

In the Matter of the Compensation of
PATRICK M. SHIPPY, Claimant
Own Motion No. 16-00004OM
INTERIM OWN MOTION ORDER
Roger Ousey PC, Claimant Attorneys
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: *En Banc*; Members Curey, Lanning, Somers, Weddell, and Johnson.

The self-insured employer has submitted a “Carrier’s Own Motion Recommendation” against the reopening of claimant’s 1999 injury claim for “post-aggravation rights” new/omitted medical conditions (right shoulder rotator cuff tear (supraspinatus tendon) and right shoulder impingement syndrome). *See* ORS 656.278(1)(b). The employer opposes reopening, noting that compensability of and responsibility for these conditions was decided by an Administrative Law Judge’s (ALJ’s) order, and that it has requested review of that order. Based on the following reasoning, we provisionally reopen claimant’s Own Motion claim for the aforementioned “post-aggravation rights” new/omitted medical conditions.

FINDINGS OF FACT

On January 27, 1999, claimant sustained a compensable right shoulder injury. The employer ultimately accepted right shoulder sprain and right long thoracic nerve of bell neuropathy. (Ex. 78).

A January 31, 2001 Notice of Closure awarded 16 percent (51.2 degrees) unscheduled permanent partial disability (PPD) for the right shoulder. (Ex. 77). Claimant’s aggravation rights expired on January 31, 2006. (*Id.*)

On August 7, 2015, claimant requested that the employer amend its acceptance regarding the 1999 injury claim to include “post-aggravation rights” new/omitted medical conditions (right shoulder rotator cuff tear (supraspinatus tendon) and right shoulder impingement syndrome). (Ex. 113).

On October 6, 2015, the employer denied responsibility for those right shoulder conditions. (Ex. 116). Claimant requested a hearing and, at the hearing, the employer amended its denial to deny compensability as well as responsibility. (Ex. 117-7).

In a November 16, 2015 Opinion and Order, an ALJ set aside the employer's denial of compensability of and responsibility for the "post-aggravation rights" new/omitted medical conditions (right shoulder rotator cuff tear (supraspinatus tendon) and right shoulder impingement syndrome). (Ex. 117).

The employer requested Board review of the ALJ's order. That review remains pending. (WCB Case No. 15-03608).

CONCLUSIONS OF LAW AND OPINION

The employer has submitted a "Carrier's Own Motion Recommendation" against the reopening of claimant's 1999 injury claim for the "post-aggravation rights" new/omitted medical conditions based on its appeal of the ALJ's order that set aside its compensability/responsibility denial regarding those conditions. Claimant contends that, based on the ALJ's decision, his Own Motion claim should be reopened for those "post-aggravation rights" new/omitted medical conditions. Based on the following reasoning, we provisionally reopen his Own Motion claim for those conditions.

Under ORS 656.267(3), Own Motion claim processing is triggered when a "post-aggravation rights" new/omitted medical condition claim is "determined to be compensable." See OAR 438-012-0001(2)(b), (4); *James W. Jordan*, 58 Van Natta 34, 37 (2006); see also WCB Admin Order 3-2005, eff. 01/01/2006. "Determined to be compensable" for a "post-aggravation rights" new/omitted medical condition includes determination of compensability by a litigation order. See OAR 438-012-0001(4)(b);¹ *Jordan*, 58 Van Natta at 37.

Within 30 days after the claim has been "determined to be compensable," the carrier must either voluntarily reopen the claim or submit a recommendation to the Board for or against reopening the claim for Own Motion relief. OAR

¹ OAR 438-012-0001(4) provides:

"For a 'post-aggravation rights' new medical condition or omitted medical condition claim, 'determined to be compensable' means:

"(a) The insurer has issued a notice of acceptance under ORS 656.262(7)(a); or

"(b) The insurer's denial under ORS 656.262(7) or 656.308(2) or de facto denial has been set aside by an order from an Administrative Law Judge, the Board, or the court."

438-012-0030(1). This 30-day processing period runs from the date of the initial determination of compensability, even if the litigation order making that determination is appealed. *See* OAR 438-012-0030(1); *Edward A. Evers*, 60 Van Natta 933, 934 (2008); *Janet F. Bonney*, 59 Van Natta 2537, 2538 (2007).

In this regard, an ALJ's order itself, determining that a "post-aggravation rights" new/omitted medical condition claim is compensable, is neither a reopening of an Own Motion claim by the Board, nor a voluntary reopening of such a claim by the carrier. However, the ALJ's order triggers the 30-day Own Motion claim processing period during which the carrier must either voluntarily reopen the claim or submit a recommendation to the Board for or against reopening.²

If the carrier appeals a litigation order that determined the "post-aggravation rights" new/omitted medical condition to be compensable, the carrier remains responsible for timely processing the Own Motion claim. *Lorna D. Huston*, 66 Van Natta 794 (2014); *Jordan*, 58 Van Natta at 37 n 3. Under such circumstances, the carrier has the option of submitting a "Carrier's Own Motion Recommendation" against reopening the claim for Own Motion relief on the basis of its appeal of the compensability decision. Consistent with our longstanding practice, we have consolidated review of the two issues, deciding the issue of compensability in our "regular" appellate jurisdiction by means of an Order on Review and the "claim reopening" issue in our "Own Motion" jurisdiction through an Own Motion Order. Order of Adoption, page 3 n 3; *Jordan*, 58 Van Natta at 37 n 3.

Here, the employer has appealed the ALJ's compensability/responsibility decision and submitted a "Carrier's Own Motion Recommendation" against reopening the Own Motion claim based on that appeal. Therefore, both compensability/responsibility of the "post-aggravation rights" new/omitted medical conditions and the Own Motion Recommendation are currently before us.

As previously noted, consistent with our longstanding practice, we have consolidated review of the two issues. Claimant has challenged this practice, contending that it unnecessarily delays his compensation on a "post-aggravation rights" new/omitted medical condition claim that has been determined to be compensable. After reexamining this matter, we consider it appropriate to revise our practice in the following manner.

² On the other hand, if the claim is never determined to be compensable, the carrier's responsibility for the processing of the Own Motion claim does not materialize. OAR 438-012-0030(1); *Jordan*, 58 Van Natta at 37.

There are two requirements that must be satisfied for the reopening of an Own Motion claim for a “post-aggravation rights” new or omitted medical condition claim under ORS 656.278(1)(b). First, the new or omitted medical condition claim must have been initiated after the expiration of claimant’s aggravation rights under ORS 656.273. ORS 656.267(3). Second, the new or omitted medical condition must be “determined to be compensable.” *Id.*; ORS 656.278(1)(b); OAR 438-012-0001(a); *Troy J. Pachano*, 62 Van Natta 509, 510 (2010); *Michael A. Aldrich*, 59 Van Natta 1704 (2007); *Jordan*, 58 Van Natta at 37. Both of these requirements have been met.³

Under such circumstances, based on the currently pending ALJ’s order, the aforementioned “post-aggravation rights” new/omitted medical conditions have been determined to be compensable/responsible. Therefore, the requirements for “claim reopening” of these “post-aggravation rights” new/omitted medical conditions are presently satisfied. ORS 656.278(1)(b); OAR 438-012-0001.

Consequently, we consider it appropriate to issue an interim Own Motion order that provisionally reopens claimant’s Own Motion claim for these “post-aggravation rights” new/omitted medical conditions.⁴ As such, the carrier is responsible for processing that claim in the first instance, including a determination as to whether claimant is entitled to temporary disability benefits, whether claim closure under OAR 438-012-0055 is warranted and, if so, whether claimant is

³ There is no requirement that a claimant be in the work force, or be entitled to temporary disability, to have a “post-aggravation rights” new or omitted medical condition claim reopened in Own Motion jurisdiction. ORS 656.278(1)(b); *Ford A. Cheney*, 65 Van Natta 1 (2013); *Duane L. Leafdahl*, 54 Van Natta 1796, 1797(2002)

Note that this differs from the requirements that must be satisfied to qualify for reopening a claim for a “worsening of a compensable injury” under ORS 656.278(1)(a). The requirements for reopening a “worsened condition” claim include: (1) a worsening of a compensable injury that results in a partial or total inability to work; (2) the worsening must require hospitalization, surgery (either inpatient or outpatient), or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the worker to return to work; and (3) the claimant must be in the work force as defined under the criteria in *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989). ORS 656.278(1)(a); *James J. Kemp*, 54 Van Natta 491, 505 (2002). If a claimant meets these requirements, his or her “worsened condition” Own Motion claim qualifies for reopening either by the carrier or the Board.

⁴ To the extent that our decision in *Steven L. Traister*, 65 Van Natta 1295, *recons*, 65 Van Natta 1615 (2013), restricts the Board from “contingently reopening” an Own Motion claim, we disavow such reasoning.

entitled to permanent disability benefits.⁵ See ORS 656.278(1), (2); *Stacy Thompson*, 60 Van Natta 1085, 1087 (2008); *Tamara Kramer-Fischer*, 58 Van Natta 1456, 1457 (2006); *Duane L. Leafdahl*, 54 Van Natta 1796, 1799 (2002).

In reaching this conclusion, we note that, consistent with ORS 656.313(1)(a)(A) and our Own Motion authority under ORS 656.278, the carrier's filing of a request for Board review of the ALJ's order stays payment of compensation flowing from that decision, except for temporary disability benefits that accrue from the date of the order appealed from until claim closure or until the ALJ's order is reversed, whichever event first occurs.⁶ In other words, "retroactive" temporary disability benefits (*i.e.*, benefits accruing *before* the date of the ALJ's appealed compensability/responsibility decision) would not be due until any "claim reopening" Own Motion order became final.

In conclusion, to summarize, following issuance of a "claim reopening" Interim Own Motion Order, we will continue to proceed with our review of a pending "Own Motion" matter in conjunction with our review of an ALJ's compensability/responsibility decision. If we affirm the ALJ's compensability/responsibility decision, we will replace the Interim Own Motion Order with a final, appealable Own Motion Order reopening the Own Motion claim for the "post-aggravation rights" new/omitted medical condition claim. Under such circumstances, the carrier will continue to process the Own Motion claim, including the payment of any previously stayed "retroactive" temporary disability benefits (unless it appeals our "compensability/responsibility" decision or our final Own Motion Order).⁷

⁵ In *Edward A. Billman*, 55 Van Natta 693, 694-95 (2003), we explained that under ORS 656.278, a carrier is not required to pay interim compensation pending Own Motion claim reopening, although it may do so. Thus, payment of interim compensation pending Own Motion claim reopening is a discretionary act. See *Joseph D. Hapka*, 59 Van Natta 213, 222 (2007). Nevertheless, because this interim Board order provisionally reopens the Own Motion claim based on the ALJ's compensability/responsibility decision, any temporary disability benefits due are payable under this reopened Own Motion claim pursuant to this order. Therefore, such temporary disability benefits are not "interim compensation."

⁶ The filing of such an appeal also extends to such benefits subsequently awarded by a claim closure decision. See *SAIF v. VanLanen*, 127 Or App 346, *rev den*, 319 Or 211 (1994); *Diamond Fruit Growers v. Goss*, 120 Or App 390 (1993); *Tricia A. Batchler*, 65 Van Natta 1460 (2013).

⁷ Here, the employer concedes that, if the ALJ's compensability/responsibility decision is affirmed, the Own Motion claim should be reopened.

Conversely, if we reverse the ALJ's compensability/responsibility decision, we will also issue a final, appealable Own Motion Order withdrawing our interim order and declining to reopen the Own Motion claim. Under such circumstances, consistent with ORS 656.313(2) and our Own Motion authority under ORS 656.278, claimant would not be obligated to repay any compensation that was paid by the carrier pursuant to our interim order.^{8,9}

Accordingly, based on the above reasoning and pursuant to this interim order, we reopen claimant's Own Motion claim for the "post-aggravation rights" new/omitted medical conditions (right shoulder rotator cuff tear (supraspinatus tendon) and right shoulder impingement syndrome) for the employer to process in accordance with law.¹⁰ ORS 656.278(1)(b).

Claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of any increased temporary disability compensation created by this order, not to exceed \$ 1,500, payable directly to claimant's attorney. ORS 656.386(4); OAR 438-015-0080(1).

IT IS SO ORDERED.

Entered at Salem, Oregon on June 8, 2016

⁸ The carrier may seek reimbursement of the amounts resulting from our Interim Own Motion Order which reopens the claim from the Reopened Claims Reserve pursuant to ORS 656.625(1). However, jurisdiction concerning the decision to provide reimbursement from the Reopened Claims Program rests with the Director, not the Board. *See* ORS 656.625(2), (3); OAR 436-045-0010; *SAIF v. Holmstrom*, 113 Or App 242, 245 (1992); *Kemp*, 54 Van Natta at 511-13.

⁹ Finally, to the extent that any portion of our previous Own Motion case law is inconsistent with this revised practice, we disavow that precedent.

¹⁰ In reaching this conclusion, we have not addressed claimant's entitlement to any temporary benefits that may arise from this reopening. Instead, such issues are claim processing matters that may later arise and are the carrier's responsibility in the first instance. *See Thompson*, 60 Van Natta at 1087 n 3; *Kramer-Fischer*, 58 Van Natta at 1457; *Leafdahl*, 54 Van Natta at 1799.