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In the Matter of the Compensation of  
**JACK D. VILLERS, Claimant**  
WCB Case No. 02-09000  
ORDER ON REVIEW  
Scott M McNutt Sr, Claimant Attorneys  
John M Pitcher, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Spangler's order that set aside its denials of claimant's L3-4 and L4-5 degenerative back conditions. On review, the issues are jurisdiction and, potentially, compensability. We vacate.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the exception of the final paragraph on page 3 of the Opinion and Order.

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable low back injury on October 16, 1986. Claimant's aggravation rights on this claim have expired. Subsequently, claimant requested that the employer accept L3-4 and L4-5 degenerative disc disease, stenosis, retrolisthesis and instability. The employer issued two denials, and claimant requested a hearing.

The ALJ determined that the Hearings Division lacked jurisdiction over the compensability of claimant's L3-4 degenerative disc disease, stenosis, retrolisthesis and instability. However, the ALJ concluded that claimant's current L4-5 conditions were compensable. For the reasons stated below, we vacate the ALJ's Opinion and Order.

In its "Carrier's Own Motion Recommendation," filed on January 30, 2003, the employer identified the accepted conditions related to claimant's October 1986 injury as "lumbar strain with laminotomy and discectomy at L4-5." Claimant formally requested the acceptance of L3-4 and L4-5 degenerative disc disease, stenosis, retrolisthesis and instability. None of these conditions have been formally accepted by the employer. As such, these conditions constitute "post-aggravation rights" new or omitted medical conditions. Based on our decisions in

*Pamela Martin*, 54 Van Natta 1852 (2002), and *James Kemp*, 54 Van Natta 491 (2002), the Hearings Division lacks jurisdiction to determine the compensability of a claimant's "post-aggravation rights" new or omitted medical conditions.

In *Martin*, we applied *amended* ORS 656.267 (2001) and 656.278(1)(b) (2001), and held that the Hearings Division lacked jurisdiction to resolve a "non-medical service" dispute regarding a "post-aggravation rights" new medical condition claim. We noted that, under prior case law, a new or omitted medical condition claim must be processed under ORS 656.262 and ORS 656.268, even if the aggravation rights on the initial claim had expired. See *Johansen v. SAIF*, 158 Or App 672, *adhered to on recon* 160 Or App 579, *rev den* 329 Or 528 (1999); *Larry L. Ledin*, 52 Van Natta 680 (2000), *aff'd SAIF v. Ledin*, 174 Or App 61 (2001). The 2001 legislature, however, amended ORS 656.267 and 656.278(1)(b), which affect Own Motion claims and "post-aggravation rights" new or omitted medical condition claims.

Relying on *Kemp*, we reiterated in *Martin* that the amendments to ORS 656.267 and 656.278(1)(b) were effective on January 1, 2002, applied to all claims regardless of the date of injury, and were intended to apply retroactively to pending Own Motion claims, provided that any previous processing of the claim under prior case law had not become final. Because the processing of the "post-aggravation rights" new medical condition claim in *Martin* had not become final, we concluded that the claim was subject to *amended* ORS 656.267 and 656.278(1)(b). As such, the Hearings Division did not have jurisdiction over the dispute and we dismissed the claimant's hearing request, noting that authority over the dispute rested with the Board under its Own Motion jurisdiction pursuant to *amended* ORS 656.278(1)(b). See also *David J. Albano*, 54 Van Natta 2079 (2002) (based on ORS 656.267(3), the Hearings Division lacked jurisdiction to consider a "non-medical service" dispute regarding a "post-aggravation rights" new medical condition claim).

Here, in a claim initiated prior to September 1, 2003, claimant is seeking to establish the compensability of "post-aggravation rights" new or omitted medical conditions. (L3-4 and L4-5 degenerative disc disease, stenosis, retrolisthesis, and instability). As discussed in *Martin* and *Kemp*, the amendments to ORS 656.267 and 656.278(1)(b) were effective on January 1, 2002. Claimant sought acceptance of the aforementioned L3-4 and L4-5 conditions on January 24, 2003.<sup>1</sup> Therefore,

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<sup>1</sup> In accordance with OAR 438-012-0030, the employer is obligated to either voluntarily reopen claimant's accepted claim for the processing of the new and/or omitted medical condition claim(s) or file an Own Motion

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the “post-aggravation rights” new or omitted medical condition claim is subject to *amended* ORS 656.267 and 656.278(1)(b). *See* OAR 438-012-0030. As such, the Hearings Division did not have original jurisdiction to consider the compensability of the new or omitted medical condition claim. Instead, the compensability of claimant’s L3-4 and L4-5 degenerative disc disease, stenosis, retrolisthesis and instability as a “post-aggravation rights” new or omitted medical condition must be determined by the Own Motion Board, pursuant to ORS 656.278.<sup>2</sup>

ORDER

The ALJ’s order dated May 5, 2003 is vacated. Claimant’s hearing request is dismissed.

Entered at Salem, Oregon on April 26, 2004

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Recommendation (either recommending for or against claim reopening). For “post-aggravation rights” new or omitted condition claims arising *on or after* September 1, 2003, if the carrier issues a denial pursuant to *amended* OAR 438-012-0024, the claimant will be able to appeal the denial directly to the Hearings Division. This provision is not applicable here because the “post-aggravation rights” new or omitted medical condition claim was initiated *before* September 1, 2003. *See Keith A. Broeckel*, 55 Van Natta 3572 (2003).

<sup>2</sup> In our Own Motion Order issued this date, we addressed the compensability of claimant’s new or omitted medical conditions. *Jack D. Villers*, 56 Van Natta \_\_\_\_ (Issued this date).