
In the Matter of the Compensation
DAVID L. HERNANDEZ, Claimant
WCB Case No. 02-07310
ORDER ON REVIEW
Vick & Conroyd, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Phillips Polich.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Crumme's order that affirmed a portion of an Order on Reconsideration temporary disability award. On review, the issue is jurisdiction.¹ We vacate the ALJ's order and set aside the Order on Reconsideration and Notice of Closure as invalid.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant has several accepted bilateral knee conditions. His aggravation rights expired on December 7, 1983. (Ex. 7-1).

On November 9, 2000, claimant requested acceptance of "left medial meniscus chondromalacia and joint effusion condition." (Ex. 15). Claimant's request was denied. However, on June 4, 2001, an ALJ approved the parties' stipulated agreement indicating that SAIF accepted "right knee contusion, traumatic right knee prepatellar bursitis, right knee loose body, right knee patellofemoral arthritis, right knee hypertrophic prepatellar bursitis, right knee medial meniscus tear in posterior horn, right knee chondromalacia of medial femoral condyle, left knee tear in mid and posterior horn of medial meniscus and

¹ Jurisdiction is a threshold issue which must be considered, even if it is not raised by the parties. *See SAIF v. Reddekopp*, 137 Or App 102 (1995) (Board has jurisdiction to determine whether a claim falls within our Own Motion jurisdiction); *Southwest Forest Industries v. Anders*, 299 Or 205 (1985) (even if jurisdiction is not raised by the parties, it is our duty to raise lack of jurisdiction *sua sponte*); *Julie L. Johnson*, 55 Van Natta 1266, 1267 (2003); *see e.g., Hill v. Oland*, 52 Or App 7891, 794 (1981) (even if a party does not raise a jurisdictional issue, "if we are without jurisdiction to hear [an] appeal, we must dismiss it *sua sponte*[.]").

left knee chondromalacia of medial femoral condyle, left knee medial compartment arthritis.” SAIF modified its acceptance accordingly. (Exs. 17, 18).

Dr. Becker examined claimant again on June 14, 2001 and July 18, 2001, noting that claimant was not fit for the work he did at the time of his 1977 injury. (Exs. 19, 20). On September 27, 2001, Dr. Becker stated that claimant was “eligible for time loss from work” beginning that day, and “continuing,” due to his right knee condition. (Ex. 23). On December 5, 2001, Dr. Becker performed right knee surgery. He examined both knees on March 21, 2002 and found claimant medically stationary.

On May 10, 2002, SAIF issued a Notice of Closure under ORS 656.268, with a statement of rights explaining that claimant could seek Director reconsideration. The closure notice awarded temporary and permanent disability. (Ex. 30). Claimant requested reconsideration. An August 26, 2002 Order on Reconsideration increased claimant’s temporary and permanent disability awards. (Ex. 32).

SAIF requested a hearing, which resulted in reduction of the Order on Reconsideration’s temporary disability award. SAIF requested Board review, seeking further modification of claimant’s temporary disability award.

However, because claimant’s aggravation rights under the 1977 claim expired in 1983, neither the Hearings Division nor the Board on review has authority to consider matters relating to claimant’s “post-aggravation rights” new or omitted medical condition claims for left medial meniscus chondromalacia and joint effusion. *See* ORS 656.267(3) (2001); ORS 656.278(1)(b)(2001); *Pamela A. Martin, D’cd*, 54 Van Natta 1852 (2002) (applying *James J. Kemp*, 54 Van Natta 491 (2002), Board determined that the Hearings Division did not have jurisdiction over a “post-aggravation rights” new medical condition claim).

We acknowledge that, under the law in effect when SAIF accepted claimant’s “post-aggravation rights” new or omitted medical condition claims, SAIF was required to process the claims under ORS 656.262 (1995) and ORS 656.268. *See Larry L. Ledin*, 52 Van Natta 680 (2000), *aff’d SAIF v. Ledin*, 174 Or App 61 (2001); *Johansen v. SAIF*, 158 Or App 672, *adhered to on recon*, 160 Or App 579, *rev den*, 329 Or 528 (1999); *John R. Graham*, 51 Van Natta 1740, 51 Van Natta 1746 (1999) (held that a “new medical condition” claim qualifies for reopening and closure under ORS 656.268 pursuant to ORS

656.262(7)(c) (1995), even if the original claim is in the Board's Own Motion jurisdiction).

Nevertheless, once the 2001 statutory amendments to ORS 656.278(1)(b) and ORS 656.267(3) became effective on January 1, 2002, SAIF was required to process these claims under the Board's Own Motion rules. *See Arvin D. Lal*, 55 Van Natta 816, 822-23 (2003). Under those rules, SAIF was required to either voluntarily reopen the claim or submit a recommendation for or against reopening to the Board. ORS 656.278(5); OAR 438-012-0020(1); OAR 438-012-0030. *See Lal*, 55 Van Natta at 823.

Here, SAIF did neither. Instead, it submitted a Notice of Closure, with appeal rights referring to reconsideration by the Workers' Compensation Division. Because SAIF did not comply with the Board rules for processing this Own Motion claim, its Notice of Closure was invalid, as was the subsequent Order on Reconsideration. Consequently, we vacate the ALJ's order for lack of jurisdiction and set aside the Notice of Closure and the Order on Reconsideration as invalid.²

ORDER

The ALJ's order dated January 6, 2003 is vacated. The May 10, 2002 Notice of Closure and the August 26, 2002 Order on Reconsideration are set aside as invalid.

Entered at Salem, Oregon on June 10, 2003

² SAIF remains obligated to process the "post-aggravation rights" new medical conditions in accordance with ORS 656.278(1)(b) (2001), which (based on its acceptance of the conditions) will likely include the reopening and eventual closure of the claim under the Board's Own Motion rules. If and when those events happen, if claimant is dissatisfied with SAIF's rating of temporary and permanent disability benefits, he may request Board review of the Own Motion closure notice at that time. In addition, claimant is not entitled to double benefits; therefore, if and when SAIF processes the "post-aggravation rights" new medical conditions to closure, it may offset the award of temporary and permanent disability benefits made in its May 10, 2002 Notice of Closure to the extent that those benefits have already been paid to claimant. *Clarence R. Wikel*, 55 Van Natta 1329, 1333 n. 3 (2003).