
In the Matter of the Compensation of
BELINDA A. BUTCHER, Claimant
Own Motion No. 07-0158M
**OWN MOTION ORDER REVIEWING CARRIER CLOSURE ON
RECONSIDERATION**
Ransom Gilbertson Martin et al, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell, Biehl, and Herman. Member Biehl dissents.

The SAIF Corporation requests reconsideration of our February 19, 2008 Own Motion Order Reviewing Carrier Closure that modified a Notice of Closure to award claimant temporary total disability (TTD) benefits beginning April 27, 2005. On March 21, 2008, we abated our order to consider SAIF's motion for reconsideration and granted claimant an opportunity to respond. Having received claimant's response, we proceed with our reconsideration and replace our prior order with the following order.

FINDINGS OF FACT

Claimant compensably injured her low back on March 5, 1986. Claimant's aggravation rights have expired.

On April 27, 2005, claimant sought treatment with Dr. McQueen, her attending physician, for low back complaints. Diagnosing a low thoracic/upper lumbar strain, Dr. McQueen prescribed heat, pain and anti-inflammatory medication, and physical therapy. He released claimant from work through May 24, 2005. (Exs. 6-1, 6-2, 6-3, 6-4). Throughout claimant's follow-up examinations, Dr. McQueen noted that claimant's condition was improving with the prescribed treatment. On May 24, 2005, Dr. McQueen returned claimant to full time work as of that date, again noting that claimant's condition had improved. (Ex. 6-5).

Claimant returned to Dr. McQueen on June 17, 2005 due to increased low back symptoms. Continuing to prescribe pain and anti-inflammatory medication and future physical therapy, Dr. McQueen released claimant from work "until [claimant's] back is 100 percent better." He further noted that consideration for a referral to a back specialist and MRI studies might be necessary. (Ex. 6-6).

In February 2006, claimant requested that SAIF modify its acceptance to include “lumbosacral joint sprain/strain” as a “post-aggravation rights” new/omitted medical condition. Following litigation, SAIF issued a Modified Notice of Acceptance to include “lumbosacral strain/sprain” as a “post-aggravation rights” new/omitted medical condition in this 1986 claim. (Ex. 13).

On April 7, 2006, claimant attended a SAIF-arranged medical examination with Dr. Vessely, who diagnosed a lumbar sprain/strain (fully resolved) and lumbar spondylosis (preexisting). Dr. Vessely noted that claimant “continue[d] to work full time.” Dr. Vessely opined that claimant’s compensable lumbar sprain/strain was medically stationary. (Ex. 8).

In May 2007, claimant requested that SAIF reopen her claim and pay TTD compensation. On August 21, 2007, SAIF voluntarily reopened claimant’s claim for the “post-aggravation rights” new/omitted medical condition (“lumbosacral strain/sprain”). (Ex. 16). ORS 656.278(1)(b); ORS 656.278(5).

On August 27, 2007, SAIF issued its Notice of Closure, which did not award TTD compensation. Claimant requested Board review.

On February 19, 2008, we issued an Own Motion Order Reviewing Carrier Closure in which we found that: (1) the record established that claimant required “other curative treatment;” (2) her attending physician’s (Dr. McQueen’s) April 27, 2005 authorization for TTD was “for the hospitalization, surgery, or other curative treatment” pursuant to ORS 656.278(1)(b); and (3) the authorization satisfied the provisions of ORS 656.210, ORS 656.212, and ORS 656.262(4). Therefore, we concluded that claimant was entitled to TTD benefits beginning April 27, 2005, to be paid in accordance with the provisions of ORS 656.210, ORS 656.212, and ORS 656.262(4). SAIF requested reconsideration of that order.

CONCLUSIONS OF LAW AND OPINION

On reconsideration, SAIF does not dispute that claimant required “other curative treatment” for the “post-aggravation rights” new/omitted medical condition (“lumbosacral strain/sprain”). However, SAIF argues that claimant is not entitled to any TTD benefits because the “other curative treatment” was not “prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work,” which it contends is an additional requirement mandated by the text and context of ORS 656.278(1)(a) and (1)(b). Claimant responds that this additional requirement does not apply to her claim, which was reopened under ORS 656.278(1)(b) for processing of a “post-aggravation rights” new or omitted medical condition. Based on the following reasoning, we agree with SAIF.

SAIF's argument presents a question of statutory construction, which we carry out under the analytical framework set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). We begin by examining the text and context of the relevant statutes to ascertain the legislature's intent. *Id.* at 610. The context of a statute relevant at the first level of analysis may include other provisions of the same statute and related statutes, *id.* at 610-11, prior enactments and judicial interpretations of those and related statutes, *Owens v. Maass*, 323 Or 430, 435 (1996), and the historical context of the relevant enactments, *Goodyear Tire & Rubber Co. v. Tualatin Tire and Auto*, 322 Or 406, 415 (1995), *on recons*, 325 Or 46 (1997). If those sources do not reveal legislative intent, we resort to legislative history and other extrinsic aids. *PGE*, 317 Or at 611-12.

ORS 656.278(1) provides, in relevant part:

“(1) Except as provided in subsection (7) of this section, the power and jurisdiction of the Workers' Compensation Board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified in those cases in which:

“(a) There is a worsening of a compensable injury that results in the inability of the worker to work and requires 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. In such cases, the payment of temporary disability compensation in accordance with ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary;

(b) The worker submits and obtains acceptance of a claim for a compensable new medical condition or an omitted medical condition pursuant to ORS 656.267 and the claim is initiated after the rights under ORS 656.273 have expired. In such cases, the payment of temporary disability compensation in accordance with the provisions of ORS 656.210, 656.212 (2) and 656.262 (4)

may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary, and the payment of permanent disability benefits may be provided after application of the standards for the evaluation and determination of disability as may be adopted by the Director of the Department of Consumer and Business Services pursuant to ORS 656.726[.]”

In *Mark A. Cavazos*, 55 Van Natta 3004 (2003), we applied the *PGE* analysis to determine when the legislature intended a claimant's entitlement to temporary disability benefits to begin on an open Own Motion “worsened condition” claim under ORS 656.278(1)(a). Specifically, we concluded that the legislature intended at least the following requirements for payment of temporary disability benefits after a claimant qualifies for reopening of his or her Own Motion claim under ORS 656.278(1)(a). First, the 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). Second, temporary disability benefits are payable from the date the attending physician authorizes temporary disability related to the hospitalization, surgery, or other curative treatment, 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). *Cavazos*, 55 Van Natta at 3013.

In reaching this conclusion, we noted that the text of ORS 656.278(1)(a) consists of two sentences, with the first sentence providing the requirements to qualify for reopening a “worsened condition” claim in Own Motion. *Cavazos*, 55 Van Natta at 3009; *James J. Kemp*, 54 Van Natta 491, 500 (2002). These reopening requirements include a worsening of a compensable injury that “requires 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.”¹ ORS 656.278(1)(a). If any one of the three qualifying medical

¹ In addition to the medical treatment requirement, two other requirements must also be satisfied to qualify for reopening a “worsened condition” claim. Those additional requirements are: (1) the worsening must result in the partial or total inability of the worker to work; and (2) 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). *Cavazos*, 55 Van Natta at 3009 n 5; *Kemp*, 54 Van Natta at 503.

treatments listed in ORS 656.278(1)(a) is satisfied, a “worsening condition” claim meets the medical treatment requirement for reopening in Own Motion.² *Larry D. Little*, 54 Van Natta 2536 (2002).

We also noted that the second sentence of ORS 656.278(1)(a) provides the requirements for the *payment* of temporary disability benefits in cases where the “worsening” described in the first sentence of ORS 656.278(1)(a) has been established.³ *Cavazos*, 55 Van Natta at 3010. We explained that the second sentence of ORS 656.278(1)(a) demonstrates that the legislature did not simply require that the attending physician authorize temporary disability for the compensable condition; instead, it provided an explicit limitation on such authorization by providing that temporary disability benefits “may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment.” *Cavazos*, 55 Van Natta at 3010; ORS 656.278(1)(a).

Finally, we noted that, although the “other curative treatment” requirement for reopening a “worsened condition” claim under ORS 656.278(1)(a) includes additional factors,⁴ under the circumstances of *Cavazos* (where there was no surgery or hospitalization and the treatment was not “curative”), we did not need to determine whether those additional factors applied to the *payment* of temporary disability benefits. *Id.* at 3013 n 7.

In *Lloyd E. Garoutte*, 56 Van Natta 416 (2004), we applied the requirements for payment of temporary disability benefits under ORS 656.278(1)(a), as explained in *Cavazos*, to determine entitlement to such benefits for a reopened

² These qualifying medical treatments are defined as follows: (1) “surgery” is defined as an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker; and (2) “hospitalization” is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility. ORS 656.278(1)(a); *Larry D. Little*, 54 Van Natta 2536, 2542 (2002). The third type of qualifying medical treatment has three requirements, all of which must be satisfied to meet that medical treatment category: (1) 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); (2) prescribed (directed or ordered by a doctor) in lieu of (in the place of or instead of) hospitalization; and (3) that is necessary (required or essential) to enable (render able or make possible) the injured worker to return to work. *Little*, 54 Van Natta at 2544, 2546.

³ In addition, in order to be entitled to temporary disability compensation, the claimant must be a member of the work force during the period for which such benefits are sought. ORS 656.005(30); ORS 656.278(2)(b); *Cavazos*, 55 Van Natta at 3010 n 6; *Kemp*, 54 Van Natta at 504.

⁴ Specifically, the “other curative treatment” requirement for reopening a “worsened condition” claim under ORS 656.278(1)(a) requires “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.”

“post-aggravation rights” new or omitted medical condition claim under ORS 656.278(1)(b). In doing so, we reasoned that the analysis regarding entitlement to temporary disability benefits is the same because the statutory language regarding payment of temporary disability benefits on open “worsened” condition claims and open “post-aggravation rights” new or omitted medical condition claims is identical. *Garoutte*, 56 Van Natta at 423 n 12. Specifically, we noted that both ORS 656.278(1)(a) and (1)(b) provide that “the payment of temporary disability compensation in accordance with ORS 656.210, 656.212(2) and 656.262(4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker’s condition becomes medically stationary.”

Nevertheless, in *Garoutte*, we qualified that analysis by noting that because the treatment in *Cavazos* was not “curative,” it was unnecessary to determine whether the additional “other curative treatment” requirements for reopening a “worsened condition” claim under ORS 656.278(1)(a) applied to the payment of temporary disability benefits under ORS 656.278(1)(a). *Garoutte*, 56 Van Natta at 423 n 10. Furthermore, we reached the same conclusion in *Garoutte* (where there was no surgery or hospitalization and the treatment was not “curative”); *i.e.*, under the circumstances presented in *Garoutte*, it was not necessary to determine whether those additional factors for reopening a claim under ORS 656.278(1)(a) applied to the payment of temporary disability benefits for claims opened under ORS 656.278(1)(b). *Id.*

Here, SAIF presents the question that *Garoutte* left unanswered. That is, whether the additional factors regarding “other curative treatment” required for reopening a “worsened condition” claim under ORS 656.278(1)(a) apply to the payment of temporary disability benefits for a “post-aggravation rights” new or omitted medical condition claim opened under ORS 656.278(1)(b). We proceed to address that issue.

The text of ORS 656.278(1)(b) follows the same structure as ORS 656.278(1)(a). In this regard, ORS 656.278(1)(b) consists of two sentences. The first sentence describes the circumstances under which a new or omitted medical condition claim comes within the Board’s Own Motion jurisdiction and qualifies for reopening. The second sentence provides the requirements for payment of benefits where the circumstances described in the first sentence are satisfied. ORS 656.278(1)(b); *Kemp*, 54 Van Natta at 506.

Regarding the first sentence, the statute requires that “the worker submits and obtains acceptance of a claim for a compensable new medical condition or an omitted medical condition pursuant to ORS 656.267 and the claim is initiated after the rights under ORS 656.273 have expired.” ORS 656.267, which is referenced in the first sentence of ORS 656.278(1)(b), deals with the requirements to initiate new and omitted medical condition claims and the jurisdiction of such claims.

The clear language of the first sentence of ORS 656.278(1)(b) establishes that there are two requirements regarding claim reopening for a “post-aggravation rights” new or omitted medical condition claim. First, the new or omitted medical condition claim must have been initiated after the expiration of the claimant’s aggravation rights under ORS 656.273. Second, the new or omitted medical condition must be accepted or found compensable through litigation. *Kemp*, 54 Van Natta at 507-08.

There are no additional requirements to reopen a “post-aggravation rights” new or omitted medical condition claim under ORS 656.278(1)(b). Specifically, there is no requirement for any medical treatment to qualify for *reopening* a “post-aggravation rights” new or omitted medical condition claim under ORS 656.278(1)(b). As addressed above, this differs from the multiple requirements for reopening a “worsened condition” claim under ORS 656.278(1)(a), which include inability to work, work force status, and requisite medical treatment (“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”).

The second sentence of ORS 656.278(1)(b) provides the requirements for *payment* of benefits in “post-aggravation rights” new or omitted medical condition claims. This sentence provides:

“In such cases, the payment of temporary disability compensation in accordance with the provisions of ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability compensation *for the hospitalization, surgery or other curative treatment* until the worker’s condition becomes medically stationary, and the payment of permanent disability benefits may be provided after application of the standards for the evaluation and determination of disability as may be

adopted by the Director of the Department of Consumer and Business Services pursuant to ORS 656.726[.]” (Emphasis added).

This sentence begins with the phrase “[i]n such cases,” which refers to the prior sentence that listed the requirements regarding claim reopening for a “post-aggravation rights” new or omitted medical condition claim. Thus, based on this opening clause (“[i]n such cases”), the language of ORS 656.278(1)(b) links the requirements in the first sentence for reopening a “post-aggravation rights” new or omitted medical condition claim to the requirements in the second sentence for payment of benefits available on such claims.⁵ In other words, unless the requirements for reopening a “post-aggravation rights” new or omitted medical condition claim are satisfied, the payment of benefits on such claims is not reached.

One of the available benefits for a “post-aggravation rights” new or omitted medical condition claim is permanent disability compensation, which is not available for “worsened condition” claims. *See* ORS 656.278(1)(a), (1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recons*, 54 Van Natta 1552 (2002), *aff’d*, *Dougan v. SAIF*, 193 Or App 767, *vacated*, 339 Or 1 (2005).⁶ The other available benefit is temporary disability compensation. Although there is no medical treatment requirement for *reopening* a “post-aggravation rights” new or omitted medical condition claim, *payment* of temporary disability benefits on such a reopened claim is explicitly limited to the attending physician’s authorization of “temporary disability compensation *for the hospitalization, surgery or other curative treatment*[.]” (Emphasis added).

⁵ Likewise, as quoted and discussed above, the first sentence of ORS 656.278(1)(a) provides the requirements for reopening a “worsened condition” claim and the second sentence begins with the phrase “[i]n such cases,” explicitly linking the requirements for reopening a “worsened condition” claim to the requirements for payment of benefits available on such claims.

⁶ On review, the *Dougan* court vacated the Court of Appeals decision and dismissed the claimant’s petition for review, finding that, pursuant to ORS 656.278(4), a claimant is not entitled to judicial review of an Own Motion order that does not diminish or terminate a former award. Effective January 1, 2006, the Legislature amended ORS 656.278(4) to permit any party to appeal an Own Motion Order. *See* House bill 2294, sections 2, 4.

As noted above, the court has reiterated that text should not be read in isolation but must be considered in context. *Stevens v. Czerniak*, 336 Or 392, 401 (2004); *State v. Barrett*, 331 Or 27, 32 (2000); *PGE*, 317 Or at 610-11. Context includes other provisions of the same statute. *Stevens*, 336 Or at 401; *Owens*, 323 Or at 435; *PGE*, 317 Or at 611.

Here, the context includes both subsection (1)(a) and (1)(b). Importantly, although each subsection refers to a different type of claim and to the requirements for reopening and the payment of benefits for each type of claim, the requirements for the payment of temporary disability benefits are *identical* for both reopened “worsened condition” claims under subsection (1)(a) and for reopened “post-aggravation rights” new or omitted medical condition claims under subsection (1)(b). Specifically, both subsections provide that “the payment of temporary disability compensation in accordance with ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker’s condition becomes medically stationary.” The ordinary presumption is that the same language, when used in related statutes, has the same meaning. See *PGE*, 317 Or at 611; *Sweeney v. SMC Corp.*, 178 Or App 576, 587 (2002). These two subsections of the same statute concerning Own Motion claims are certainly related.

Furthermore, although the legislature explicitly made *permanent* disability benefits available to “post-aggravation rights” new or omitted medical condition claims and did not make such benefits available to “worsened condition” claims, it just as explicitly made *temporary* disability benefits available to both types of claims based on the *same requirements*. That is the legislature’s prerogative. In other words, simply because the legislature made permanent disability benefits available only to “post-aggravation rights” new or omitted medical condition claims does not mean that it intended different requirements for payment of temporary disability benefits for both types of claims, especially since it used identical language to describe the requirements for payment of temporary disability benefits for both types of claims.

In addition, in listing the requirements for the payment of temporary disability, ORS 656.278(1)(a) and (1)(b) both refer to the attending physician authorizing temporary disability compensation for “*the* hospitalization, surgery or other curative treatment” using the definite article “the” to describe the words “hospitalization,” “surgery,” and “other curative treatment.” (Emphasis added). Like the courts, we ordinarily assume that the use of the definite article, as opposed

to the indefinite article, has legal significance. *See State v. Rodriguez*, 217 Or App 24, 30-31 (2007); *Carroll and Murphy*, 186 Or App 59, 68 (2003) (providing that the legislature uses “a,” as an indefinite article, to refer to an unidentified, undetermined, or unspecified object and uses “the,” as a definite article, to indicate the intention to refer to a definite object). Thus, by using the definite article “the” to describe “hospitalization, surgery or other curative treatment,” the legislature intended to refer to a specific “hospitalization,” “surgery,” or “other curative treatment” denoted elsewhere in the statutory scheme, not to “hospitalizations,” “surgeries,” or “other curative treatments” more generally. *See Osborn v. PSRB*, 325 Or 135, 142-43 (1997) (statutes use of the definite article “the” indicates legislature’s intent to refer to a previous part of the statute); *Anderson v. Jensen Racing, Inc.* 324 Or 570, 578-79 (1997) (the definite article “the” functions as an adjective to denote a particular, specified thing, not a general, unspecified class of things); *Thunderbird Hotels v. City of Portland*, 218 Or App 548, 559-60 (2008); *Rose v. SAIF*, 200 Or App 654, 663 (2005) (use of definite article makes clear that statutory reference to item is reference to same item that is mentioned earlier in same statute); *Sweeney*, 178 Or App at 586 (statute referring to “the remedy” using definite article “the” suggested that the legislature intended to refer to a specific remedy denoted elsewhere in the scheme, not remedies more generally); *Madrigal v. J. Frank Schmidt & Son*, 172 Or App 1, 8 (2001) (use of the definite article – the loss of wages – indicates that the phrase refers to the same loss of wages that was mentioned in the preceding section of the statute).

The only other reference to “the hospitalization, surgery or other curative treatment” in the statutory scheme is found in ORS 656.278(1)(a). As discussed above, that language provides the identical requirements for payment of temporary disability benefits for reopened “worsened condition” claims. Importantly, in the preceding sentence, ORS 656.278(1)(a) also refers to “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.*” (Emphasis added). This language describes the specific “hospitalization,” “surgery,” or “other curative treatment” that is denoted by the subsequent use of the definite article “the” to describe the “hospitalization, surgery or other curative treatment” requirement for payment of temporary disability benefits in subsections (1)(a) and (1)(b).

Therefore, for the reasons explained above, we find that, by using the phrase “*the hospitalization, surgery or other curative treatment*” in the second sentences of subsections (1)(a) and (1)(b), the legislature intended to refer to and incorporate the prior reference to “*other curative treatment prescribed in lieu of hospitalization that*

is necessary to enable the injured worker to return to work,” the phrase used in the first sentence of subsection (1)(a). In other words, the legislature intended that, provided that the other requirements for payment of temporary disability are satisfied, both “worsened condition” claims and “post-aggravation rights” new or omitted medical condition claims are entitled to temporary disability benefits when 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.

As explained above, we reach our conclusion by examining the text and context of ORS 656.278(1)(b), without violating the statutory prohibition “not to insert what has been omitted, or to omit what has been inserted.” ORS 174.010. Contrary to the dissent’s criticism of our reasoning, we have not inserted what has been omitted; instead, we have simply examined the text and context of the statute to determine the legislature’s intent. In contrast, the dissent’s reasoning essentially omits the definite article “the” in its analysis of the language in question.

Although we find no ambiguity in the statute, we acknowledge that the threshold of ambiguity is a low one. It does not require that competing constructions be equally tenable. It requires only that a competing construction not be “wholly implausible.” *Owens v. MVD*, 319 Or 259, 268 (1994); *Godfrey v. Fred Meyer Stores*, 202 Or App 673, 686 (2005). Although we disagree with the dissent’s construction, it is not “wholly implausible.” Therefore, assuming that there is ambiguity in the statute, we turn to legislative history. *See SAIF v. Allen*, 320 Or 192, 202 (1994) (because the intention of the legislature in using the article “the” in the phrase under consideration was not clear, the court resorted to legislative history).

Our examination of legislative history reveals nothing pertinent on this matter. That means that we resort to general maxims of statutory construction, including the maxim that where no legislative history exists the court will attempt to determine how the legislature would have intended the statute be applied, had it considered the issue. *PGE*, 317 Or at 612; *Security State Bank v. Luebke*, 303 Or 418, 423 (1987). Given the wording of subsections (1)(a) and (1)(b) of the statute, it seems clear that the legislature would favor our interpretation. For consistency purposes alone, given the language used by the legislature in these two subsections, it makes logical sense to interpret these subsections harmoniously so that the language “the * * * other curative treatment” used in the second sentences of both subsections refers to the language used earlier in the first sentence of subsection (1)(a) (“other curative treatment prescribed in lieu of hospitalization

that is necessary to enable the injured worker to return to work”). That way, the same requirements would apply for payment of temporary disability benefits for both “worsened condition” claims and “post-aggravation rights” new or omitted medical condition claims. There is no indication that the legislature would have intended otherwise.

Therefore, we find that the legislature intended that, provided that the other requirements for payment of temporary disability are satisfied, both “worsened condition” claims and “post-aggravation rights” new or omitted medical condition claims are entitled to temporary disability benefits when 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. ORS 656.278(1)(a), (b).

Here, although Dr. McQueen authorized TTD for other curative treatment regarding claimant’s reopened “post-aggravation rights” new or omitted medical condition (“lumbosacral strain/sprain”), the record does not establish that the “other curative treatment” was “prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” Therefore, claimant has not established entitlement to temporary disability compensation. Consequently, we affirm SAIF’s August 27, 2007 Own Motion Notice of Closure.

IT IS SO ORDERED.

Entered at Salem, Oregon on August 21, 2008

Member Biehl dissenting.

The majority concludes that the additional factors regarding “other curative treatment” required for reopening a “worsened condition” claim under ORS 656.278(1)(a) apply to the payment of temporary disability compensation for a “post-aggravation rights” new or omitted medical condition claim opened under ORS 656.278(1)(b). Because I disagree with the majority’s interpretation of the requirements for payment of temporary disability compensation under ORS 656.278(1)(b), I respectfully dissent.

In construing ORS 656.278(1)(b), our task is to discern legislative intent. *See* ORS 174.020. We begin by examining the text and context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). The context of a statute relevant at the first level of analysis may include other provisions of the

same statute and related statutes, *id.* at 610-11, prior enactments and judicial interpretations of those and related statutes, *Owens v. Maass*, 323 Or 430, 435 (1996), and the historical context of the relevant enactments, *Goodyear Tire & Rubber Co. v. Tualatin Tire and Auto*, 322 Or 406, 415 (1995), *on recons*, 325 Or 46 (1997). If those sources do not reveal legislative intent, we resort to legislative history and other extrinsic aids. *PGE*, 317 Or at 611-12.

I agree with the majority's summary of our decisions in *Mark A. Cavazos*, 55 Van Natta 3004 (2003), and *Loyd E. Garoutte*, 56 Van Natta 416 (2004). I also agree with the majority's acknowledgment that the text of ORS 656.278(1)(a) and (b) follow the same structure, with the first sentence of each subsection describing the circumstances under which the referenced type of claim comes within the Board's Own Motion jurisdiction and qualifies for reopening and the second sentence providing the requirements for payment of benefits where the circumstances described in the first sentence are satisfied.

However, the majority does not give proper consideration to the explicit text of the second sentence of ORS 656.278(1)(b), which provides the requirements for *payment* of benefits in "post-aggravation rights" new or omitted medical condition claims. This sentence provides:

"In such cases, the payment of temporary disability compensation in accordance with the provisions of ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary, and the payment of permanent disability benefits may be provided after application of the standards for the evaluation and determination of disability as may be adopted by the Director of the Department of Consumer and Business Services pursuant to ORS 656.726[.]"
(Emphasis added).

This sentence begins with the phrase "[i]n such cases," which refers to the prior sentence that listed the requirements regarding claim reopening for a "post-aggravation rights" new or omitted medical condition claim. The requirements for

reopening a “post-aggravation rights” new or omitted medical condition claim are *conditions precedent* for payment of benefits on such a claim. Thus, based on this opening clause (“[i]n such cases”), the clear language of ORS 656.278(1)(b) links the requirements for reopening a “post-aggravation rights” new or omitted medical condition claim to the requirements for payment of benefits available on such claims.⁷ One of those available benefits is permanent disability compensation, which is not available for “worsened condition” claims. See ORS 656.278(1)(a), (1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004).

The other benefit available is temporary disability compensation. Although there is no medical treatment requirement for *reopening* a “post-aggravation rights” new or omitted medical condition claim, *payment* of temporary disability benefits on such a reopened claim is explicitly limited to the attending physician’s authorization of “temporary disability compensation *for the hospitalization, surgery or other curative treatment*[.]” (Emphasis added).

The majority concludes that, by using the phrase “*the hospitalization, surgery or other curative treatment*” in the second sentences of subsections (1)(a) and (1)(b), the legislature intended to refer to and incorporate the prior reference to “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work,” the phrase used in the first sentence of subsection (1)(a) that concerns the requirements for *reopening* a “worsened condition” claim.⁸

However, the majority overlooks the explicit language prescribed in the opening clause (“[i]n such cases”) of the second sentence of ORS 656.278(1)(b) that incorporates the *condition precedent* prescribed in the first sentence of that subsection addressed above. In other words, after listing the different requirements

⁷ Likewise, the first sentence of ORS 656.278(1)(a) provides the requirements for reopening a “worsened condition” claim and second sentence begins with the phrase “[i]n such cases,” explicitly linking the requirements for reopening a “worsened condition” claim to the requirements for payment of benefits available on such claims.

⁸ In reaching its conclusion, the majority overlooks another meaning of the word “the.” In this regard, “the” can be “used as a function word before a singular noun denoting a group to indicate reference to the group as a whole.” *Webster’s Third New Int’l Dictionary* 2369 (unabridged ed 1993). Under that definition, the phrase “the hospitalization, surgery or other curative treatment” in the second sentence of ORS 656.278(1)(b) indicates the inclusion of a plural when it is unknown whether the reference is to a singular or a plural. In other words, the reference in ORS 656.278(1)(b) is to the hospitalization or hospitalizations, surgery or surgeries, or other curative treatment or treatments. I find this a more reasonable interpretation of the language in the second sentence of ORS 656.278(1)(b).

necessary to reopen each type of claim in subsection (1)(a) and (1)(b), the statute expressly conditions the sentences that follow in each subsection with the phrase “[i]n such cases” and proceeds to list the requirements for payment of benefits for each type of claim. Because each subsection concerns a separate type of claim and explicitly addresses the requirements for payment of benefits regarding the type of claim addressed by the particular subsection, I find that the legislature intended each subsection to fully address the requirements for reopening and payment of benefits for the specific type of claim addressed by each subsection. In other words, the legislature intended to fully encompass the requirements for reopening and payment of benefits for “post-aggravation rights” new or omitted medical condition claims in ORS 656.278(1)(b), which does *not* include any reference to “other curative treatment in lieu of hospitalization that is necessary to enable the injured worker to return to work.”⁹

In reaching this conclusion, I note that our role in construing a statute is “simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted[.]” ORS 174.010; *PGE*, 317 Or at 611. We are not at liberty to read into a statute an additional requirement that simply is not there. ORS 174.010; *Deluxe Cabinet Works v. Messmer*, 140 Or App 548, 555, *rev den*, 324 Or 305 (1996). In my opinion, the majority has done just that by incorporating the reference to “other curative treatment in lieu of hospitalization that is necessary to enable the injured worker to return to work” – a provision in the first sentence of ORS 656.278(1)(a) that refers to the requirements for reopening a “worsened condition” claim – into the second sentence of ORS 656.278(1)(b) – a provision that concerns payment of benefits for “post-aggravation rights” new or omitted medical condition claims.

Furthermore, a common textual maxim provides that the use of a term in one section and not in another section indicates a purposeful omission (*expressio unius est exclusio alterius*). *Fisher Broadcasting, Inc. v. Department of Revenue*, 321 Or 341, 353 (1995); *Perlenfein and Perlenfein*, 316 Or 16, 22-23 (1993) (legislature’s use of a particular term in one provision of a statute and omission of that term in a related provision leads to a conclusion that the legislature did not intend that the term apply in the provision from which it is omitted). With this principle in mind,

⁹ Moreover, because the issue of payment of temporary disability benefits on a reopened “worsened condition” claim is not before us, we need not address SAIF’s argument that payment of temporary disability benefits on such claims would require attending physician authorization of temporary disability compensation for the hospitalization, surgery or other curative treatment “prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.”

if the legislature had intended ORS 656.278(1)(b) to include “other curative treatment in lieu of hospitalization that is necessary to enable the injured worker to return to work” as a requirement for payment of temporary disability benefits for a “post-aggravation rights” new or omitted medical condition claim, it would have so stated. In addition, as indicated by statutory language making permanent disability benefits available for “post-aggravation rights” new or omitted medical condition claims but not for “worsened condition” claims, it is apparent that the legislature did not necessarily intend to make the benefits available or the requirements for such benefits identical for both “worsened condition” claims and “post-aggravation rights” new or omitted medical condition claims. *Goddard*, 193 Or App at 244-45. Because the legislature’s intent is clear from the text and context of the statute, no further inquiry is necessary.

In conclusion, I would continue to find that, based on Dr. McQueen’s authorization for TTD for the other curative treatment regarding claimant’s reopened “post-aggravation rights” new or omitted medical condition (“lumbosacral strain/sprain”), she is entitled to TTD beginning April 27, 2005, to be paid in accordance with the provisions of ORS 656.210, ORS 656.212, and ORS 656.262(4). Because the majority finds otherwise, I respectfully dissent.