

In the Matter of the Compensation of
FRED T. YILEK, Claimant
Own Motion No. 08-0180M
OWN MOTION ORDER
Unrepresented Claimant
Cambridge, Carrier

Reviewing Panel: Members Langer and Biehl.

The self-insured employer has submitted claimant's request for claim reopening for a worsening of his left knee condition. *See* ORS 656.278(1)(a). Claimant's aggravation rights have expired. Based on the following reasoning, we decline to authorize claim reopening of this "worsened condition" claim.

FINDINGS OF FACT

On April 27, 2001, claimant sustained a compensable left knee injury. The claim was accepted for a "left knee contusion and medial meniscus tear of the left knee" and was first closed on October 11, 2002. Claimant's aggravation rights expired October 11, 2007.

On March 14, 2008, claimant sought treatment for bilateral knee pain with Dr. Morrison. Diagnosing degenerative joint disease, Dr. Morrison recommended "Synvisc" injections. Dr. Morrison also noted that the treatment for claimant's right knee condition was being paid under an "out-of-state" work-related injury and that claimant was paying for the left knee. Thereafter, a series of "Synvisc" injections was administered to both knees.

In August 2008, claimant returned to Dr. Morrison with continued bilateral knee problems. Because treatment for claimant's right knee condition had been approved under the "out-of-state" claim, Dr. Morrison recommended arthroscopy. The status of claimant's left knee condition was not addressed nor treated. Claimant underwent a right knee arthroscopy on September 11, 2008.

On September 24, 2008, Dr. Morrison completed a Form 827, indicating an "aggravation" of claimant's left knee conditions.

On November 7, 2008, the employer's investigator obtained claimant's recorded statement. Claimant noted that he had undergone right knee surgery in September 2008. Further, he explained that he was seeking claim reopening for his left knee to obtain medical attention. Since March 2005, he had been receiving time loss benefits under his "out-of-state" right knee claim.

On December 3, 2008, claimant was examined by Dr. Webb regarding his left knee complaints. Dr. Webb diagnosed: (1) “[h]istories of left knee medial meniscus bucket handle type tear with arthroscopic subtotal excision;” and (2) “[l]eft knee traumatic osteoarthritis related to a work injury in 2001 occurring at [the employer].” Dr. Webb also recommended repeating a series of “Synvisc” injections to the left knee, noting that if claimant did not improve after those injections, he “would likely recommend further diagnostic and operative left knee arthroscopy.”

CONCLUSIONS OF LAW AND OPINION

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 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.

To begin, claimant must satisfy the first and second requirements for reopening his Own Motion claim for a worsening of his compensable left knee conditions; *i.e.*, whether claimant’s compensable left knee conditions worsened resulting in a partial or total inability to work and requiring requisite medical treatment. *Redeena M. Monroe*, 55 Van Natta 3730 (2003). Based on the aforementioned reasoning, we are not persuaded that these statutory requirements have been satisfied.

After conducting our review, the record does not establish that claimant’s accepted *left* knee 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 him to return to work. ORS 656.278(1)(a); *Larry D. Little*, 54 Van Natta at 2546. In this regard, although claimant underwent a trial of “Synvisc” injections to the left knee and Dr. Webb recommended a second trial of such injections to the left knee, the record does not establish that this treatment constituted surgery, hospitalization, or “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); *Little*, 54 Van Natta at 2547 (no medical evidence that treatment (epidural steroid injections) constituted surgery, hospitalization, or “other curative treatment prescribed in lieu of hospitalization” that was “necessary to enable the injured worker to return to work”); *see also Darryl G. Altman*, 58 Van Natta 1503 (2006) (ORS 656.278(1)(a) not satisfied where recommended surgery was directed to a condition that was neither claimed nor accepted).

Furthermore, Dr. Webb stated that, if claimant did not improve following a second trial of “Synvisc” injections to the left knee, he “would likely recommend further diagnostic and operative left knee arthroscopy.” We interpret Dr. Webb’s statement as suggesting the *possibility* of surgery if claimant should fail to improve following the recommended injections. Although a *recommendation* for a requisite medical treatment is sufficient to satisfy the medical treatment requirement under ORS 656.278(1)(a) for reopening a “worsened condition” claim, a *possibility* of such treatment is not sufficient. *Jeffery D. Dugan*, 56 Van Natta 550 (2004) (“possibility” of surgery insufficient to satisfy ORS 656.278(1)(a)); *Vicki M. Weaver*, 56 Van Natta 2862 (2004) (although recommendation for requisite medical treatment is sufficient to satisfy medical treatment requirement under ORS 656.278(1)(a), possibility of such treatment is not).

Finally, on this record, it is unclear whether there has been a worsening of claimant’s left knee conditions that resulted in a total or partial inability to work. The resolution of the inability to work issue is a medical question that must be addressed 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 left knee conditions worsened resulting in an inability to work. ORS 656.278(1)(a).¹

Here, Dr. Webb stated that claimant “will *continue* with activity modification.” (Emphasis added). However, the record does not establish that claimant previously had a worsening of his *left* knee condition that resulted in a

¹ 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.

total or partial inability to work. Therefore, we do not find that Dr. Webb's mention of "continuing with activity modification" establishes such a worsening of claimant's accepted *left* knee conditions ("left knee contusion and medial meniscus tear of the left knee").²

Accordingly, the request for claim reopening is denied.³ Claimant's entitlement to medical expenses pursuant to ORS 656.245 regarding his accepted conditions is not affected by this order.⁴

IT IS SO ORDERED.

Entered at Salem, Oregon on January 15, 2009

² The record does not demonstrate that claimant has initiated a "post-aggravation rights" new medical condition claim. Thus, any consideration of "unclaimed" conditions would be premature. See ORS 656.267(3); ORS 656.278(1)(b). Instead, our decision is limited to a review of claimant's worsening claim for his previously accepted left knee conditions ("left knee contusion and medial meniscus tear of the left knee"). Furthermore, our decision is premised on a finding that no hospitalization, surgery or other curative treatment prescribed in lieu of hospitalization that is necessary to enable claimant to return to work as required under ORS 656.278(1)(a) has been rendered or recommended for claimant's accepted left knee conditions or resulted in an inability to work. Under such circumstances, we are unable to authorize the reopening of claimant's 2001 claim under ORS 656.278(1)(a).

If claimant wishes to initiate a new or omitted medical condition claim, he may request formal written acceptance of the claim from the employer. ORS 656.267(1). If the employer receives such a claim, and the claim is "determined to be compensable," it must be processed according to the Board's rules. See 438-012-0001(4); OAR 438-012-0030(1); *James W. Jordan*, 58 Van Natta 34, 37 (2006).

³ If claimant obtains or presents evidence that addresses the "medical treatment" and "inability to work" components of the statutory standard, he 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).

In addition, the employer also challenges whether claimant was in the "work force" at the time of his current disability. Because the claim does not meet other "claim reopening" requirements, we have not addressed the "work force" issue. Nevertheless, if claimant wishes to present evidence addressing the "work force" issue he may also request reconsideration within the time parameters expressed above.

⁴ Finally, inasmuch as claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers. 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