

In the Matter of the Compensation of
TREBA V. RUTHERFORD, Claimant

WCB Case No. 03-05569, 03-01446

ORDER ON REVIEW

Merkel & Associates, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys
Vavrosky Maccoll Olson et al, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

Claimant requests review of that portion of Administrative law Judge (ALJ) Hazelett's order that did not award an insurer-paid attorney fee when, at hearing, the insurer accepted claimant's "post-aggravation rights" new medical condition. On review, the issues are jurisdiction and, potentially, attorney fees. We vacate in part and affirm in part.

FINDINGS OF FACT

Claimant suffered a left knee injury while working for the Steinfeld's Products Co., Inc. (Steinfeld) in 1986. The insurer accepted the claim, which was diagnosed as a sprain and torn medial meniscus. (Exs. 3, 6, 7). On December 13, 1988, the claim was closed by Determination Order awarding 11 percent scheduled permanent disability for loss of the left leg (knee). (Ex. 43).

In November 2002, claimant suffered a second injury involving her left knee while working for Steinfeld's successor, Dean Pickle & Specialty Products (Dean) and filed an injury claim. (Ex. 49). Drs. Grewe and Woodward diagnosed claimant's current left knee condition as osteoarthritis of the medial compartment of the left knee. Drs. Grewe and Woodward characterized the condition as consequential to, and caused in major part by, claimant's 1986 injury and its treatment. (Exs. 66-9, 71-3, 82, 88-1, 2). Claimant was hospitalized from June 20-24, 2003 and underwent a left total knee arthroplasty. (Ex. 72AA).

On December 31, 2002, Dean denied the November 2002 injury claim. (Ex 54-1).

On May 9, 2003, claimant asked the insurer under his 1986 claim to "advise whether you accept claimant's current medical condition and treatment with regard to the left knee." (Ex. 64C). In addition, on July 2, 2003, claimant requested the

insurer to “voluntarily reopen the claim for own motion benefits” and to confirm its “ongoing acceptance of claimant’s current left knee condition.” (Ex. 74).

On July 31, 2003 the insurer submitted a “Carrier’s Own Motion Recommendation,” recommending against reopening for a “worsening” of the previously accepted left knee condition. The recommendation reported that claimant had not submitted a new or omitted medical condition claim. (Ex. 80-4). In an August 19, 2003 letter clarifying its position, the insurer reiterated that claimant had not requested acceptance of new or additional medical conditions. (Ex. 83).

Claimant requested a hearing. Under such circumstances, we deferred further action on claimant’s request for Own Motion relief. (Ex. 86). The hearing was ultimately convened on October 27, 2003. At its outset, claimant withdrew her claim against Dean. (WCB Case No. 03-01446).

Claimant and the insurer then stipulated that: (1) on October 27, 2003, claimant for the first time requested the insurer to accept left knee medial compartment osteoarthritis as a “post-aggravation rights” new medical condition; (2) on the same date, the insurer agreed to accept left knee medial compartment osteoarthritis as a consequential condition; and (3) the insurer agreed to recommend reopening of the 1986 claim. (Tr. 4-8).

CONCLUSIONS OF LAW AND OPINION

In a single order entitled “Opinion and Order and Own Motion Recommendation,” the ALJ (1) dismissed claimant’s hearing request with respect to Dean; (2) denied claimant’s request for an award of assessed attorney fees payable by the insurer; and (3) recommended that the claim be reopened pursuant to our Own Motion authority based on the “post-aggravation rights” new medical condition claim for osteoarthritis of the medial compartment of the left knee.

On review, claimant seeks an assessed attorney fee award for prevailing on a denied claim.¹ Based on the following reasoning, we conclude that the ALJ’s order was not final with respect to claimant’s Own Motion attorney fee request under OAR 438-015-0080(5) relating to claimant’s “post-aggravation rights” new

¹ Issues regarding reopening claimant’s Own Motion claims for “worsening” and a “post-aggravation rights” new medical condition (post-traumatic osteoarthritis in the medial compartment of the left knee) are resolved in an Own Motion Order issued in Own Motion No. 03-0332M on this date.

medical condition claim.² Because the ALJ's decision with respect to the attorney fee issue does not constitute a final, appealable order, we dismiss claimant's request for review on that issue and return this case to the Hearings Division.

Claimant's claim for a "post-aggravation rights" new medical condition was initiated at hearing on October 27, 2003. Thus, rules amending claim processing for "post-aggravation rights" new/omitted medical condition claims for claims made after September 1, 2003 apply. See OAR 438-012-0018; OAR 438-012-0070; OAR 438-012-0075; OAR 438-012-0080; OAR 438-012-0090; WCB Admin. Order 2-2003, Order of Adoption, page 21; *Keith A. Broeckel*, 55 Van Natta 3572 (2003).

The ALJ correctly proceeded with the hearing, addressing the "post-aggravation rights" new medical condition claim and related assessed attorney fee issue. See OAR 438-007-0027. However, pursuant to OAR 438-012-0090, in resolving the assessed attorney fee dispute, the ALJ should have issued a separate "Proposed and Final Own Motion Order" (under a separate case number) including the advice of "appeal rights" provided in OAR 438-012-0090(2).³

² OAR 438-015-0080(5) provides:

"If an Own Motion insurer denies a "post-aggravation rights" new medical condition or omitted medical condition claim pursuant to OAR 438-012-0070 and/or 438-012-0075 and an attorney is instrumental in obtaining a rescission of the denial prior to a decision by the Administrative Law Judge, the Administrative Law Judge or the Board shall award a reasonable assessed fee."

³ OAR 438-012-0090(2) provides:

"(2) Within 30 days of closure of the hearing record, the Administrative Law Judge shall decide the issues arising from the hearing request(s) from a denial and/or clarification notice of a "post-aggravation rights" new medical condition or omitted medical condition claim(s) by issuing a 'Proposed and Final Own Motion Order,' including the following written statement, in prominent or bold face type, concerning the parties' rights of appeal:

"NOTICE TO ALL PARTIES: IF YOU ARE DISSATISFIED WITH THIS PROPOSED AND FINAL OWN MOTION ORDER, YOU MAY, WITHIN THIRTY (30) DAYS AFTER THE MAILING DATE ON THIS ORDER, REQUEST REVIEW BY THE WORKERS' COMPENSATION BOARD (OWN MOTION SECTION), 2601 25TH ST. SE, SUITE 150, SALEM, OR 97302-1282. ANY SUCH REQUEST SHALL EITHER BE DELIVERED OR MAILED TO THE BOARD AT THE ABOVE ADDRESS. COPIES OF THE REQUEST SHOULD ALSO BE MAILED TO ALL OTHER PARTIES TO THIS PROCEEDING.

Here, the ALJ issued an “Opinion and Order and Own Motion Recommendation” that contained a “standard” advice of rights on review rather than the notice of “appeal rights” required by OAR 438-012-0090(2). Absent entry of the prescribed order containing the mandated notice of “appeal rights,” that portion of the ALJ’s order addressing the Own Motion attorney fee issue is not final and, therefore, not reviewable. *See Oldham v. Plumlee*, 151 Or App 402 (1997); *Lankford v. Copeland*, 141 Or App 138, 143 (1996); *Delbert Shay*, 52 Van Natta 2020 (2000) (ALJ’s order incorrectly advising parties to appeal case to the Board rather than the Court of Appeals is not final and, therefore, not reviewable).

Because we are unable to review that portion of the ALJ’s order that addressed claimant’s Own Motion attorney fee request under OAR 438-015-0080(5), we likewise are not authorized to remand that portion of the case to the ALJ. Nonetheless, because that portion of the ALJ’s order is not final, we vacate that portion of the ALJ’s order and return the record to the Presiding ALJ to consider the issuance of a “Proposed and Final Own Motion Order” addressing the assessed attorney fee issue and including the correct notice of appeal rights as required by OAR 438-012-0090(2).^{4 5} *See Delbert Shay*, 52 Van Natta at 2021. The Presiding ALJ is also directed to assign a separate WCB case number to this own Motion attorney fee issue.

Accordingly, we affirm those portions of the ALJ’s Opinion and Order dated October 27, 2003 that did not concern claimant’s attorney fee request. That portion of the ALJ’s order that addressed the attorney fee issue is vacated. The record is returned to the Presiding ALJ for further actions and proceedings

“FAILURE TO DELIVER OR MAIL THE REQUEST FOR REVIEW TO THE BOARD WITHIN THE TIME ALLOWED WIL RESULT IN THE LOSS OF YOUR RIGHT TO APPEAL THIS OWN MOTION ORDER AND THE BOARD WILL BE UNABLE TO REVIEW THE ADMINISTRATIVE LAW JUDGE’S DECISION, WHICH SHALL, AS A MATTER OF LAW, CONSTITUTE A FINAL OWN MOTION ORDER OF THE BOARD.”

⁴ We return the record to the Presiding Judge because ALJ Hazelett retired while review was pending.

⁵ In doing so, the parties and the Presiding ALJ are requested to address the effect, if any, the following points and authorities have on the attorney fee issue: OAR 438-012-0024(1); OAR 438-012-0030(1)(b); *Thomas A. Miller*, 56 Van Natta 126 (2004); *Gary S. Fox*, 55 Van Natta 3026 (2003); and *Sherlee Samel*, 55 Van Natta 2634 (2003).

consistent with this order. Those proceedings may be conducted in any manner that the Presiding ALJ deems achieves substantive justice.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 6, 2004