
In the Matter of the Compensation of
VICTOR J. CERVANTES, Claimant
WCB Case No. 01-02977, 01-00368
ORDER ON REVIEW (REMANDING)
Ransom & Gilbertson & Martin, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Phillips Polich, Bock, and Biehl.¹

Liberty Northwest Insurance Corporation (Liberty), on behalf of the United Methodist Church of Sheridan (Sheridan Church), requests review of Administrative Law Judge (ALJ) Peterson's order that: (1) set aside its denial of claimant's occupational disease claim for a bilateral elbow condition; (2) awarded claimant an assessed attorney fee under ORS 656.386(1); (3) upheld Barrett Business Services' (Barrett's) denial of claimant's aggravation claim for the same condition; (4) directed Liberty to reimburse Barrett for interim compensation paid to claimant; and (5) assessed a penalty against Liberty for an allegedly unreasonable claim denial. On review, the issues are compensability, responsibility, interim compensation and penalties. We vacate and remand.

FINDINGS OF FACT

Claimant has an accepted claim for bilateral epicondylitis (an elbow condition) with Barrett, stemming from employment in 1999. (Exs. 115A, 124A, 126). That claim was closed and eventually claimant was awarded permanent disability. (Ex. 153A). In March 2000, claimant began working at Camp Magruder, a youth camp operated by the Oregon Idaho Annual Conference of the United Methodist Church (hereafter "the Conference"). While working at the camp, claimant's elbow symptoms resurfaced.

Claimant filed an aggravation claim with Barrett, which was denied on January 9, 2001. (Ex. 174). That denial contained a disclaimer of responsibility. Accordingly, on January 12, 2001, claimant (through his attorney) filed a claim with Kemper Insurance Company, which he mistakenly believed insured

¹ After consultation with the Department of Justice, this Board has chosen to exercise its right to issue orders as a panel of three pursuant to ORS 656.718(2) and (3).

employees at Camp Magruder. Kemper wrote to claimant and informed him that Liberty in fact insured Camp Magruder.

On February 15, 2001, claimant wrote to Liberty through his attorney and filed a claim for his bilateral elbow condition, specifying that his employer at the time of injury was Camp Magruder, “owned and operated by United Methodist Church.” (Ex. 180B). Claimant enclosed the denial from Barrett and other medical documents. (*Id.*)

On April 9, 2001, Liberty denied responsibility for claimant’s elbow condition on behalf of “the United Methodist Church.” (Ex. 182). On June 11, 2001, Liberty issued an “amended denial of responsibility,” for the reason that claimant was not an employee of the “United Methodist Church,” but instead was an employee of the Conference. The Sheridan Church/Liberty also alleged that claimant was not a subject worker. (Ex. 186).

Claimant requested a hearing from all denials. On the Notice of Hearing issued by the Hearings Division, the address of the employer insured by Liberty was listed as “United Methodist Church, 234 N Bridge St Sheridan OR 97378.” The Conference was not listed as a party on the Notice of Hearing.

On June 18, 2001, Liberty, on behalf of the Sheridan Church, filed a motion to dismiss claimant’s request for hearing. In that motion, Liberty alleged that the Sheridan Church had only one employee, and it was not claimant. It further alleged that Camp Magruder was run by the Conference, and that Liberty was currently processing that claim under another claim number.

A hearing convened on July 2, 2001. Claimant was present with his attorney. Barrett was present with its attorney. Liberty was present through its attorney. However, Liberty’s attorney clarified that he was representing only the Sheridan Church, and no other entity of the United Methodist Church. (Tr. 1). Liberty contended that its denial on behalf of the Sheridan Church must be upheld. Liberty’s attorney further noted that the Conference had not been joined in the proceedings. In response, claimant argued that he had filed a claim against the correct employer, and that Liberty’s own “negligence” in processing the claim with the wrong employer should not be cause for a delay of the hearing.

The ALJ denied Liberty’s motion to dismiss the Sheridan Church. The ALJ then set aside the denial of Liberty as insurer for “the United Methodist Church dba ‘Camp Magruder.’” (*O&O* at 4). The ALJ also awarded claimant an attorney

fee under ORS 656.386(1), upheld Barrett's denial, directed Liberty to reimburse Barrett for interim compensation paid to claimant, and assessed a penalty against Liberty for unreasonable claim processing. Liberty timely requested Board review.

CONCLUSIONS OF LAW AND OPINION

Claimant filed a claim against Camp Magruder, owned and operated by the United Methodist Church. (Ex. 180B). Thereafter, Liberty denied the claim, asserting that its insured (the Sheridan Church) was not claimant's employer, but rather, he was employed by the Conference (another entity insured by Liberty). Claimant requested a hearing from Liberty's denials on behalf of the Sheridan Church, but did not file a hearing request regarding a *de facto* denial by the Conference/Liberty. In response to claimant's hearing request from Liberty/Sheridan's denial, the Hearings Division did not mail a notice of the hearing to the Conference.

Nevertheless, at hearing, despite Liberty's counsel's assertion that he was not representing the Conference, claimant's counsel continued to assert his claim for the elbow condition against the Conference. (Tr. 1-3). In effect, we interpret claimant's counsel's statements at hearing as a motion to continue the hearing in order to file a request for hearing alleging a *de facto* denial against the Conference/Liberty, to be consolidated with claimant's already existing hearing requests regarding Liberty's denials on behalf of the Sheridan Church and regarding Barrett's denial. *See* OAR 438-006-0065.²

In accordance with ORS 656.283(5) and OAR 438-006-0020, the Conference is entitled to at least 10-day written notice of the hearing. Here, the record does not establish that Liberty/Sheridan Church received *any* notice (10 days or otherwise) of a hearing involving claimant's "Conference" claim.

² OAR 438-006-0065(1) and (2) provide:

"(1) An Administrative Law Judge shall consolidate into one proceeding all cases in which a claimant has requested hearings involving denials of responsibility of a claim issued by insurers or self-insured employers under ORS 656.308(2)(a).

(2) Any request for hearing pertaining to the same claim or claimant as that of a pending hearing request shall also recite whether the request for hearing should be consolidated with a pending hearing request or be separately scheduled for hearing."

Instead, the record reflects that all hearing requests and notices regarding those requests pertained to claimant's "Sheridan" claim.³

Therefore, it was incumbent on the ALJ to continue the hearing to enable claimant to file an additional request for hearing from a *de facto* denial by the Conference/Liberty (to be consolidated with the pending requests for hearing regarding Liberty/Sheridan Church for the same claim), to provide the Conference adequate notice of the proceeding, and then to reconvene the "consolidated" hearing to further develop the record. *Cf. Lura F. Carter*, 51 Van Natta 1226, 1229 (1999) (Board declined to find that the ALJ should have granted a continuance where the record, including the Hearings Division file, indicated that the employer and its carrier were mailed a copy of the notice of hearing).

Under these circumstances, we find that the case has been improperly or incompletely developed. ORS 656.295(5). This matter must therefore be remanded to the ALJ.⁴

³ Notice to an insurer can sometimes constitute notice to an employer. *See Nollen v. SAIF*, 23 Or App 420, 423 (1975) (timely service of a request for review on an employer's insurer is sufficient compliance with ORS 656.295(2) to vest appellate jurisdiction with the Board). However, there must be an absence of prejudice to the "un-noticed" party (here, the Conference). *See Nollen*, 23 Or App at 423; *Alfredo R. Herrera*, 51 Van Natta 1360, *on recon* 51 Van Natta 1427 (1999). At hearing, Liberty expressly stated that it did not represent the Conference. Accordingly, it cannot be said that there was an absence of prejudice to the Conference resulting from its lack of notice of the hearing under ORS 656.283(5). Therefore, notice to its insurer (Liberty) is not sufficient in these circumstances.

⁴ We acknowledge claimant's understandable frustration with the course of events precipitated by Liberty's claim processing actions or inactions in response to his claim. Nevertheless, to proceed without notice to a necessary party would violate the statutory notice provision. *See* ORS 656.283(5). We further note that our resolution of this case on these grounds does not preclude claimant from seeking, on remand, a penalty and/or related attorney fee against Liberty for its conduct on behalf of the Sheridan Church and/or the Conference.

Accordingly, the ALJ's order dated July 16, 2001 is vacated. This matter is remanded to ALJ Peterson for further proceedings consistent with this order; *i.e.*, following written notice of a continued hearing to the Conference and all the parties and their representatives, the reconvening of further proceedings. These proceedings may be held in any manner that the ALJ deems achieves substantial justice to all parties.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 17, 2002