not end our inquiry. Based on our review of the record, the parties' dispute actually concerns claimant's entitlement to temporary disability benefits under the already reopened "post-aggravation rights" new/omitted medical condition claim. *Michael Kehoe*, 60 Van Natta 3510, 3512 (2008) (because the claimant's left knee surgery concerned his "post-aggravation rights" new medical condition, he was entitled to temporary disability benefits as authorized by his attending physician under his reopened Own Motion claim for his new medical condition, rather than under his reopened "worsened condition" claim); *Bradley J. McKinley*, 60 Van Natta 305, 306 (2008) (following the carrier's submission of an Own Motion Recommendation for reopening of a "worsened condition" claim, the issue for resolution was not claim reopening for a "worsened condition" claim but rather the claimant's entitlement to temporary disability benefits under a previously reopened "post-aggravation rights" new/omitted medical condition claim).

From the insurer's submission, it is apparent that it is disputing claimant's entitlement to temporary disability benefits, asserting that he is not in the work force. In response, claimant submits an affidavit and documentation in support of his work force contentions.

Entitlement to temporary disability benefits on the reopened “post-aggravation rights” new/omitted medical condition claim is determined under ORS 656.278 and the Board’s Own Motion rules enacted under that statute. The requirements for payment of temporary disability benefits for claims reopened under ORS 656.278(1)(a) or (1)(b) include the following.

First, claimant must require (including a physician’s recommendation for) hospitalization, inpatient or outpatient surgery, or other 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) prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work. Second, temporary disability benefits are payable from the date the attending physician authorizes such benefits for the hospitalization, surgery (inpatient or outpatient), or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work (which may be the date the requisite treatment is recommended). Third, temporary disability benefits are payable under ORS 656.210, 656.212(2), and 656.262(4). *Belinda A. Butcher*, 60 Van Natta 2173, 2184 (2008); *David B. Morton*, 56 Van Natta 3880, 3882 (2004); *Judy L. Frazier*, 56 Van Natta 3270, *on recons*, 56 Van Natta 3430 (2004); *Mark A. Cavazos*, 55 Van Natta 3004 (2003).

Under ORS 656.268(4)(g), temporary disability is due and payable for those periods of time authorized by the attending physician. We cannot infer entitlement to temporary disability in the absence of such authorization. *See Ronald J. Reynolds*, 55 Van Natta 3597 (2003); *Thomas R. Sledd*, 54 Van Natta 5 (2002); *Tamitha A. Barendrecht*, 53 Van Natta 1135, 1136-37 (2001); *Kerry Nguyen*, 52 Van Natta 688, 689 (2000) (the claimant was not entitled to temporary disability benefits for a period not authorized by attending physician; entitlement to such benefits was not inferred from review of medical records).

Temporary disability compensation is not payable “for periods of time during which the claimant did not qualify as a ‘worker’ pursuant to ORS 656.005(30).” ORS 656.278(2)(b).

ORS 656.005(30) defines “worker” and provides, in relevant part:

“‘Worker’ means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *. For the purpose of determining

entitlement to temporary disability benefits or permanent total disability benefits under this chapter, ‘worker’ does not include a person who has withdrawn from the workforce during the period for which such benefits are sought.”

In *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989), the court defined the criteria for determining whether the claimant was in the workforce. Under the *Dawkins* criteria, a claimant is in the workforce 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.

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. *William N. Alford*, 57 Van Natta 1670, 1672 (2005) (determining “date of disability” for work force status for “post-aggravation rights” new/omitted medical condition claim); *David L. Hernandez*, 55 Van Natta 30 (2003); *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

The relevant time period for which claimant must be in the work force is the time before the “date of disability,” when his condition worsened resulting in an inability to work and requiring the requisite medical treatment under ORS 656.278(1)(a). See generally *SAIF v. Blakely*, 160 Or App 242 (1999); *Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *Stuart T. Valley*, 55 Van Natta 475 (2003).

Here, on April 8, 2008, Dr. Wilhite recommended surgery. On June 25, 2009, Dr. Wilhite agreed that claimant would be unable to work as of the date of surgery.

Based on such evidence, we conclude that, as of June 25, 2009, claimant’s compensable condition worsened resulting in an inability to work and requiring surgery. Therefore, June 25, 2009, is the “date of disability” for the purposes of determining whether he was in the work force.

In his October 20, 2009 affidavit, claimant asserted that: (1) he is self-employed and has been working part-time since early 2009; and (2) he has and is actively looking for work. Based on claimant's assertions, we are persuaded that he has demonstrated his willingness to work.

In support of his self-employment assertions, claimant submitted copies of three contracts and billings/payments concerning these contracts. These show that he received payments for his contract work in March 2009, September 2009 and October 2009. The billings refer to work completed through April 20, 2009. Based on claimant's submissions, we are persuaded that he was in the work force on April 20, 2009.

However, the "date of disability" is June 25, 2009. Thus, claimant must establish that he was in the work force in the time period before June 25, 2009.¹ It is unclear from his affidavit whether claimant is contending that he continued working prior to June 25, 2009. In this particular case, we need not settle this concern, because we find that the record supports claimant's presence in the work force under the second *Dawkins* criterion; *i.e.*, the "work search" requirement.

In order to satisfy the second *Dawkins* criterion, claimant must show that, although he was not working, he is willing to work and was seeking work. We have already concluded that claimant has demonstrated his willingness work. His affidavit outlines his work search, asserting that he has been actively seeking full-time employment since his self-employment business slowed down. He submitted copies of employment applications submitted on December 8, 2008, April 2, 2009, May 1, 2009, June 2, 2009 and September 21, 2009.

Based on claimant's un rebutted affidavit and supporting documentation, we find that he has demonstrated that he has made a reasonable effort to seek work. Thus, based on this record, we conclude that claimant has established that he was willing to work and was making a reasonable effort to find work at the time of disability, *i.e.* before June 25, 2009.

¹ See *Jeffrey L. Coefield*, 53 Van Natta 614 (2001) (seven to nine week period between prior claim closure/medically stationary date and subsequent worsening not so brief so as to relieve the claimant of the burden of proving that he remained in the work force at "date of disability"); *Robert D. Peck*, 45 Van Natta 2202 (1993) (same - five to seven week period); compare *Mitchell T. Buselle*, 61 Van Natta 625 (2009) (one-week period between the claimant becoming unemployed and the "disability date" was insufficient to establish that he had withdrawn from the work force); *Rodney M. Waldrip*, 56 Van Natta 1516 (2004) (worker had not withdrawn from work force where there was a two-week period between last employment and attending physician's release to modified work).

Accordingly, the insurer is directed to pay temporary disability beginning from the date of surgery, which is the date the attending physician authorized such benefits. ORS 656.278(2)(b); *David L. Hernandez*, 56 Van Natta 2441, 2449 (2004); *Loyd E. Garoutte*, 56 Van Natta 416, 424 (2004). The insurer is to continue paying temporary disability until such benefits can be lawfully terminated.

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 December 2, 2009