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

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Brazeau's order that: (1) upheld Systems Services of America (SSA's) denial of claimant's injury claim for a right shoulder condition; (2) upheld a *de facto* denial of claimant's injury claim for the same condition allegedly from Northwest Freight Concepts (NFC), a noncomplying employer; and (3) declined to assess penalties and attorney fees against SSA and NFC. On review, the issues are claim processing, subjectivity, compensability, penalties, and attorney fees. We vacate and remand.

#### FINDINGS OF FACT

On July 24, 2008, claimant, a worker for NFC, experienced severe right shoulder pain while working in his job as a "lumper" unloading and moving freight. (Tr. 10, 11; Ex. 5). At that time, claimant was working for NFC at the docks owned by SSA. (Tr. 11). Later that evening, claimant sought medical treatment and filed a claim for a right shoulder injury with NFC. (Exs. 5, 7).

Thereafter, the Workers' Compensation Division (WCD) investigated NFC's complying status. (Ex. 21). On September 10, 2008, WCD issued a Proposed and Final Order Declaring Noncompliance, finding NFC to be a noncomplying employer. (Ex. 22). On that same date, WCD advised SSA that it was the "prime contractor" for claimant's work with NFC, and thus it was responsible for processing of claimant's claim under ORS 656.029.<sup>1</sup> This decision was based on information from WCD's investigation of NFC's noncomplying status. (Ex. 21-3). WCD's noncompliance order was not appealed.

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<sup>1</sup> ORS 656.029(1) provides:

"If a person awards a contract involving the performance of labor where such labor is a normal and customary part or process of the person's trade or business, the person awarding the contract is responsible for providing workers' compensation insurance coverage for all individuals, other than those exempt under ORS 656.027, who perform labor under

On September 25, 2008, SSA denied claimant's injury claim, contending that he was not a subject worker of SSA and that his right shoulder injury did not arise out of and in the course of employment with SSA. (Ex.29). Claimant subsequently requested a hearing on SSA's denial. He also contested the handling of the NCE claim, raising the issues of compensability, time loss, and failure to process.

### CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that claimant had not established a compensable claim.<sup>2</sup> On review, claimant disagrees with the ALJ's finding.

Based on our *de novo* review, we do not address the merits of the compensability or ORS 656.029 issues because, as a threshold matter, we find that WCD's actions were inconsistent with ORS 656.054, the statutory authority for the processing of NCE claims. Given the current statutory scheme, WCD must first refer the claim against the NCE to an assigned claims agent before compensability of claimant's claim, or any potential issues arising under ORS 656.029, can be addressed. We reason as follows.

ORS 656.054(1) provides, in part:

“A compensable injury to a subject worker while in the employ of a noncomplying employer is compensable to the same extent as if the employer had complied with this chapter. The Director of the Department of Consumer and Business Services *shall refer the claim* for such an injury to an assigned claims agent within 60 days of the date the director has notice of the claim. At the time of referral of the claim, the director shall notify the

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the contract unless the person to whom the contract is awarded provides such coverage for those individuals before labor under the contract commences. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person who is charged with the responsibility for providing such coverage before labor under the contract commences, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.”

<sup>2</sup> The ALJ did not address any issues regarding ORS 656.029.

employer in writing regarding the referral of the claim and the employer's right to object to the claim. A claim for compensation made by such a worker shall be processed by the assigned claims agent in the same manner as a claim made by a worker employed by a carrier-insured employer \* \* \*." (Emphasis added).

In addition, OAR 436-080-0060(1)(a) (WCD Admin. Order 03-065, eff. Jan. 1, 2004) provides:

"When the division issues an order under OAR 436-080-0010 declaring an employer a noncomplying employer, and a subject worker has filed a claim for an injury sustained during the period of noncompliance while the worker was employed by such employer, *the division will* \* \* \* [*r*]efer the claim with a copy of the order and the results of its investigation to the assigned claims agent for processing as required by ORS 656.054 \* \* \*." (Emphasis added).

Here, consistent with the above statutory and regulatory authority, WCD was required to refer claimant's claim to the statutory claims agent once it determined that NFC was a noncomplying employer. ORS 656.054; OAR 436-080-0060(1)(a). The assigned claims agent then was obligated to investigate the compensability of, and its responsibility for, the claim. After completing that investigation, the claims agent could then issue an acceptance or a denial (including a contention that claimant was not a subject worker or that another entity was responsible for the claim under ORS 656.029).

However, instead of following the above procedures, WCD referred the claim to another employer (SSA) whom it considered responsible for the claim pursuant to ORS 656.029. While we are unaware of any statutory prohibition against WCD making such a determination and notifying SSA of its position, WCD remained obligated under ORS 656.054 to "refer the claim" that claimant filed against the NCE to the assigned claims agent for processing within 60 days of the date the Director had notice of the claim. *See James L. Guyton*, 41 Van Natta 1277 (1989) (ORS 656.054 *requires* the Director to refer a claim against a noncomplying employer to the assigned claims agent). Consistent with ORS 656.054, OAR 436-080-0060(1)(a) also provides that WCD "will" refer a claim against an NCE to the assigned claims agent for processing, along with a copy of its NCE order and the results of its investigation.

Once the claim is statutorily referred, the claims agent conducts its investigation and otherwise processes the claim, including a determination of compensability and/or the NCE's responsibility for the claim. At any time within which the claim may be accepted or denied as provided in ORS 656.262, the employer may request a hearing to object to a claim. ORS 656.054; *Clark v. Linn*, 98 Or App 393, 396-97 (1989) (statutes and administrative rules clearly provide that it is the assigned processing agent's responsibility to accept or deny a claim against a noncomplying employer).<sup>3</sup> If the claims agent denies the claim, the claimant can request a hearing.

Several cases illustrate the proper processing of NCE claims. In *Lankford v. Copeland*, 141 Or App 138 (1996), *overruled as to disposition*, *Oldham v. Plumlee*, 151 Or App 402, 404 (1997), the court described the statutorily required procedure for NCE claim processing under ORS 656.054: "the Director only decides *whether* claimant may seek compensation under the Workers' Compensation Act. The next step is assignment of the claim by the Director to a carrier for processing. Only then are the claimant's right to receive compensation and the amount thereof directly in issue." *Id.* at 142-43; *see also Vandrimmelen v. Berlin*, 148 Or App 21, 23 n 1 (1997) (under ORS 656.054(1), the Director "*must refer*" claims for injuries while working for a NCE to the processing agent).

Similarly, we have previously held that, under ORS 656.054, the statutory claim processing agent is the exclusive processor of claims filed with an NCE. *Joseph Sweet*, 41 Van Natta 2418 (1989); *see also Guyton*, 41 Van Natta at 1279. In *Sweet*, we noted that the statute "*require[d]*" the Director to refer such a claim to the processing agent. 41 Van Natta at 2418 (emphasis added). Because we were without statutory authority to refer the claim directly to the statutory claim processing agent, we referred the claim to WCD, who could "then refer the claim to either [the processing agent] for processing under ORS 656.054 if the employer is noncomplying, or the appropriate carrier for regular processing if the employer is complying." *Id.*

Accordingly, based on the aforementioned authorities, WCD was required to refer (along with a copy of the NCE order and the results of its investigation) claimant's injury claim with the NCE to the statutory claims agent for processing. ORS 656.054; OAR 436-080-0060(1)(a).

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<sup>3</sup> Here, because the processing agent was not involved in the claim (as statutorily required), claimant alleged a *de facto* denial against the NCE, which was a reasonable action under the circumstances and allowed him to protect his interests in establishing the compensability of his claim.

In reaching this conclusion, we disagree with an alternative analysis of ORS 656.054 that would first require a determination of compensability before referral of the claim to the assigned claims agent. While the statute provides that a worker's "compensable injury" sustained while in the employ of an NCE is compensable to the same extent as if the employer had complied with chapter 656, it then specifically provides that the Director "shall refer *the claim* for such an injury to an assigned claims agent within 60 days from the date the director has *notice of the claim.*" ORS 656.054 (emphasis added). Thus, when read in context, the statute's reference to "compensable injury" indicates that a claimant's injury claim against an NCE must be processed by the assigned claims agent no differently than any other injury claim. The statute does not condition this required referral on the presence of a compensable claim; rather, the statute is expressly contingent on the claim against an NCE. Whether the injury claimed is, in fact, compensable is a determination made by the assigned claims agent, not the Director. See *Astleford v. SAIF*, 122 Or App 432 (1993) (ORS 656.054(1) gives the assigned claims agent "the authority to accept or deny *the claim* that is filed against a noncomplying employer" (emphasis added)).

The third sentence of ORS 656.054 also supports the above interpretation, providing "[a]t the time of referral of *the claim*, the director shall notify the employer in writing regarding the referral of *the claim* and the employer's right to object to *the claim.*" (Emphasis added.) Likewise, OAR 436-080-0060(1)(a) does not condition referral of the claim to the statutory claim processing agent on a compensability determination. Rather, mirroring the enabling statute (ORS 656.054), the rule provides that the triggering event for referral is *a claim* for an injury, and that WCD "will" refer such a claim.

Again, we are not suggesting that WCD is prohibited from offering an opinion regarding the application of ORS 656.029. However, even if it considers ORS 656.029 applicable, WCD must *also* refer the claim (as well as its NCE order and its investigative reports) to the assigned claims agent.<sup>4</sup> ORS 656.054; OAR 436-080-0060(1)(a). Whether another employer is responsible under ORS 656.029 is an argument that the statutory processing agent is authorized to make, on behalf of the NCE. Prior court and Board case precedent supports this proposition. See *Liberty Northwest Ins. Corp. v. Hegerberg*, 118 Or App 282 (1993) (while investigating an employer's noncomplying status, the Director also

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<sup>4</sup> Once WCD refers claimant's claim against the NCE to the assigned claims agent, the Director must notify the NCE in writing regarding the referral of the claim and the NCE's right to object to the claim. ORS 656.054(1).

concluded that another insurer was responsible under ORS 656.029(1), and that the NCE was not responsible; the Director sent the claim to the “ORS 656.029” insurer for processing and also sent it to the assigned claims agent for denial on behalf of the NCE); *Martin L. Madsen*, 60 Van Natta 927 (2008) (NCE claim was sent to assigned claims agent for processing, and claim was accepted; thereafter, at hearing and on review, the issue of ORS 656.029 was litigated).

In sum, based on the above reasoning, it was premature for the ALJ to address the compensability and responsibility issues. Instead, those determinations must await WCD’s claim referral to the statutory claims agent and its processing of the claim. If that processing results in a denial and should claimant timely request a hearing from that denial (or the NCE timely appeals the processing agent’s acceptance of the claim), those matters may be consolidated with these already pending matters.

Accordingly, we remand this case to the ALJ for further proceedings consistent with this order. ORS 656.295(5); *see Bailey v. SAIF*, 296 Or 41, 45 n 3 (1985). Those proceedings should await WCD’s compliance with its statutory claims processing duties under ORS 656.054 and the statutory claims agent’s eventual claim processing decision. Until that statutory process is

completed, and claimant and/or the NCE have had an opportunity to request a hearing regarding the statutory claims agent’s decision, the compensability of claimant’s claim against the NCE (as well as any potential issues arising under ORS 656.029) cannot be properly determined.

#### ORDER

The ALJ’s order dated January 14, 2009 is vacated. Because ALJ Brazeau has retired from the agency, this matter is remanded to the Presiding ALJ with instructions to assign the case to another ALJ for further actions consistent with this order.

Entered at Salem, Oregon on March 1, 2010