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In the Matter of the Compensation of  
**DENISE COLEMAN, Claimant**  
WCB Case No. 02-06875  
ORDER ON REVIEW  
Cary et al, Claimant Attorneys  
John E Snarskis & Assocs, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Crummé's order that affirmed an Order on Reconsideration that awarded no scheduled permanent disability for loss of use or function of the left hand. The insurer cross-requests review of that portion of the ALJ's order that awarded an assessed attorney fee under ORS 656.382(2). On review, the issues are jurisdiction, remand, scheduled permanent disability, and attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following supplementation.

An April 25, 2002 Notice of Closure awarded 16 percent scheduled permanent disability for loss of use or function of claimant's left hand based on sensory loss in the thumb, index, and middle finger. (Ex. 16-2). This award was based on a closing examination performed by Dr. Johnson, a neurosurgeon, and concurred in by the treating neurosurgeon, Dr. Freeman. (Exs. 13; 14; 16-2).

Claimant requested reconsideration. In doing so, claimant raised the following issues: disagreement with the rating of unscheduled permanent disability as it pertained to the age, education and adaptability factors. (Ex. 17A-2).

On July 11, 2002, the Appellate Review Unit (ARU) sought clarification from Dr. Freeman regarding claimant's documented loss of "palmar sensation." (Ex. 19). Dr. Freeman responded that he had not seen claimant for one year. (Ex. 19-2). Therefore, the appellate reviewer concluded that Dr. Freeman had "chosen not to assist in clarifying the sensory loss in this claim." (Ex. 20-2). Noting that claimant had not requested a medical arbiter and that the closing examination failed to record the sensory findings in millimeters (mm), the ARU

awarded no value for sensory loss and reduced claimant's scheduled permanent disability award to zero.<sup>1</sup> (Ex. 20-2).

### CONCLUSIONS OF LAW AND OPINION

The ALJ affirmed the Order on Reconsideration's reduction of claimant's scheduled permanent disability award of 16 percent to zero. The ALJ first determined that, even though claimant had not raised the issue of extent of scheduled permanent disability on the request for reconsideration form, the Workers' Compensation Division (WCD) had the authority under OAR 436-030-0115(5) to perform a complete review of the claim closure, to include the scheduled permanent disability issue.<sup>2</sup> The ALJ also determined that the record should not be reopened for a medical arbiter examination and report because claimant had not first exhausted her remedies in the reconsideration proceeding. According to the ALJ, the reconsideration request form notified claimant that WCD would completely review the Notice of Closure and, as a result, she had reasonable notice that she should supplement the reconsideration record and/or request an arbiter examination if the existing record failed to support the closure notice's scheduled permanent disability award.<sup>3</sup>

On review, claimant contends that WCD erred in addressing the issue of scheduled permanent disability when it had not been raised by the parties.

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<sup>1</sup> The ARU did not seek clarification from Dr. Johnson regarding the sensory findings he made in his closing examination nor did it appoint a medical arbiter pursuant to ORS 656.268(7)(b).

<sup>2</sup> OAR 436-030-0115(5) provides:

“ Only one reconsideration proceeding may be completed on each Notice of Closure and the director will do a complete review of that notice. Once the reconsideration proceeding is initiated by the worker, the insurer must raise any additional issues and submit any evidence for review by the director within the time frames allowed for processing the reconsideration request. When the director requires additional information to complete the record, the reconsideration proceeding may be postponed pursuant to ORS 656.268(6).”

<sup>3</sup> The “Request for Reconsideration” form provides options for a claimant to check a “yes” or “no” box to object to various aspects of the claim closure. However, based on other provisions of the “Request for Reconsideration” form, WCD will apparently always do a complete review of the Notice of Closure. Given such circumstances, checking the “no” box may be a meaningless exercise, and potentially misleading. In essence, claimant has only one discretionary choice: whether to request an arbiter. And even then, if claimant chooses not to exercise that choice, WCD can request an arbiter in its own discretion.

In doing so, claimant further argues that the “specific” procedures set forth in OAR 436-030-0135(6) govern the scope of review of an Order on Reconsideration and preclude consideration of an issue not raised by the parties on reconsideration.<sup>4</sup> Alternatively, claimant contends that she should be allowed the remedy of a medical arbiter examination. We first address claimant’s jurisdictional arguments.

### Jurisdiction

We adopt and affirm the ALJ’s order with the following supplementation.

In *Arlene J. Bond*, 50 Van Natta 2426 (1998), we considered the issue of the scope of the Director’s review of a Notice of Closure. We stated:

“[w]e have previously held that the [Director’s] review of a timely appealed closure notice is not necessarily limited to only those issues expressly raised by the parties. Cases such as *James E. Clemons*, 50 Van Natta 267 (1998); *Jason O. Olson*, 47 Van Natta 2192, 2194 (1995); *Russell D. Sarbacher*, 45 Van Natta 2230 (1993) and *Darlene K. Bentley*, 45 Van Natta 1719, 1722 (1993) stand for the general proposition that the [Director] may take whatever authorized action it deems necessary in its reconsideration of a closure notice or Determination Order. *See also Estella Rogan*, 50 Van Natta 205, n.4 (1998) ([Director] was authorized to address premature

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<sup>4</sup> OAR 436-030-0135(6) provides:

“The reconsideration order shall address issues raised by the parties and shall address compensation as follows:

- (a) Compensation reduced in a reconsideration order shall be “in lieu of” any compensation awarded by the Notice of Closure.
- (b) Additional compensation awarded in a reconsideration order shall be “in addition to” any compensation awarded by the Notice of Closure. The reconsideration order may award total compensation due less any compensation previously ordered.
- (c) Any compensation affirmed in a reconsideration order shall be so stated.
- (d) The dollar rate per degree of disability shall be listed.”

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closure issue even though issue was not expressly raised by the parties).” *Id.* at 2426.

In accordance with our reasoning in cases such as *Bond*, we conclude that WCD could address the scheduled permanent disability issue, even though that issue was not raised by the parties. Moreover, we disagree with claimant’s interpretation of OAR 436-030-0135(6) as mandating that *only* those issues *actually raised* by the parties can be addressed in the reconsideration order. Instead, we interpret the words “the reconsideration order shall address the issues raised by the parties” as requiring WCD to address issues raised by the parties; however, we do not construe OAR 436-030-0135(6) as precluding WCD from addressing any additional issues which arise as a result of the “complete review” of the closure required by OAR 436-030-0115(5).

Accordingly, we agree with the ALJ’s conclusion that WCD had the authority under OAR 436-030-0115(5) to perform a complete review of the claim closure, to include an issue (scheduled permanent disability) not raised by the parties.

### Remand

We adopt and affirm the ALJ’s order with the following supplementation regarding claimant’s request to reopen the record to obtain a medical arbiter’s examination and report.

On review, claimant contends that it was an abuse of discretion for the Director to not seek clarification from the physicians who had rendered opinions or appoint an arbiter to evaluate claimant’s sensory loss. Therefore, claimant argues that she “should be allowed a remedy be fashioned to create a full record including clarification from the physicians in the record or examination by arbiters on the specific question of sensory loss due to her two-point discrimination findings.” (App. Brief p.5).

We interpret claimant’s arguments to be a request for a remand to the ALJ for the deferral of further proceedings pending receipt of a medical arbiter’s report pursuant to ORS 656.268(6)(f).<sup>5</sup>

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<sup>5</sup> Although we lack the authority to remand this claim to the Director for the appointment of a medical arbiter, *see Pacheco-Gonzalez v. SAIF*, 123 Or App 312 (1993), we have adopted alternative remedies to provide for such an examination. *See Birrer v. Principal Financial Group*, 172 Or App 654, 662 (2001); *on remand Corrine L. Birrer*, 53 Van Natta 678 (2001); *Gloria Garibay*, 52 Van Natta 2251 (2001); *Vicky L. Woodard*, 52 Van Natta 796 (2001).

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Claimant is apparently relying on ORS 656.268(7)(b) in arguing that the Director should have appointed a medical arbiter. ORS 656.268(7)(b) provides as follows: “If neither party requests a medical arbiter and the director determines that insufficient medical information is available to determine disability, the director *may* refer the claim to a medical arbiter appointed by the director.” (Emphasis added).

Here, the Director, through WCD, determined that insufficient medical information was available and sought clarification of the sensory findings from claimant’s treating physician, Dr. Freeman. (Ex. 19). However, Dr. Freeman declined to clarify the findings, responding that he had not seen claimant in over a year. (Ex.19-2). At that point, WCD *could have* scheduled a medical arbiter examination to address the sensory findings, but it was not *required* to do so as it is not mandatory under ORS 656.268(7)(b). *See Daniel J. Hines, 55 Van Natta 337, 338 n1 (2003).*

We acknowledge that claimant did not raise the issue of scheduled permanent disability in her request for reconsideration, and, therefore, did not request the appointment of a medical arbiter. However, claimant bears the burden of proving injury-related impairment. ORS 656.266. Pursuant to ORS 656.283(7), “claimant was on notice that [she] needed to present written evidence to DCBS [Department of Consumer and Business Services] *before* [she] sought a hearing before the ALJ[.]” *See SAIF v. Everett, 179 Or App 112, 117, rev den 334 Or 76 (2002) (emphasis added).*

Here, claimant presented no evidence on reconsideration regarding her sensory loss. *See ORS 656.268(6)(a)(B).* Claimant also did not request a medical arbiter examination to address the insufficient sensory findings. *See ORS 656.268(7)(a).* Claimant’s failure to timely and adequately address the merits of her claim before the ARU amounts to a failure to exhaust her administrative remedies. *See Mullenaux v. Dept. of Revenue, 293 Or 536, 540 (1982); Larry Draheim, 54 Van Natta 1419, 1423 (2002) (failure to present documentary evidence on reconsideration amounted to failure to exhaust administrative remedies).* This failure is fatal to claimant’s appeal of the agency’s Order on Reconsideration. *Mullenaux, 293 Or at 541 (cited in Everett, 109 Or App at 119).* Under these circumstances, claimant is not entitled to the “remedy” of appointment of a medical arbiter and she may not present evidence outside the reconsideration record. *See Everett, 179 Or App at 119.*

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Accordingly, we conclude, as did the ALJ, that claimant failed to exhaust her administrative remedies in the reconsideration proceeding, and, therefore, could not reopen the record at the hearing level for receipt of additional evidence concerning her entitlement to scheduled permanent disability. *See Everett*, 179 Or App at 119; *Gayle R. Moore*, 55 Van Natta 266 (2003).

### Extent of Scheduled Permanent Disability

We adopt and affirm the ALJ's order regarding this issue.

### Attorney Fees

Claimant requested a hearing regarding the Order on Reconsideration's award of unscheduled permanent disability, seeking an increase from 26 percent to 41 percent. Rather than presenting their positions at an in-person hearing, the parties submitted written arguments. In its written response to claimant's opening position, the insurer sought a reduction in the Order on Reconsideration's unscheduled permanent disability award from 26 percent to 20 percent. In reply, claimant contended that, because the insurer sought a reduction in claimant's unscheduled permanent disability award, the ALJ should award and assessed attorney fee pursuant to ORS 656.382(2). The ALJ increased claimant's unscheduled permanent disability award to 36 percent and awarded claimant an assessed attorney fee under ORS 656.382(2) for prevailing against the insurer's argument that the unscheduled award should be reduced. (O & O p. 6).

The insurer argues that claimant is not entitled to an assessed attorney fee on the grounds that there is no statutory basis for the fee awarded by the ALJ. Specifically, the insurer argues that ORS 656.382(2) does not authorize a fee in this case because: (1) "the issue of an assessed fee was raised for the first time in claimant's reply argument to the Board (sic);" and (2) "neither the employer nor the insurer filed a request for hearing."

We affirm the ALJ's award of an assessed fee under ORS 656.382(2) based on the following reasoning.

ORS 656.382(2) provides:

"If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer

or insurer, and the Administrative Law Judge, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the Administrative Law Judge, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal.”

We acknowledge that the insurer did not formally file a request for hearing. However, the parties submitted the case on the written record without a hearing, during which time the insurer raised the issue of a reduction in claimant’s unscheduled award in its written response.

Under these circumstances, we find that an attorney fee was appropriately assessed pursuant to ORS 656.382(2) when the insurer unsuccessfully sought a reduction in claimant’s unscheduled permanent disability award. *See Kordon v. Mercer Industries*, 308 Or 290 (1989); *Michelle M. Green*, 51 Van Natta 260 (1999) (where the employer argued at hearing that the claimant’s unscheduled permanent disability award should be reduced from amount awarded by the Order on Reconsideration, the claimant’s attorney was entitled to an assessed fee under ORS 656.382(2) for services at hearing because the Order on Reconsideration’s award was not disallowed or reduced).<sup>6</sup> Furthermore, because the insurer did not seek the reduction of claimant’s unscheduled permanent disability award until the submission of its written response, we consider claimant’s request for an insurer-paid attorney fee under ORS 656.382(2) in her “reply” argument to have been timely raised.<sup>7</sup>

### ORDER

The ALJ’s order dated May 13, 2003 is affirmed.

Entered at Salem, Oregon on November 5, 2003

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<sup>6</sup> The insurer argues that *Green* should be disavowed. Having once more considered this issue, we decline the insurer’s request.

<sup>7</sup> Claimant is not entitled to an attorney fee on review for her counsel’s services in defending on the attorney fee issue. *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).