
In the Matter of the Compensation of
DAVID J. ALBANO, Claimant
WCB Case No. 02-02623
ORDER ON REVIEW
Daniel M Spencer, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Johnson's order that found that his new medical condition claim was in the Board's Own Motion jurisdiction. On review, the issue is jurisdiction.

Subsequent to the filing of Board briefs in this case, claimant submitted a Citation to Additional Authority advising the Board of a recent court case pertaining to the applicability of 1995 and 1997 amendments to ORS 656.262(7) regarding new medical conditions. *Hiner v. Crawford Health & Rehabilitation*, 183 Or App 640 (September 25, 2002). It is permissible for any party to provide supplemental authorities to assist the Board in its review of a case. However, further argument will not be considered. See *Betty L. Juneau*, 38 Van Natta 553, 556 (1986). Accordingly, we allow claimant's submission, but consider it only to the extent that it advises us of recent developments in the law. See *Dale A. Pritchett*, 44 Van Natta 2134 (1992); *Debra A. West*, 43 Van Natta 2299 (1991).

We adopt and affirm the ALJ's order with the following exception, correction, and supplementation.

We do not adopt the fourth sentence of the section entitled "Proper Claims Processing." The date in the last sentence of the seventh paragraph of the Findings of Fact should read "January 1, 2002."

On February 16, 1989, claimant sustained a compensable right knee injury. On May 4, 1989, the insurer accepted a disabling right knee strain and contusion. On December 4, 1989, a Determination Order closed the claim. Claimant's aggravation rights expired five years later, on December 4, 1994.

On April 23, 2001, claimant requested the insurer to accept: (1) a medial meniscus tear of the right knee as an omitted medical condition pursuant to ORS 656.262(6) (1995); and (2) progressive traumatic arthritis of the right knee as a new medical condition pursuant to ORS 656.262(7) (1995). On May 21,

2001, the insurer issued a modified notice of acceptance that accepted a disabling medical meniscus tear of the right knee. Pursuant to a September 25, 2001 Stipulation and Order, the insurer agreed to amend its notice of acceptance to include right knee posttraumatic arthritis and to pay compensation according to law. On March 13, 2002, the insurer issued a modified notice of acceptance that accepted the disabling right knee posttraumatic arthritis.

Claimant argues that, upon issuance of the September 25, 2001 Stipulation, which became final, the insurer was required to process the claim as an “open claim” for a new medical condition under the law in effect prior to the amendments made by Oregon Laws 2001, chapter 865, sections 10 and 11. Like the ALJ, we disagree with claimant’s argument.

Here, the injured worker’s aggravation rights have expired on the 1989 right knee injury claim. Under such circumstances, that claim is 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 and claim processing would have been under ORS 656.262 and 656.268.

However, the 2001 legislature amended several statutes that affect Own Motion claims and “post-aggravation rights” new or omitted medical condition claims. Specifically, the legislature added ORS 656.267,¹ which relates to claims

¹ Amended ORS 656.267 provides:

for new and omitted medical conditions. In addition, the legislature amended ORS 656.278. This amendment included a separate provision dealing with “post-aggravation rights” new or omitted medical condition claims. *See amended ORS 656.278(1)(b).*²

"(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.

"(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.

"(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)."

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ORS 656.278(1)(b) provides:

"(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:

"* * * * *

"(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

In *James J. Kemp*, 54 Van Natta 491 (2002), 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, including claim processing. Such claims are not subject to further litigation under any jurisdiction. *Id.* at 498 fn 9.

Here, contrary to claimant’s argument, his new medical condition claim does not fit within the exception to “post-aggravation rights” new and omitted condition claims being within the Board’s Own Motion jurisdiction. Claimant argues that, because the September 25, 2001 Stipulation became final, the insurer was required to process the claim as an “open claim” for a new medical condition under ORS 656.262 (1995) and 656.268 (1995). We disagree.

In the September 25, 2001 Stipulation, the insurer agreed “to amend its Notice of Acceptance to include right knee posttraumatic arthritis, and to pay compensation according to law.” That stipulation is final. Thus, the acceptance of the right knee posttraumatic arthritis condition is final. However, claim processing regarding this new medical condition claim is not final. To the contrary, the dispute before us deals with ongoing claim processing issues regarding this new medical condition claim.

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[.]”

Moreover, as we found in *Kemp*, the legislature intended the changes in amended ORS 656.267 and 656.278 to apply retroactively to pending claims. *Kemp*, 54 Van Natta at 497-98. In this regard, the legislature did not include a “savings clause” regarding the effective dates of any of the 2001 amendments. If the legislature had intended that claims reopened under prior case law pursuant to ORS 656.262 (1995) and 656.268 (1995) were to be processed to closure under that prior law, it would have included a “savings clause” or some other indication that the jurisdictional and claim processing changes it was creating under amended ORS 656.267 and 656.278 were not fully retroactive. As we explained in *Kemp*, the legislature did not do so.

Essentially, claimant argues that, because his new medical condition claim was accepted when the prior law was applicable, that claim should be processed to closure under that prior law. Thus, in effect, claimant asks us to insert a “savings clause” where the legislature provided none. We cannot do that. *Kemp* 54 Van Natta 497 fn 8. Our role in construing a statute is explicitly limited to “simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted[.]” ORS 174.010; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993). Here, the legislature provided no “savings clause;” therefore, we cannot insert such a clause.

There is no dispute that claimant initiated the new and omitted medical condition claims after the expiration of his aggravation rights. Furthermore, as discussed above, although acceptance of those claims is final, processing of the claims under prior case law has not become final. Therefore, pursuant to amended ORS 656.267(3), the new and omitted medical condition claims “shall be processed as requests for relief under the Workers’ Compensation Board’s own motion jurisdiction pursuant to ORS 656.278(1)(b).” See *Pamela A. Martin, Dcd*, 54 Van Natta 1852 (2002) (Board vacated ALJ’s order setting aside *de facto* denial of “post-aggravation rights” new medical condition claim; applying *Kemp*, Board found that the “post-aggravation rights” new medical condition claim was subject to amended ORS 656.267 and 656.278(1)(b); therefore, the Hearings Division was without jurisdiction over the “non-medical services” claim); *John S. Ross*, 54 Van Natta 602 (2002); *William E. Hartzog*, 54 Van Natta 593 (2002).

Furthermore, recent court cases do not affect the jurisdiction issue in the present case. In *Hiner v. Crawford Health & Rehabilitation*, 183 Or App at 640, the court reversed our order in *Lisa A. Hiner*, 52 Van Natta 2203 (2000), that had held that a carrier was not obligated to reopen an originally nondisabling claim for the processing of new medical conditions under ORS 656.262(7)(c) (1997) because

the compensability litigation regarding those conditions had become final before the effective date of the 1997 amendments. Relying on *Larry L. Ledin*, 52 Van Natta 682 (2000), *aff'd SAIF v. Ledin*, 174 Or App 61 (2001), we reasoned that the 1997 amendments applied to a new medical condition claim made before the amendments became effective only if the claim was the subject of litigation and was not finally found to be compensable until after the amendment became effective.

The court observed that the parties' disagreement centered around the meaning of the word "existing" in Oregon Laws 1997, chapter 605, section 2 (which provided that the amendments to ORS 656.262 "apply to all claims or causes of action *existing* or arising on or after the effective date of this Act * * *"). Referring to *Webster's Third Law Int'l Dictionary* 796 (unabridged ed 1993), the court stated that "existing" is the present participle of "exist" and means "to have being in space or time."

Characterizing our interpretation of the retroactivity clause as "too narrow" (which would limit "existing" new medical condition claims subject to the 1997 amendments to those where the compensability of the claim was pending *in litigation* on the effective date of the 1997 Act), the court reasoned that such a reading would, in direct contradiction of the express terms of the Act, exclude from coverage the vast number of new medical conditions that are acknowledged to be compensable but that, due to some technical snare, have not resulted in a reopening of the original claim for processing. Consequently, the court held that a new medical condition claim was "existing" if, on the effective date of the Act, it was perfected under the terms of ORS 656.262(7) and was as yet unprocessed or was pending in litigation. Accordingly, the court remanded to us to reconsider whether conditions (which were found compensable after the carrier's initial claim acceptance, but before the 1995 and 1997 amendments to ORS 656.262(7)) were subject to those statutory amendments regarding new medical conditions.

For the following reasons, we find *Hiner* distinguishable. The decision in *Hiner* relies on interpretation of express terms regarding the effective date of 1997 amendments to ORS 656.262(7). As such, that decision does not apply to the jurisdiction issue before us, which relates to legislative changes made in 2001. Moreover, in *Hiner*, the new medical condition claim was made and accepted *before* the expiration of aggravation rights.

Here, as addressed above, the new medical condition claim was initiated and accepted *after* the aggravation rights expired. In addition, pursuant to

amended ORS 656.267(3), a new provision added by the 2001 legislature, new medical condition claims initiated after expiration of aggravation rights shall be processed as requests for Own Motion relief under ORS 656.278(1)(b). Furthermore, as explained in *Kemp*, the legislature explicitly provided that the 2001 amendments to ORS 656.278 and 656.267 “become operative on January 1, 2002” and “apply to all claims regardless of date of injury.” See Or Laws 2001, ch 865, § 21, 22(2). Thus, because the facts and the applicable law differ between the present case and *Hiner*, we find *Hiner* distinguishable.

We also find distinguishable another recent court case. In *Talley v. BCI Coca Cola Bottling*, 184 Or App 129 (October 9, 2002), the court reversed our order in *Stanley W. Talley*, 53 Van Natta 214 (2001), that held that the Hearings Division lacked jurisdiction over the claimant’s hearing request from a “post-Authorized Training Program (ATP)” Notice of Closure because the carrier had reopened the claimant’s claim for the ATP after the expiration of the claimant’s “5-year aggravation rights.” The court identified the “narrow question” as whether the Board’s Hearings Division had jurisdiction over the claimant’s hearing request under ORS 656.283(1) as a “matter concerning a claim.” (The court stated that it was not addressing the question of whether the claimant was eligible for vocational assistance when the carrier reopened the claim after the expiration of the claimant’s “aggravation rights.”)

The court concluded that the Hearings Division had jurisdiction over the claim processing matter. In reaching its conclusion, the court rejected the carrier’s argument that, because the claim had been voluntarily reopened following the expiration of the claimant’s “aggravation rights,” the closure of the claim was subject to the Board’s Own Motion procedures under ORS 656.278. Noting that the claim was not reopened for a worsening of the claimant’s condition requiring hospitalization (nor that the claimant had either sought, or received, a Board Own Motion order reopening the claim), the court reasoned that the claim was not subject to the Board’s Own Motion procedures for claim closure.

Determining that the only other path for processing the reopened claim was ORS 656.268(8) (1991), the court observed that the statute provided that, when a claim was reopened for vocational assistance and a claimant ceased to be enrolled in a training program, the Director of DCBS “shall reconsider the claim.” The court further noted that the reconsideration was implemented through an Order on Reconsideration, from which an objecting party could request a hearing. Reasoning that if the claim had been correctly processed the claimant would have had an opportunity to request a hearing on the Director’s reconsideration order,

the court held that the processing of the claim was a matter concerning a claim over which the Hearings Division had jurisdiction.

In *Talley*, the court found that, even though the claimant's aggravation rights had expired long before the employer reopened the claim for an ATP, the claim was subject to processing under ATP statutes and not subject to the Board's Own Motion procedures for claim closure. On the surface, this holding appears similar to claimant's argument in the present case; *i.e.*, a claim reopened under prior law is subject to processing under that prior law. However, *Talley* is distinguishable on several grounds.

First, *Talley* does not address "post-aggravation rights" new and omitted medical condition claims. *See amended* ORS 656.267(3), 656.278(1)(b). Instead, it addressed an ATP claim, which involved separate statutory requirements. *See* ORS 656.268(8) (1991). In addition, *Talley* does not address the 2001 amendments, which include retroactive application of the legislative changes regarding processing "post-aggravation rights" new and omitted medical condition claims, as addressed above. For these reasons, *Talley* is distinguishable.

Accordingly, as the ALJ found, claimant's "post-aggravation rights" new and omitted medical condition claims are within the Board's Own Motion jurisdiction. *Amended* ORS 656.267(3).³

³ As addressed above, the sole issue before the ALJ involved claim processing regarding "post-aggravation rights" new and omitted medical condition claims. Therefore, as in *Pamela A. Martin, Dcd*, 54 Van Natta at 1858, the Hearings Division lacks jurisdiction over such a dispute. However, had there been a causation-type medical service dispute relating to claimant's 1989 injury claim in addition to issues regarding "post-aggravation rights" new and omitted medical condition claims, the ALJ would have had jurisdiction over that medical service issue. *See* ORS 656.245; ORS 656.704(3)(a) and (b)(A) and (C). Under such circumstances, the ALJ would have issued an order that: (1) addressed the medical service dispute; and (2) dismissed the hearing request to the extent that it raised issues regarding "post-aggravation rights" new and omitted medical condition claims (issues over which the Hearings Division lacks jurisdiction). *See Pamela A. Martin, Dcd*, 54 Van Natta at 1858 fn 2; WCB Admin. Order 2-2001 (eff. 01/01/02), Order of Adoption, page 3-5 fn 1.

As discussed in *Kemp* and *Martin*, the statutory amendments have effected the processing of "post-aggravation rights" new and omitted medical condition claims. Specifically, when a carrier receives a claim for a "post-aggravation rights" new and/or omitted medical condition, it must either voluntarily reopen the claim or submit a recommendation to the Own Motion Board recommending for or against reopening of the claim by the Board. OAR 438-012-0020; 438-012-0030. In addition, if there is a medical service claim aspect to the "post-aggravation rights" new and/or omitted medical condition, the carrier must also decide whether to pay the medical bill or issue a denial of the medical service claim.

ORDER

The ALJ's order dated June 4, 2002 is affirmed.

Entered at Salem, Oregon on October 24, 2002

Where a carrier has issued a causation denial of the medical service component of the "post-aggravation rights" new and/or omitted medical condition (from which claimant has requested a hearing) and the carrier has submitted an Own Motion recommendation recommending denial of the claim reopening request, the following procedures would likely occur. The Board would likely postpone action regarding the Own Motion matter pending resolution of the pending litigation. OAR 438-012-0050(b). In addition, if the record presented to the Own Motion Board was insufficiently developed to resolve the Own Motion matters, the Board would likely choose to consolidate those matters with the pending litigation at the hearings level. *See* OAR 438-012-0040(3).

Such a consolidation would result in the Board directing the assigned ALJ to: (1) conduct a hearing in any matter the ALJ determines will achieve substantial justice; (2) make findings of fact and conclusions of law regarding the consolidated Own Motion issues; and (3) forward to the Board a separate, unappealable recommendation with respect to the Own Motion issues along with a copy of the appealable order issued regarding the hearing matter(s). Following receipt of the ALJ's recommendation, the Own Motion Board would request the parties' positions regarding that recommendation. After considering the parties' positions, the record developed before the Board and at hearing, and the ALJ's recommendation, the Board would issue its order regarding the Own Motion issues.

If a carrier failed to process a "post-aggravation rights" new or omitted medical condition claim as an Own Motion claim (but instead issued a "denial" of the condition and medical services component), and the claimant requested a hearing, the following procedure would likely occur if the matter was subsequently brought to the attention of the Own Motion Board. If the hearing were still pending, the Board would likely consolidate the Own Motion matter with the pending medical service dispute. If the hearing had already occurred and an ALJ order had issued, the Board could rely on the hearing record, allow further supplementation of the record, and/or refer the matter for a separate fact-finding hearing if the record was insufficiently developed to resolve the Own Motion issues.