In the Matter of the Compensation of
**RANDY M. MASSINGALE, Claimant**
Own Motion No. 09-0047M
OWN MOTION ORDER
Unrepresented Claimant
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

The SAIF Corporation has submitted claimant's request for claim reopening based on a worsening of his accepted right ankle condition. ORS 656.278(1)(a). Claimant's aggravation rights have expired. SAIF recommends against reopening, contending that: (1) claimant has not scheduled the proposed surgery; and (2) he was not in the work force at the time of the current worsening. Based on the following reasons, we decline to authorize claim reopening.

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 the partial or total inability of the worker to work. 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. 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).[1] *James J. Kemp*, 54 Van Natta 491 (2002). If a claimant meets these requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

On February 9, 2009 and, on February 16, 2009, Dr. Holmboe, claimant's attending physician, recommended and requested authorization for right ankle surgery. (Exs. 18, 20).

SAIF has recommended against reopening claimant's "worsening" claim, contending, among other issues, that he has not scheduled the proposed surgery. Thus, SAIF argues that claimant's claim does not meet the medical treatment criteria necessary for claim reopening under ORS 656.278(1)(a). We disagree, based on the following reasoning.

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[1] Pursuant to the Court's reasoning in *Dawkins*, a claimant is in the work force 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 seeking work; or (3) not employed, but willing to work and is not seeking work because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258.

The determinative issue, as described above, is whether claimant's previously accepted condition has worsened requiring 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. ORS 656.278(1)(a); *James J. Kemp*, 54 Van Natta at 501. We have previously determined that a medical recommendation, request, or statement that a claimant needs one of the three medical treatments listed in ORS 656.278(1)(a) is sufficient to satisfy the requisite treatment requirement for a "worsening" under that statute. *Thurman M. Mitchell*, 54 Van Natta 2607, 2615 (2002). Consequently, it is not necessary that the claimant actually undergo (or be scheduled to undergo) one of the listed treatments in order to establish that the compensable condition worsened "requiring" such treatment. *Corey A. Otterson*, 56 Van Natta 363 (2004).

Here, Dr. Holmboe requested authorization for right ankle surgery. SAIF has authorized the surgery. Thus, the medical treatment recommended (*i.e.*, surgery) qualifies as one of the three required medical treatments under ORS 656.278(1)(a). Furthermore, the record does not indicate that the surgery recommendation was withdrawn or that claimant has decided not to proceed with the recommended surgery. *See James Bond*, 56 Van Natta 2374 (2004); *compare Bill H. Davis*, 49 Van Natta 337 (1997) (temporary disability benefits suspended where surgery recommendation was withdrawn).

Accordingly, this medical record establishes that claimant's compensable condition worsened requiring surgery. Furthermore, Dr. Holmboe released claimant to modified work. This is sufficient to satisfy the "inability to work" requirement regarding a worsened condition claim. ORS 656.278(1)(a); *Alan G. Jones*, 55 Van Natta 429 (2003).

Nevertheless, to fully satisfy the "claim reopening" requirements of ORS 656.278(1)(a), claimant must have remained in the work force under the *Dawkins* criteria, as summarized above. Based on the following reasoning, the record does not support claimant's presence in the work force.

The "date of disability" for the purpose 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. *Thurman M. Mitchell*, 54 Van Natta at 2616.

On February 9, 2009, Dr. Holmboe recommended right ankle surgery and released claimant to modified work. (Ex. 18-1,-4). Based on Dr. Holmboe's comments, we conclude that claimant sustained an inability to work and was in need of surgery for his compensable right ankle condition as of February 9, 2009. In other words, as of February 9, 2009, claimant's compensable condition worsened pursuant to ORS 656.278(1)(a); *i.e.*, the worsening resulted in an inability to work and required surgery.

Therefore, February 9, 2009 is the "date of disability" for the purpose of determining whether claimant was in the work force. The relevant time period for which claimant must establish he was in the work force is the time prior to February 9, 2009, when his condition worsened resulting in an inability to work and requiring surgery. *See generally Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *SAIF v. Blakely*, 160 Or App 242 (1999); *Steve E. Parker*, 57 Van Natta 2097 (2005); *Paul M. Jordan*, 49 Van Natta 2094 (1997).

As summarized above, under the *Dawkins* criteria, claimant is in the work force at the time of disability if he 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, *Kemp*, 54 Van Natta 502-03.

SAIF contends that claimant was not in the work force at the time of the current disability. In support of its contention, SAIF reports that claimant has not responded to its "workforce" inquiry. SAIF further notes that claimant has reported that he had not worked since December 2008 and was not eligible for unemployment benefits. Claimant has not challenged SAIF's statements.

Under such circumstances, the record does not demonstrate claimant's presence in the work force at the time of his current disability.[2] Accordingly, the request for reopening of claimant's "worsened condition" claim is denied.

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[2] If a party obtains evidence that addresses the "work force" component of the statutory standard 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).

Claimant's entitlement to medical expenses pursuant to ORS 656.245 is not affected by this order.[3] [4]

IT IS SO ORDERED.

Entered at Salem, Oregon on May 5, 2009

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[3] 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 right ankle condition. Furthermore, our decision is premised on a finding that claimant is not in the work force as required under ORS 656.278(1)(a). Under such circumstances, we are unable to authorize the reopening of claimant's 1978 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 SAIF. ORS 656.267(1). If SAIF 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).

[4] Inasmuch as claimant is unrepresented, he may wish to consult the Ombudsman for Injured Workers, whose job it is to assist injured workers in such matters. He may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

DEPT OF CONSUMER & BUSINESS SERVICES
OMBUDSMAN FOR INJURED WORKERS
PO BOX 14480
SALEM OR 97309-0405