
In the Matter of the Compensation of
DALE SCOTT, Claimant
WCB Case Nos. 08-06557, 08-06010, 08-05938
ORDER ON RECONSIDERATION (REMANDING)
Bottini Bottini & Oswald, Claimant Attorneys
VavRosky MacColl PC, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

On March 31, 2010, we withdrew our March 1, 2010 order that vacated and remanded an Administrative Law Judge's (ALJ's) order based on our finding that it was premature for the ALJ to address compensability/responsibility issues regarding claimant's claim until such time as the Workers' Compensation Division (WCD) had referred claimant's claim against the noncomplying employer (NCE) to an assigned claims agent under ORS 656.054. We took this action to consider System Services of America's (SSA's) motion for reconsideration. Having received claimant's response, we proceed with our reconsideration.

We briefly recap the procedural background. After experiencing right shoulder pain while unloading and moving freight as a dockworker, claimant filed a claim against his employer, Northwest Freight Concepts (NWFC), who did not carry workers' compensation insurance. Following an investigation, the WCD determined that SSA was the "prime contractor" over claimant's employer and, as such, would be responsible for processing his injury claim under ORS 656.029(1). Consequently, although it issued an order finding NWFC to be noncomplying, the WCD did not refer claimant's injury claim to a statutory claims agent.

SSA then denied claimant's injury claim on the grounds that he was not a subject worker and that his right shoulder injury did not arise out of and in the course of employment with SSA. Thereafter, claimant requested a hearing concerning SSA's denial, as well as a *de facto* denial on behalf of the NCE. The ALJ upheld both denials and declined to assess penalties and attorney fees.

On review, we vacated the ALJ's order, reasoning that it was premature for the ALJ to address compensability/responsibility issues regarding claimant's claim until such time as the WCD had referred claimant's claim against NWFC to an assigned claims agent under ORS 656.054. We remanded the case to the ALJ to await the WCD's claim referral and the assigned claims agent's response to the claim.

On reconsideration, SSA contends, among other things, that the litigation of a *de facto* denial concerning claimant's claim against NWFC was not premature and that to allow a new hearing concerning the compensability of claimant's claim with SSA would be "extremely prejudicial" because of the ALJ's previous adverse finding concerning the reliability of claimant's testimony. Therefore, SSA contends that remand is not appropriate.¹

After further considering this record and the parties' positions, we disagree with SSA's contentions and continue to adhere to our prior decision. We reason as follows.

According to SSA, the ALJ properly addressed the compensability issue concerning claimant's NCE claim because there was, in effect, a *de facto* denial due to the WCD's failure to make a referral and its lack of opposition to the ALJ's consideration of the compensability decision. SSA reasons that the WCD's lack of a referral essentially amounted to a failure to properly process claimant's claim in a timely fashion, which, similar to when a carrier-insured employer fails to timely process a claim, amounted to a *de facto* denial. *See* ORS 656.054(1) (NCE claims are to be processed in the same manner as claims made with a carrier-insured employer); *see also SAIF v. Allen*, 320 Or 192, 208 (1994) (if a claim is not accepted or denied within the statutory time limit, the claim is deemed *de facto* denied).

According to SSA, the WCD's decision to not refer this matter to its processing agent, and to not involve the processing agent to defend the claim, did not prevent the ALJ from rendering a decision adverse to or in favor of NWFC as to the *de facto* denial issues. In so concluding, SSA notes that the WCD's waiver of participation at the hearing does not provide a legitimate basis for failing to address the "procedurally proper *de facto* denial." For these reasons, SSA asserts that the *de facto* denial status and claimant's ability to appeal that denial were ripe at the time of hearing and correctly decided by the ALJ.²

¹ SSA also argues that a decision on the merits is procedurally proper because compensability is a threshold issue that must be decided before responsibility. Because our prior order thoroughly addresses this issue, we do not discuss it further.

² We note that in its respondent's brief, SSA asserted:

"The Division was required first to determine compensability by '[r]efer[ring] the claim * * *' to its claims agent. * * *. Instead of apparently approving the WCD's failure to follow Oregon law, and its own regulations, the ALJ should have postponed the hearing and ordered

However, as discussed in our prior order, SSA's position does not square with the statutory scheme concerning the processing of claims involving NCEs. In particular, ORS 656.054(1) provides that a claimant's right to interim compensation does not begin until the Director's referral of the claim to the assigned claims agent. Likewise, ORS 656.054(1) authorizes the NCE to object to the claim at any time within which the claim may be accepted or denied by the assigned claims agent. The aforementioned statutory time periods do not commence until the Director refers the claim to the assigned claims agent.

In other words, the processing of a NCE-related claim does not rest with the Director or the noncomplying employer—there is no authority in ORS Chapter 656 that permits an NCE to process claims for occupational injuries or diseases; rather, the statutory responsibility for accepting or denying such a claim lies with the assigned claims agent. See *Clark v. Linn*, 98 Or App 393 (1989) (an NCE may not challenge compensability of a claim by issuing a denial; that is the assigned claims agent's responsibility); *Eddie Borrego*, 42 Van Natta 2311, 2312 (1990), *recons*, 42 Van Natta 2661 (1990), *rev'd on other grounds Slater v. SAIF*, 108 Or App 717 (1991) (NCEs have no statutory authority to process claims; the assigned claims agent is the exclusive processor of claims filed with an NCE); *Ronald D. Wytcherley*, 42 Van Natta 1713, 1714 (1990) (same). Under ORS 656.054, the assigned claims agent's claim processing responsibility does not vest until the Director refers the claim. Once that referral occurs, if the assigned claims agent did not accept/deny the claim within 60 days, a claimant could request a hearing on a "*de facto*" denial basis and proceed to a hearing on the merits of the claim. See *Allen*, 320 Or at 208. However, in the absence of a Director (WCD) referral, it is statutorily premature for an ALJ to consider the compensability of a NCE-related claim.

Finally, SSA argues that remand is not appropriate because it will be "extremely prejudicial" to its interests to allow claimant another opportunity to litigate the compensability of his claim.³ Specifically, SSA asserts that claimant

the WCD to make the referral of the claim to its authorized claim agent. Then, after their investigation and processing had occurred, a complete and final hearing could have taken place." (Respondent's Brief, p. 8).

³ Pursuant to ORS 656.295(5), we may remand a case to the ALJ for "further evidence taking, correction or other necessary action," if we find that a case has been "improperly, incompletely or otherwise insufficiently developed or heard by the [ALJ]." Here, because the WCD was statutorily required to refer claimant's "NCE" claim to the assigned claims agent for processing, and because it retains that authority, we find it appropriate to remand the case to the ALJ. The parties shall be

will now be able to prepare for the questions that were posed to him at the prior hearing, which prompted the ALJ to find claimant's testimony unreliable. In response, we note that although the ALJ's order has been vacated for remand purposes, claimant's previous sworn statements remain in the record and will be relevant in any subsequent decision.

Consequently, for the reasons set forth above and in our initial order, we adhere to our conclusion that remand is appropriate.⁴

Accordingly, on reconsideration, as supplemented herein, we republish our March 1, 2010 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 28, 2010

responsible for contacting the WCD to request that it comply with its statutory claims processing duties under ORS 656.054. Once the assigned claims agent issues a decision, if the parties wish to proceed to hearing, they shall then contact the assigned ALJ.

⁴ As a result of our March 1, 2010 order, claimant has not "finally prevailed" from an order or decision denying his claim for compensation. See ORS 656.386(1). Instead, we have vacated the ALJ's order and remanded the case to the ALJ for further proceedings. Consequently, claimant is not presently entitled to an attorney fee award. Nevertheless, should he finally prevail after the ALJ conducts the remand proceedings, the ALJ shall award a reasonable attorney fee for services rendered at the initial hearing, on Board review, and after remand. ORS 656.388(1); *Chester S. Ostrowski*, 44 Van Natta 966 (1992).