In the Matter of the Compensation of
**ROY P. WOOD, Claimant**
WCB Case No. 01-07853
ORDER ON RECONSIDERATION
Cary et al, Claimant Attorneys
Charles L Lisle, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests reconsideration of our July 30, 2003 Order on Review that vacated for lack of subject matter jurisdiction an Administrative Law Judge's (ALJ's) order that set aside the self-insured employer's denial of claimant's "post-aggravation rights" new/omitted medical condition claim for L4-5 and L5-S1 annular disc disruptions. *Roy P. Wood*, 55 Van Natta 2474 (2003). On August 25, 2003, we abated our July 30, 2003 Order on Review to further consider claimant's request and provide the employer an opportunity to respond to claimant's motion. *Roy P. Wood*, 55 Van Natta 2778 (2003). The time allowed for the employer's response has expired without receipt of any response. Accordingly, we proceed with our reconsideration.

Relying on *Pamela A. Martin, Dcd*, 54 Van Natta 1852 (2002), and *James J. Kemp*, 54 Van Natta 491 (2002), we determined that the amendments to ORS 656.267 (2001) and ORS 656.278(1)(b) (2001) were effective January 1, 2002, and applied to claimant's "post-aggravation rights" new/omitted medical condition claim. As such, we found that the Hearings Division did not have jurisdiction to decide the compensability of that claim. *See Mary A. Grace*, 55 Van Natta 718, 720 (2003). Consequently, we vacated the ALJ's order.

In his request for reconsideration, claimant requests that we "reconsider and decide this case under [our] administrative rules that become effective September 1, 2003." Based on the following reasoning, we find that the amended rules do not apply to claimant's claim, which was filed before September 1, 2003.

The amended rules to which claimant refers create a different system for processing "post-aggravation rights" new or omitted medical condition claims. Specifically, these rules provide for denials of "post-aggravation rights" new or omitted medical condition claims and for a hearing on appeal of such denials, resulting in a Proposed and Final Own Motion Order on the merits by an ALJ that is final and enforceable unless timely appealed to the Own Motion Board. *See* WCB Admin. Order 2-2003, Order of Adoption, July 9, 2003,

OAR 438-012-0001(4), OAR 438-012-0024, OAR 438-012-0070, OAR 438-012-0075, OAR 438-012-0090, OAR 438-012-0095. However, although *effective* September 1, 2003, these amended rules *apply* to Own Motion claims filed or initiated on or after September 1, 2003. OAR 438-012-0018; WCB Admin. Order 2-2003, Order of Adoption, page 21; *Keith A. Broeckel*, 55 Van Natta 3572, 3574-76 (2003); *Bernard D. Johnson*, 55 Van Natta 3036, 3037 fn1 (2003); *Gary S. Fox*, 55 Van Natta 3026, 3033 fn3 (2003); *Sherlee Samel*, 55 Van Natta 2634, 2642 fn6 (2003).

Here, because claimant's claim was filed before September 1, 2003, these amended rules do not apply to his claim. Accordingly, we deny claimant's request to apply these amended rules to his claim on reconsideration.

Finally, as we noted in our prior order, the employer is required to process claimant's "post-aggravation rights" new/omitted medical condition claim for L4-5 and L5-S1 annular disc disruptions pursuant to the Own Motion rules applicable to that claim. *See* WCB Admin. Order 2-2001, eff. 01/01/02. As explained below, within 14 days from the date of this order, the employer is required to file an amended Own Motion Recommendation that addresses claimant's "post-aggravation rights" new/omitted medical condition claim for L4-5 and L5-S1 annular disc disruptions.[1]

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[1] In October 2001, the employer filed an Own Motion Recommendation. Nonetheless, in 2001, such a recommendation could not pertain to a "new/omitted medical condition" claim. *See Arvin D. Lal*, 55 Van Natta 816, 819 (2003); *Pamela A. Martin, D'cd*, 54 Van Natta 1852, 1857 (2002); *Larry L. Ledin*, 52 Van Natta 680, 681 (2000), *aff'd SAIF v. Ledin*, 174 Or App 61, 62 (2001). Instead, the Own Motion Recommendation was limited to a worsening of claimant's previously accepted condition. Effective January 1, 2002, "post-aggravation" new/omitted medical condition claims required processing as a request for Own Motion relief pursuant to ORS 656.278(1)(b) (2001). *Edward G. Sprague*, 55 Van Natta 1564, 1567-68 (2003). Such processing requires compliance with the Board's rules for processing requests for relief under its Own Motion jurisdiction. OAR 438-012-0001 *et seq; Sprague*, 55 Van Natta at 1568; *Lal*, 55 Van Natta at 822. Under these rules, for injuries occurring before January 1, 2002, a carrier must, within 90 days after receiving an Own Motion claim (including a claim for a "post-aggravation rights" new or omitted medical condition), either voluntarily reopen the claim or submit a recommendation to the Board recommending for or against reopening of the claim by the Board. OAR 438-012-0020; OAR 438-012-0030.

Here, the employer has not processed the "post-aggravation rights" new/omitted medical condition claim pursuant to the amended Own Motion rules that became effective January 1, 2002. *See* WCB Admin. Order 2-2001. In other words, the employer has neither voluntarily reopened the new/omitted medical condition claim nor submitted an Own Motion Recommendation. Thus, consistent with the aforementioned points and authorities, the employer must submit an amended Own Motion Recommendation that is consistent with the "post-January 1, 2002" law. Because this "post-aggravation rights" new/omitted medical condition claim came under the Board's jurisdiction as of January 1, 2002, and the employer has not yet submitted an amended Own Motion Recommendation, the employer must

Accordingly, on reconsideration, as modified herein, we adhere to and republish our July 30, 2003 Order on Review. The parties' right of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on November 19, 2003

do so within 14 days of the date of this order. Once that recommendation is filed, the Board will expeditiously proceed with its Own Motion review of the "post-aggravation rights" new medical condition claim based on the record developed before the ALJ and the parties' arguments.