In the Matter of the Compensation of
PAMELA A. MARTIN, DCD, Claimant
WCB Case No. 01-09790
ORDER ON REVIEW
Hollander & Lebenbaum, Claimant Attorneys
Meyers Radler et al, Defense Attorneys

Reviewing Panel: *En banc.* Members Biehl and Phillips Polich concur.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Herman's order that: (1) found that the deceased worker's surviving spouse (hereinafter, "claimant") had standing to file a "new medical condition" claim for the deceased worker's (hereinafter, "decedent's") degenerative left knee condition; (2) found that claimant was entitled to file a hearing request on the decedent's behalf; and (3) set aside the employer's *de facto* denial of the "new medical condition" claim. On review, the issues are jurisdiction, standing, claim processing, and, potentially, compensability. We vacate.

FINDINGS OF FACT

We adopt the ALJ's findings of fact, with the following supplementation and summary.

On October 31, 1986, decedent compensably injured her left knee. Although the employer accepted the claim, it did not identify the accepted condition. Decedent underwent arthroscopic surgery in December 1986. On July 31, 1987, decedent sustained a second compensable left knee injury, which included a fracture of the patella and the fibula.

On December 1, 1987, the October 1986 claim was closed by Determination Order, which awarded 25 percent scheduled permanent disability. Decedent's aggravation rights on that claim expired on December 1, 1992. (Ex. 11).

On March 24, 1989, the July 1987 claim was closed by Determination Order, which awarded 12 percent scheduled permanent disability. Decedent's aggravation rights on that claim expired on March 24, 1994. (Ex. 13).

On August 1, 1999, decedent sought treatment from Dr. Heusch, treating osteopath, who recommended a total left knee replacement and requested that the October 1986 claim be reopened. Dr. Jones, orthopedist, examined decedent on

behalf of the employer and opined that the compensable left knee injuries constituted more than 50 percent of the decedent's combined condition and current need for treatment in the form of a total left knee replacement. Dr. Heusch concurred with this report.

On March 28, 2000, Dr. Heusch performed the total left knee replacement surgery. On April 7, 2000, the employer submitted a "Carrier's Own Motion Recommendation" to the Board under ORS 656.278 (1995). On April 20, 2000, the Board issued an "Own Motion Order" authorizing reopening of the October 31, 1986 claim to provide temporary disability compensation beginning March 28, 2000.

On May 23, 2001, decedent died from causes unrelated to the compensable injuries. She was survived by her husband.

On July 20, 2001, the employer closed the Own Motion claim by Notice of Closure, which reflected an award of temporary disability benefits from March 28, 2000 through May 23, 2001. That order became final.

On September 11, 2001, counsel on behalf of claimant requested that the employer accept "degenerative joint disease, left knee." On September 27, 2001, the employer responded that the degenerative joint disease had been encompassed in the original acceptance of the claim and rated in the December 1, 1987 Determination Order.

Claimant filed a request for hearing on December 17, 2001, raising as an issue *de facto* denial of the claim for degenerative joint disease. A hearing was convened and closed on March 13, 2002. At hearing, claimant asserted that he had initiated, on decedent's behalf, a "new medical condition" claim under ORS 656.262(7)(a) (1995).

CONCLUSIONS OF LAW

The ALJ determined that claimant, as the spouse of a deceased injured worker, was entitled to file a request for hearing to pursue a claim and had standing to bring a new medical condition claim under ORS 656.262(7)(a) (1995). On the merits of the claim, the ALJ rejected the employer's argument that the claim at issue (end stage post-traumatic degenerative joint disease) was accepted in February 1987. The ALJ also found that the end stage post-traumatic degenerative

joint disease was compensable as a consequential condition under ORS 656.005(7)(a)(A).

On review, the employer contends that claimant does not have standing to file a new medical condition claim or to file a request for hearing. The employer also contends that decedent's left knee degenerative joint disease was encompassed within the scope of claim acceptance related to the 1986 claim. Claimant disputes these contentions.

Decedent's aggravation rights regarding the 1986 claim expired on December 1, 1992. This case centers on the propriety of a new medical condition claim that was initiated on September 11, 2001, many years after the injured worker's aggravation rights expired and, if properly filed, the compensability of that claim. Based on the following reasoning, we find that neither our Hearings Division nor this Board on review of the ALJ's order has jurisdiction to address these issues.

The threshold issue not raised by either party is whether, in light of the 2001 amendments to the workers' compensation statutes, either the Hearings Division or the Board on review of an ALJ's order has jurisdiction to resolve this dispute over a new medical condition claim initiated after expiration of aggravation rights (a "post-aggravation rights" new medical condition claim). We conclude that the processing of this claim is subject to ORS 656.278 and the resolution of any dispute arising from the processing of this claim lies with the Board in its Own Motion jurisdiction.

Here, the injured worker's aggravation rights have expired on the 1986 left knee injury claim. Under such circumstances, those claims are within our Own Motion jurisdiction. *Miltenberger v. Howard's Plumbing*, 93 Or App 475 (1988).

Nevertheless, prior case law held that a new or omitted medical condition claim must be processed under ORS 656.262 and 656.268, even if the aggravation rights on the initial claim had expired. *Larry L. Ledin*, 52 Van Natta 680 (2000), *aff'd SAIF v. Ledin*, 174 Or App 61 (2001); *Johansen v. SAIF*, 158 Or App 672, *adhered to on recon*, 160 Or App 579, *rev den*, 329 Or 528 (1999) (the court held that under ORS 656.262(7)(a) (1995), which expressly provides that a claimant may bring a new medical condition claim at any time, without regard to any other provision of the Workers' Compensation Law, a claim for a new medical condition is subject to the processing requirements of ORS 656.262(4)(a)); *John R. Graham*, 51 Van Natta 1740, 51 Van Natta 1746 (1999) (held that a "new medical

condition" claim qualifies for reopening and closure under ORS 656.268 pursuant to ORS 656.262(7)(c) (1995), even if the original claim is in the Board's Own Motion jurisdiction). Thus, under prior case law, this claim would have been under the jurisdiction of the Hearings Division and the Board on review of an ALJ's order.

However, while this claim was being processed, the legislature amended several statutes that affect Own Motion claims and "post-aggravation rights" new or omitted medical condition claims. Specifically, the legislature added ORS 656.267, which relates to claims for new and omitted medical conditions and provides:

> "(1) To initiate omitted medical condition claims under ORS 656.262 (6)(d) or new medical condition claims under this section, the worker must clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer or self-insured employer. A claim for a new medical condition or an omitted condition is not made by the receipt of medical billings, nor by requests for authorization to provide medical services for the new or omitted condition, nor by actually providing such medical services. The insurer or self-insured employer is not required to accept each and every diagnosis or medical condition with particularity, as long as the acceptance tendered reasonably apprises the claimant and the medical providers of the nature of the compensable conditions. Notwithstanding any other provision of this chapter, the worker may initiate a new medical or omitted condition claim at any time.
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> "(2) Claims properly initiated for new medical conditions and omitted medical conditions related to an initially accepted claim shall be processed pursuant to ORS 656.262.
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> "(3) Notwithstanding subsection (2) of this section, claims for new medical or omitted medical conditions related to an initially accepted claim that are initiated after the rights under ORS 656.273 have expired shall

> be processed as requests for relief under the Workers' Compensation Board's own motion jurisdiction pursuant to ORS 656.278 (1)(b)."

In addition, as amended, ORS 656.278 provides, in relevant part:

> "(1) Except as provided in subsection (7) of this section, the power and jurisdiction of the Workers' Compensation Board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified in those cases in which:
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> "* * * * *
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> "(b) The worker submits and obtains acceptance of a claim for a compensable new medical condition or an omitted medical condition pursuant to ORS 656.267 and the claim is initiated after the rights under ORS 656.273 have expired. In such cases, the payment of temporary disability compensation in accordance with the provisions of ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary, and the payment of permanent disability benefits may be provided after application of the standards for the evaluation and determination of disability as may be adopted by the Director of the Department of Consumer and Business Services pursuant to ORS 656.726[.]"

In *James J. Kemp*, 54 Van Natta 491 (2002), which issued after the ALJ's order, we concluded that the amendments to ORS 656.267 and 656.278(1)(b): (1) are effective on January 1, 2002; (2) apply to all claims regardless of the date of injury; and (3) are intended to apply retroactively to pending Own Motion claims. *Kemp*, 54 Van Natta at 497-98. In reaching this conclusion, we noted that the legislature did not include a "savings clause" regarding the effective dates of any of the 2001 amendments. We also found that, pursuant to *amended* ORS 656.267(3), where an omitted or new medical condition claim is initiated after the injured worker's aggravation rights had expired, that claim is within the

Board's Own Motion jurisdiction as of January 1, 2002, provided that any previous processing of the claim under prior case law had not become final. *Kemp*, 54 Van Natta at 498. In other words, the only exception to such "post-aggravation rights" claims being within the Board's Own Motion jurisdiction is omitted or new medical condition claims that have previously been litigated to a final decision, which are not subject to further litigation under any jurisdiction. *Id.* at 498 fn 9.

Here, the "post-aggravation rights" new medical condition claim has not been processed under prior case law, which required processing under ORS 656.262 and 656.268, as explained above. Furthermore, that claim also was not part of the prior Own Motion claim processing. As a matter of law, such Own Motion claim processing could not involve the "new medical condition." *Ledin*, 174 Or App at 62; *Ledin*, 52 Van Natta at 681. In this regard, the 1986 left knee injury claim was reopened under our Own Motion jurisdiction. On July 20, 2001, that Own Motion claim was closed and the closure has become final by operation of law. However, under the law in effect at the time, such Own Motion claim processing did not involve any "new medical condition" claim. Instead, at that time, the Own Motion claim processing related solely to a *worsening* of the 1986 left knee injury claim. *See Alvino H. Guardiola*, 53 Van Natta 1009 (2001) (assuming for the sake of argument that the carrier's Own Motion processing of the disputed conditions constituted an acceptance of those conditions, the carrier was still required to process the disputed conditions as "new medical conditions" pursuant to ORS 656.262(7)(c) (1995) and 656.268); *Richard S. Horton*, 53 Van Natta 1613 (2001) (where a claimant's aggravation rights have expired on the initial injury claim and the condition worsened requiring surgery, Board is authorized to reopen the claimant's claim pursuant to ORS 656.278(1)(a) (1995) and to direct the carrier to close the claim under its Own Motion rules when the claimant's condition becomes medically stationary; Board also has subject matter jurisdiction in its Own Motion capacity to review the carrier's subsequent closure of that claim).

Under the law in effect at that time, as the court explained in *SAIF v. Ledin*, 174 Or App at 62, it was not relevant to a "new medical condition" claim that the claimant's aggravation rights had expired or that the Board might exercise its Own Motion jurisdiction. *See also Ledin*, 52 Van Natta at 682 n.6 (an Own Motion order does not preclude a reopening under ORS 656.262(7)(c) (1995), although it might affect temporary disability benefits for the same condition for the same time period (*i.e.*, there may be a possibility of an offset)).

Thus, the "post-aggravation rights" new medical condition claim now being asserted was not previously processed to a final order under either prior case law or prior Own Motion claim processing. In addition, notwithstanding any issues regarding the propriety of the new medical condition claim (including whether claimant has standing to bring the claim), the fact remains that the new medical condition claim was initiated after the aggravation rights had expired. Therefore, the "post-aggravation rights" new medical condition claim is subject to *amended* ORS 656.267 and 656.278(1)(b). As such, the Hearings Division did not have jurisdiction to decide this issue.[1] [2]

Because the Hearings Division lacked jurisdiction over this matter, we vacate the ALJ's order. As explained above, under the amended statutory scheme, new medical condition claims that are initiated after expiration of aggravation rights must be processed under *amended* ORS 656.278(1)(b) and the Board's Own Motion rules. *Amended* ORS 656.267; 656.726(5); OAR 438-012-0030. Under the Board's Own Motion rules, for claims with a date of injury before January 1, 2002, the carrier shall, within 90 days after receiving the Own Motion claim, either voluntarily reopen the claim or submit a recommendation to the Board as to whether the claim should be reopened or denied. OAR 438-012-0030(1)(a) and (b).

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[1] In reaching this conclusion, we note that, pursuant to the Board's Own Motion rules, we have authority to refer a matter to the Hearings Division for an evidentiary hearing and recommended findings of fact and conclusions of law where we find the written record insufficiently developed to decide the issue before us. *See* OAR 438-012-0040(3); *Gloria L. Gardner*, 52 Van Natta 1948 (2000); *Edward T. Rothauge*, 52 Van Natta 648 (2000); *Diane K. Cotter*, 51 Van Natta 1793 (1999); *Richard A.* Schiel, 50 Van Natta 2356 (1998).

[2] Finally, we note that the record establishes that the dispute involves only the "post-aggravation rights" new medical condition claim, without involving causation issues regarding unpaid medical bills or medical service claims. Because the decedent's compensable injury occurred after January 1, 1966, if such causation issues regarding disputed medical service claims for the "post-aggravation rights" new medical condition claim were raised, those issues would be under the Board's and its Hearings Division's jurisdiction. *Compare amended* ORS 656.278(1)(c) (where the date of injury is earlier than January 1, 1966, Own Motion benefits may include payment of medical benefits). Thus, although not occurring under the facts of this case, bifurcated jurisdiction could result in a "post-aggravation rights" new medical condition claim that also involved causation issues regarding disputed medical service claims where the injury occurred on or after January 1, 1966. *See* WCB Admin. Order 2-2001 (eff. 01/01/02), Order of Adoption, page 3-5 fn 1. Under such circumstances, the Board in its Own Motion authority would have jurisdiction over the "post-aggravation rights" new medical condition claim and the Board and its Hearings Division would have jurisdiction over the causation issues regarding disputed medical service claims, provided that the compensable injury occurred on or after January 1, 1966. *Id.*

In *Kemp*, we explained the processing requirements for new and omitted medical condition claims initiated after expiration of aggravation rights. Specifically, we found that *amended* ORS 656.278(1)(b) establishes that there are two requirements regarding claim reopening for a "post-aggravation rights" new or omitted medical condition claim. First, the new or omitted medical condition claim must have been initiated after the expiration of the claimant's aggravation rights under ORS 656.273. Second, the new or omitted medical condition must be accepted or compensable. *Kemp*, 54 Van Natta at 507. Assuming that the employer continues to dispute claimant's standing to initiate the new medical condition claim and does not choose to voluntarily reopen the claim under *amended* ORS 656.278(5) and OAR 438-012-0030(1)(a), it may raise that argument to the Board in its eventual Own Motion recommendation.

Accordingly, we vacate the ALJ's order dated March 28, 2002.

IT IS SO ORDERED.

Entered at Salem, Oregon on October 4, 2002

Board Members Biehl and Phillips Polich concurring.

The Board does not have the resources to provide hearings outside of its Hearings Division. However, as the lead opinion notes, the Board has authority under its Own Motion rules to refer a matter to the Hearings Division for an evidentiary hearing and recommended findings of fact and conclusions of law where it finds the written record insufficiently developed to decide the issue before it. OAR 438-012-0040(3).

We write separately to inform the workers' compensation community that, if a party should request a hearing regarding a "post-aggravation rights" new and/or omitted medical condition claim, we would most likely grant that request and refer the matter to the Hearings Division for an evidentiary hearing and recommended findings of fact under OAR 438-012-0040(3).