

In the Matter of the Compensation of
JOHN W. HYATT, Claimant
WCB Case No. 01-06508, 00-07020
ORDER ON REVIEW
Bruce D Smith, Claimant Attorneys
Johnson Et Al, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

Claimant requests review of Administrative Law Judge (ALJ) Mongrain's order that: (1) determined the Hearings Division lacked jurisdiction to consider the reclassification of his injury claim; and (2) upheld the insurer's denial of his aggravation claim for a left shoulder condition. On review, the issues are reclassification and aggravation. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

On February 6, 1998, claimant was diagnosed with arthrosis of the left acromioclavicular joint. (Ex. 1). In June 1998, Dr. Chamberlain performed a subacromial decompression and Mumford procedure on claimant's left shoulder. (Ex. 1-9). Claimant was temporarily disabled from that surgery for several weeks, becoming medically stationary in August 1998. (Exs. 1, p. 8-14; 26, p. 36-37).

On November 11, 1998, claimant filed an occupational disease claim for the left shoulder condition. (Ex. 2). The insurer denied the claim. (Ex. 7). Claimant requested a hearing.

On February 22, 2000, a prior ALJ set aside the insurer's denial of claimant's occupational disease claim. (Ex. 10). The insurer requested Board review.

In *John W. Hyatt*, 52 Van Natta 1050, *on recon* 52 Van Natta 1503 (2000), the Board affirmed the prior ALJ's order insofar as it concerned the insurer's denial of the occupational disease claim. (Exs. 17; 19). On August 31, 2000, the insurer accepted claimant's left shoulder condition (impingement syndrome with

osteoarthritis of acromioclavicular joint) as “non disabling.” (Ex. 20). The Notice of Acceptance shows February 6, 1998 as the “date of injury.” (*Id.*)

The following day, claimant requested that the Worker’s Compensation Division (WCD) reclassify the claim to disabling. (Ex. 22). Citing ORS 656.277(2) (1997) and ORS 656.273 (1997), WCD found that claimant’s reclassification request was untimely.¹ Consequently, WCD concluded that it lacked authority to consider the reclassification issue. (*Id.*) Claimant requested a hearing.

On September 26, 2000, claimant filed a claim for aggravation. (Ex. 22A-2). The insurer denied the claim. (Ex. 27). Claimant requested a hearing.

The ALJ reasoned that because the onset of claimant’s occupational disease was February 6, 1998, ORS 656.277 (1997) and ORS 656.273 (1997), rather than ORS 656.277 (1999) and ORS 656.273 (1999), applied to the claim. Finding that claimant’s reclassification request been made more that one year after the date of injury, the ALJ determined that the reclassification request was untimely filed. Consequently, the ALJ concluded that the Hearings Division lacked jurisdiction to consider the reclassification issue.

Applying ORS 656.273 (1997), the ALJ determined that the “last award or arrangement of compensation” was the Notice of Acceptance. Finding no medical evidence of a worsening of claimant’s condition after August 31, 2000 (date of Notice of Acceptance), the ALJ concluded that claimant had failed to establish an aggravation of his compensable left shoulder condition. Consequently, the ALJ upheld the insurer’s denial.

¹ ORS 656.277(2) (1997) provides in pertinent part:

“A claim that a non disabling injury originally was or has become disabling, if made more that one year after the date of injury, shall be made pursuant to ORS 656.273 as a claim for aggravation.”

ORS 656.273(1) (1997) provides in pertinent part:

“After the last award or arrangement of compensation, an injured worker is entitled to additional compensation for worsened conditions resulting from the original injury. A worsened condition resulting from the original injury is established by medical evidence of an actual worsening of the compensable condition supported by objective findings.”

ORS 656.277 (1997) was amended by Senate Bill 220, effective October 23, 1999, to allow reclassification “if the request is received within one year after the date of acceptance.”² Or Laws 1999, ch 313 Sec. 2 and 3. In *Jon O. Norstadt*, 52 Van Natta 1627 (2000), the Board reasoned that the 1999 amendments to ORS 656.277(1) (which permit a worker to seek reclassification for one year from the date of claim acceptance) did not apply to a claim which had arisen, and had been found the responsibility of the carrier, prior to the October 23, 1999 effective date of the 1999 amendments. Consequently, the Board concluded that the claimant’s reclassification request could not be considered under the “pre-1999” version of ORS 656.277 because the request was filed more than one year after the “date of injury” for the claim.

Subsequent to the ALJ’s order here, the court reversed the Board’s order in *Norstadt*. *Norstadt v. Liberty Northwest Insurance Corporation*, 179 Or App 731 (February 27, 2002). Due to the intervening litigation regarding the responsibility for his occupational disease claim, the court reasoned that the claimant never had an opportunity to seek reclassification and, by the time the litigation was resolved, the period for requesting reclassification under the old law had expired. See *Alcantar-Baca v. Liberty Northwest Ins. Corp.*, 161 Or App 49 (1999). Citing *Rhodes v. Eckelman*, 302 Or 245, 248 (1986), the court observed that the usual rule of construction assumes the legislature “wanted remedial or procedural statutes to apply to pending cases.” Consequently, the court concluded that the 1999 amendments to ORS 656.277(1) applied to the claimant’s reclassification request.

Here, similar to *Norstadt*, by the time the compensability litigation was resolved, the period for requesting reclassification under the “pre-1999” version of ORS 656.277 had expired. Consequently, we find *Norstadt* controlling, and conclude that the 1999 amendments to ORS 656.277(1) applied to claimant’s reclassification request. Because claimant’s reclassification request was received within one year after the insurer’s acceptance of the claim, WCD was authorized to consider the reclassification issue. Likewise, the ALJ had jurisdiction to address the reclassification dispute.

Turning to the merits of the reclassification issue, we find that the record establishes that following the June 8, 1999 surgery, claimant was restricted from all work until June 22, 1999. (Ex. 1-10). Thereafter, claimant was restricted to light duty work, and not released for regular duty until July 12, 1998. (Ex. 1-11;

² The 2001 Legislature amended ORS 656.277(1) to delete the phrase “if the request is received within one year after the date of acceptance.” Or. Laws 2001, ch. 350 § 2.

1-12; 1-13). Consequently, we conclude that claimant's accepted left shoulder condition was disabling. *See* ORS 656.005(7)(c). Accordingly, we reverse the ALJ's order. WCD's order denying reclassification is likewise reversed.³

Claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order, not to exceed \$5,000. ORS 656.386(2); OAR 438-015-0055(2).

ORDER

The ALJ's order dated November 2, 2001 is reversed. WCD's order is reversed. The claim is reclassified as disabling and remanded to the insurer for processing according to law. For services at hearing and on review, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order, not to exceed \$5,000 payable directly to claimant's counsel. The insurer's denial is set aside as null and void.

Entered at Salem, Oregon on June 20, 2002

³ Because we have found that claimant's reclassification request was timely filed, and having concluded that the claim was disabling, the aggravation issue is moot. Consequently, the insurer's denial of claimant's aggravation claim is set aside as null and void.