

In the Matter of the Compensation of  
WCB Case No. 15-00811  
**MICHAEL D. LEMING**, Claimant  
ORDER ON REVIEW (REMANDING)  
Christopher W Peterman, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that: (1) granted the self-insured employer's motion to amend the issues to include its "pre-hearing" amended Notice of Acceptance and combined condition denial; (2) admitted into evidence the aforementioned amended acceptance notice and denial; (3) denied claimant's motion to continue the hearing; (4) upheld the employer's amended denial of claimant's combined sacral contusion/ventral hernia condition; and (5) declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are the ALJ's procedural rulings, compensability, penalties, and attorney fees. We vacate and remand.

FINDINGS OF FACT

In June 2008, claimant was compensably injured when he slipped and fell. (Ex. 5). In July 2008, he underwent a ventral hernia repair with mesh, performed by Dr. Hansen. (Ex. 12). The employer accepted a disabling sacral contusion and the claim closed on September 23, 2008. (Exs. 18, 22).

In January 2012, Dr. Hansen repaired the hernia again, concluding that claimant "blew out" his previous mesh repair. (Ex. 25). The employer accepted a ventral hernia and an aggravation of the accepted conditions. (Ex. 29). On April 13, 2012, the claim was closed. (Ex. 36).

On May 15, 2013, the employer issued a Modified Notice of Claim Acceptance for an aggravation of the sacral contusion and ventral hernia. (Ex. 37).

On May 21, 2013, Dr. Hansen performed a third ventral hernia repair with mesh. (Ex. 40).

On June 16, 2013, claimant treated in an emergency room for a postoperative infection. (Exs. 41, 42, 43). By October 2013, he had a recurrent bulge. (Ex. 48-5).

On December 2, 2013, Dr. Bernardo, general surgeon, examined claimant at the employer's request. (Ex. 51). He concluded that claimant's preexisting epigastric hernia and coexistent medical issues (including adrenal insufficiency and obesity) formed the major contributing cause of his repair failure and need for treatment. (Ex. 51-10). Dr. Hansen concurred with Dr. Bernardo's opinion. (Ex. 52).

In January 2014, Dr. Hansen referred claimant to Dr. Martindale, a general surgeon. (Ex. 53-1). Dr. Martindale examined claimant in April 2014, and planned to repair the hernia. (Exs. 53-1, 54).

Subsequently, Dr. Hansen determined that the mid-June 2013 post-operative infection and claimant's need for treatment/disability subsequent to that infection were caused in major part by residuals of his adrenal insufficiency (which was identified in 2007), and the medication related to that condition. (Ex. 55-2).

In May 2014, Dr. Brant, general surgeon, reviewed claimant's records at the employer's request. (Ex. 57). He opined that claimant's chronic use of steroids to treat his adrenal insufficiency, in combination with his obesity, formed the major contributing cause of his "failed hernia surgery" and June 2013 post-operative infection. (Ex. 56).

In November 2014, Dr. Martindale opined that, by the time of claimant's infection following the May 2013 surgery, the major contributing cause of claimant's need for treatment/disability was related to a combination of his preexisting adrenal insufficiency, medical treatment related thereto, and obesity. (Exs. 59, 60).

On December 22, 2014, the employer issued a Modified Notice of Acceptance to include a "work related sacral contusion and ventral hernia which by December 2, 2013 had combined with a non-work related and preexisting adrenal insufficiency and preexisting and non-work related obesity." (Ex. 61).

On December 23, 2014, the employer issued a denial, stating that claimant's injury claim was previously accepted for "work related sacral contusion and ventral hernia which by December 2, 2013 had combined with a non-work related and preexisting adrenal insufficiency, and preexisting and non-work related obesity[.]" but that, "the major contributing cause of [claimant's] combined condition and need for treatment/disability related thereto was, by June 16, 2013, no longer the work related component of the accepted combined condition." (Ex. 62).

Claimant filed a hearing request, contesting the employer's December 2014 denial. The hearing was eventually scheduled for May 6, 2016.

On January 8, 2015, claimant's counsel objected to the December 22, 2014 Modified Notice of Claim Acceptance, asserting that there had not been a substantial change since the May 15, 2013 modified acceptance, and that any combined conditions occurred before that date. (Ex. 64). Moreover, claimant's counsel asserted that, because the employer had accepted the combined condition effective December 2, 2013, but denied that condition effective June 16, 2013, the acceptance and denial were invalid. (*Id.*)

On May 5, 2015, the day before the scheduled hearing, the employer amended its December 22, 2014 Modified Notice of Acceptance. Specifically, the employer inserted "May 15, 2013" in front of the word "acceptance," and deleted the words "by December 2, 2013." (Ex. 61AA).

On that same date, the employer also amended its December 23, 2014 denial by removing the effective date of the combined condition, contending that, "the major contributing cause of [claimant's] combined condition and need for treatment/disability related thereto was, by June 16, 2013, no longer the work related component of the accepted combined condition." (Ex. 62BB). The employer denied the combined condition claim effective June 16, 2013. (*Id.*)

### CONCLUSIONS OF LAW AND OPINION

At the hearing, claimant objected to the employer's motion to amend the issues to include the amended acceptance and denial. (Tr. 2-3). Asserting that he was "surprised" by the amendments, claimant requested an opportunity for "supplemental argument and potentially evidence in response to that as may be needed, or a postponement." (Tr. 4-7). He explained that deletion of the effective date in the amended acceptance significantly changed "the game" and that he may need to supplement the record. (Tr. 7-8).

The ALJ admitted the amended notices of acceptance and denial and allowed the amendment of issues, but declined to postpone the hearing. (Tr. 5, 8). Nonetheless, the ALJ offered claimant the opportunity to submit additional *argument* regarding the amended exhibits. (Tr. 7). In written closing arguments, claimant renewed his objection to the ALJ's consideration of the amended acceptance and denial.

Stating that amendments to the issues raised and relief requested at hearing “shall be freely allowed,” the ALJ continued to allow the amendment of the Modified Notice of Acceptance and denial, *i.e.*, the issues. (O & O, at p. 6). Reasoning that claimant did not request a postponement before the hearing, and had not shown extraordinary circumstances to justify a continuance of the hearing or surprise/prejudice created by the employer’s amended documents, the ALJ declined to postpone/continue the hearing. *Id.* Ultimately, the ALJ upheld the employer’s denial of claimant’s combined condition and declined to award penalties and attorney fees. (O & O, at p. 9).

On review, we interpret claimant’s argument to be that it was an abuse of discretion/error of law for the ALJ to apply former versions of OAR 438-006-0031 and OAR 438-006-0036. Based on the following reasoning, we agree and remand this case to the ALJ.

As of April 1, 2014, OAR 438-006-0031(2) and OAR 438-006-0036(2) provide, in relevant part: “Consistent with the Board’s policy described in OAR 438-005-0035, amendments *may* be allowed, subject to a motion by an adverse party for a postponement under OAR 438-006-0081 or a continuance under OAR 438-006-0091.” (WCB Admin. Order 2-2013, eff. April 1, 2014 (emphasis supplied)). Prior to April 1, 2014, OAR 438-006-0031(2) and OAR 438-006-0036(2) provided, in relevant part, that amendments “*shall* be freely allowed.” (WCB Admin. Order 1-2003, eff. May 1, 2003 (emphasis supplied)).

Here, the ALJ concluded that the rules required that amendments to the issues raised and relief requested at hearing “shall” be freely allowed.<sup>1</sup> (O & O, at p. 6). Noting that the current rule provides that amendments “may” be allowed, claimant asserts that it was an abuse of discretion/error of law for the ALJ to apply the former version of the rule.

The use of the term “shall” suggests an interpretation that the ALJ considered such a ruling was mandated, rather than discretionary. Considering this significant difference and the potential impact on the “amendment” analysis, we consider it appropriate to return the case to the ALJ to render a discretionary determination.

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<sup>1</sup> Consolidation of issues is within an ALJ’s discretion when the parties are the same for both denials, and the denials pertain to the same claim. *See* OAR 438-006-0065(5); *Ronald L. White*, 55 Van Natta 4203, 4204 (2003).

Where such an amendment is permitted, to afford due process, the responding party must be given an opportunity to respond to the new issues raised. *See* OAR 438-006-0091(4); *Neely v. SAIF*, 43 Or App 319, 323, *rev den* 288 Or 493 (1979) (“If claimant had been given no opportunity to present evidence on [the causation] issue in the hearing below, the proper procedure would be for the Board to remand the case to the referee, ORS 656.295(5), for the taking of evidence on that issue.”); *Sandra L. Shumaker*, 57 Van Natta 2986 (2005); *Gregg Muldrow*, 49 Van Natta 1866, 1896 (1997) (where the claimant was surprised by the compensability issue at hearing, his request for a continuance should have been granted, and remand for further development of the record was appropriate); *see also SAIF v. Ledin*, 149 Or App 94 (1997). In other words, a party’s remedy for surprise and prejudice created by a late-raised issue is a motion for continuance. *See* OAR 438-006-0031; OAR 438-006-0036.

Here, claimant objected to the employer’s request to amend its acceptance and denial. (Tr. 2-3). Because the amendment to the issues was allowed, claimant, in effect, requested a continuance of the hearing to provide him with an opportunity to supplement the record to address the amendments (which now denied the “combined condition” based on a “change” since the new effective date of acceptance) and changing burden. (Tr. 4-7). *See Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008) (the word “ceases” presumes a change in the claimant’s condition or circumstances since the acceptance of the combined condition, such that the “otherwise compensable injury” is no longer the major contributing cause of disability or need for treatment of the combined condition); *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006) (the effective date of acceptance provides a baseline for determining whether a claimant’s condition has changed).

Accordingly, we vacate the ALJ’s July 10, 2015 order and remand the case to ALJ Brown for further proceedings consistent with this order. The ALJ may conduct these further proceedings in any manner that she finds will achieve substantial justice. ORS 656.283(7). The ALJ shall then issue a final appealable order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on March 1, 2016