
In the Matter of the Compensation of
JUAN C. AGUILA, Claimant
Own Motion No. 16-00033OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Randy M Elmer, Claimant Attorneys
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The carrier has submitted an Own Motion Recommendation against the reopening of claimant's Own Motion claim for a "worsening" of his previously accepted left knee condition. *See* ORS 656.278(1)(a). The carrier contends, among other issues, that claimant's compensable condition does not require any medical treatment that qualifies for claim reopening. Based on the following reasoning, we deny reopening.

FINDINGS OF FACT¹

In 2006, claimant sustained a compensable left knee injury, which the carrier accepted for "left knee medial meniscus tear." (Ex. 1-4). A February 2008 Notice of Closure awarded 5 percent whole person impairment for his left knee. (Ex. 1-2).

In April 2016, Dr. Ballard, attending physician, proposed an arthroscopic debridement to treat a recurrent horizontal medial meniscus tear. (Ex. 6-4).

On July 25, 2016, Dr. Toal, examining physician, recommended that conservative measures be exhausted before proceeding with surgery. (Ex. 8).

On August 18, 2016, Dr. Ballard amended his surgery recommendation, stating that "a cortisone shot should first be administered." (Ex. 9-1). He advised that claimant would not require any time off from work following the injection. In addition, he reported that, if the injection was helpful, claimant might be able to avoid repeat surgery. However, if the injection did not alleviate claimant's symptoms, Dr. Ballard commented that surgery was the next option. (*Id.*)

¹ Following the carrier's initial submission of exhibits, the parties submitted additional exhibits, which they did not number. We number those exhibits as follows: Dr. Ballard's July 6, 2016 response to claimant's inquiry is numbered Exhibit 7; Dr. Toal's July 25, 2016 response to the carrier's inquiry is numbered Exhibit 8; and Dr. Ballard's August 18, 2016 response to the carrier's inquiry is numbered Exhibit 9.

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.

The requirement that the worsening require hospitalization, surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the worker to return to work may be satisfied by a recommendation for any of the requisite treatments. *Thurman M. Mitchell*, 54 Van Natta 2607, 2615 (2002). A delay of a recommended surgery does not necessarily vitiate the surgery recommendation. *See Steven L. Traister*, 65 Van Natta 1295, 1300, *recons*, 65 Van Natta 1615 (2013) (requisite treatment found where the claimant cancelled the recommended surgery for “financial reasons,” but remained willing to proceed with the surgery if he received temporary disability benefits, and the surgery recommendation was not withdrawn). However, the requirement is not satisfied by a recommendation for a requisite treatment that has subsequently been withdrawn. *Andrew E. Shipman*, 64 Van Natta 1000, 1001 (2012); *Edwin V. Johnson*, 58 Van Natta 2294, 2296 (2006); *cf. Corey A. Otterson*, 56 Van Natta 363, 365 (2004) (“treatment” requirement satisfied where surgery was recommended and there was no evidence that the surgery recommendation was withdrawn or that the claimant decided not to proceed with the recommended surgery).

Here, in April 2016, Dr. Ballard proposed surgery. (Ex. 6-4). However, on August 18, 2016, he recommended that claimant not proceed with the surgery because a cortisone shot might alleviate his symptoms, which would enable him to avoid repeat surgery. (Ex. 9-1).

Consequently, Dr. Ballard has withdrawn his surgery recommendation. (*Id.*) Because the record does not support the existence of any other requisite “medical treatment” requirement, claim reopening is not warranted.²

² The carrier also contended that claimant’s Own Motion claim does not satisfy the “inability to work” requirement under ORS 656.278(1)(a). Because the “medical treatment” requirement has not been met, the “inability to work” issue need not be addressed.

Therefore, we conclude that this Own Motion claim for a “worsening” of claimant’s previously accepted left knee condition does not satisfy the criteria set forth in ORS 656.278(1)(a) to qualify for claim reopening. Accordingly, we are not authorized to reopen the claim.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 19, 2016