

In the Matter of the Compensation of
TODD P. SHELTON, Claimant
Own Motion No. 09-0026M
OWN MOTION ORDER
Kryger et al, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

The SAIF Corporation has submitted its Own Motion Recommendation against the reopening of claimant's claim for a "worsening" of his previously accepted condition ("herniated disc L5-S1"). *See* ORS 656.278(1)(a). Claimant's aggravation rights have expired. SAIF opposes reopening, contending that claimant's compensable condition does not require any medical treatment that qualifies for claim reopening. Based on the following reasoning, we deny claim reopening.

FINDINGS OF FACT

On March 17, 1994, claimant sustained a compensable low back injury. His aggravation rights have expired.

In August 2008, claimant sought treatment with Dr. York, his attending physician, for low back pain. Dr. York recommended diagnostic testing. (Ex. 4).

In October 2008, diagnosing low back and lower extremity pain, Dr. York opined that claimant would potentially benefit from a fusion or disk replacement. However, Dr. York noted that claimant was not currently interested in proceeding with surgery. (Ex. 6).

In January 2009, claimant returned to Dr. York with continuing low back pain complaints. Reporting that claimant was "apprehensive" to discuss surgical intervention, Dr. York recommended referral to Dr. Borgoy, a pain specialist, for consideration of steroid injections and further physical therapy. If claimant failed to improve, Dr. York noted that a posterior lumbar interbody fusion could be considered. (Ex. 18).

On February 13, 2009, before claimant was examined by Dr. Borgoy, Dr. York requested surgical authorization. (Ex. 21). Claimant was examined by Dr. Borgoy on February 17, 2009. Listing several personal reasons for claimant's disinterest in pursuing surgery, Dr. Borgoy reported claimant's desire for less invasive treatment. (Ex. 22).

Thereafter, Dr. Borgoy and Dr. York agreed that facet joint injections would be a “reasonable intervention in an attempt to palliate [claimant’s] care.” (Ex. 25). In March 2009, Dr. York agreed that the recommended injections were palliative in nature. (Ex. 27).

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.

Here, Dr. York recommended and requested authorization for surgery. However, claimant has chosen not to proceed with the recommended surgery at this time. Thus, the surgical requirement under ORS 656.278(1)(a) has not been satisfied. *See Francisco Villagrana*, 58 Van Natta 1860 (2006) (where the claimant’s medically stationary status is contingent upon undergoing recommended surgery, claim is not prematurely closed if the claimant refuses the surgery); *Karen T. Mariels*, 44 Van Natta 2452 (1992) (same).

Furthermore, Dr. York characterized the prescribed injection treatment as “palliative,” not curative. As such, the facet joint injections do not qualify as “other *curative* treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work” under ORS 656.278(1)(a). *See William F. VanMeter*, 59 Van Natta 2752 (2007) (claim reopening denied because of the attending physician’s un rebutted opinion that the pain medications and referral to a pain specialist was “palliative,” not curative); *Michael D. Pickett*, 56 Van Natta 284 (2004) (claim reopening denied because of the attending physician’s un rebutted opinion that the recommended arthroscopic surgery was “palliative” treatment). Consequently, based on the reasoning above, we are not authorized to reopen the Own Motion claim.¹

¹ In response to SAIF’s Own Motion Recommendation, claimant explained that a new request for surgery has been submitted and should he decide to proceed with the recommended treatment, he will pursue “claim reopening” at that time. Should such circumstances occur, another Own Motion claim would be initiated and processed according to the Board’s Own Motion rules. *See OAR 438-012-0001; OAR 438-012-0030.*

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

IT IS SO ORDERED.

Entered at Salem, Oregon on June 11, 2009