
In the Matter of the Compensation of
GARRY L. HOLCOMB, Claimant
WCB Case No. 02-01504, 01-09624
ORDER ON REVIEW
Lourdes Sanchez PC, Claimant Attorneys
Craig A Staples, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Crumme's order that: (1) found that claimant's April 18, 2001 injury claim for a cervical condition was untimely filed; and (2) upheld the self-insured employer's compensability and responsibility denials. On review, the issues are the timeliness of the claim and, potentially, compensability and responsibility.

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

Claimant worked for the employer as a delivery supervisor. On April 18, 2001, claimant injured his neck and left shoulder when a "work surface" used for office cubicles fell on his head. (Tr. 8). He sought treatment with Dr. Wiltse on May 11, 2001. (Ex. A).

On June 12, 2001, claimant filed a claim with his employer, the operations for which had been assumed by another entity. In that claim form and in an attachment to the form, claimant related his neck and shoulder conditions to loading and unloading a truck that was "too short" for him and to being hit on the head repeatedly in the course of his work. (Exs. 2, 3). He described his injury date as "4-18-01 and prior to." (Exs. 3). That claim form was misdirected to the wrong insurance company, but eventually was forwarded to the employer's processing agent on October 9, 2001. (*See* Ex. 3, bottom margin).

Also on October 9, 2001, claimant filed a second claim form alleging a distinct injury on April 18, 2001, whereby the "work surface" fell on his head. (Exs. 3A, 4). Claimant admitted at hearing that he had "backdated" the second claim form to June 12, 2001. (*See* Ex. 4; Tr. 26).

On October 26, 2001, the employer's claim processing agent denied responsibility for claimant's initial claim, asserting that claimant's current need for treatment and/or disability was related to a "new injury" with a new employer. (Ex. 8). On February 26, 2002, using a new claim number to segregate the second

claim based on a distinct injury, the employer's processing agent denied compensability on behalf of the new entity and its insurer. (Ex. 11). Claimant requested a hearing from the denials.

At the beginning of the hearing, the employer did not raise a "late filing" defense. (Tr. 3). However, directly after claimant's testimony about "backdating" the second claim form, the employer raised a "new issue" that claimant's injury claim or claims were untimely filed.¹ (Tr. 31). Claimant objected to the "new issue" being raised at that time. In the alternative, claimant raised an "occupational disease" theory. (Tr. 30).

The ALJ found that *part of* claimant's injury claim (in other words, his injury claim based on a distinct injury on April 18, 2001) was untimely filed.² See ORS 656.265(4). The ALJ then found that claimant's injury and occupational disease claims were not compensable on the merits of the medical evidence and upheld the employer's denials. Claimant requested Board review.

On review, claimant contends that the employer did not timely raise its "timeliness" defense under ORS 656.265. We disagree.

The Board's rules provide that amendments to the issues raised and relief requested at hearing "shall be freely allowed." OAR 438-006-0031, OAR 438-006-0036; see *SAIF v. Ledin*, 149 Or App 94 (1997) (a carrier may amend its denial at hearing). In addition, another portion of OAR 438-006-0031 provides: "If, during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing."

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 436-006-0091(3); *Sandra L. Shumaker*, 51 Van Natta 1981 (1999), *on recon* 52 Van Natta 33 (2000). In other words, a party's remedy for surprise and prejudice created by a late-raised issue is a motion of continuance. See OAR 438-006-0031, OAR 438-006-0036. We review rulings pursuant to these

¹ Claimant also initially stipulated that he filed the second claim form on October 9, 2001, but then withdrew from that stipulation after learning that the employer was raising a timeliness defense based on that fact. (Tr. 28, 31).

² The ALJ also found that claimant's *first* injury claim (based on injuries and work activity on or before April 18, 2001) was timely filed. (Exs. 2, 3).

provisions for an abuse of discretion. *See Coral M. Green*, 47 Van Natta 1459, 1460 (1995); *Richard N. Wigert*, 46 Van Natta 486 (1994) (in absence of contention that ALJ had abused discretion by refusing to permit carrier to raise particular issue, Board declined to consider challenge to ALJ's procedural ruling).

Here, we find that the ALJ did not abuse his discretion in allowing the employer to raise the new “timeliness” issue, based on claimant’s testimony about “backdating” the second claim form.³ Claimant’s remedy, then, was to request a continuance. OAR 438-006-0036. Instead of requesting a continuance, claimant raised a new occupational disease theory, which the ALJ allowed.⁴ (*O&O* at 5). In these circumstances, we find no abuse of discretion in allowing the new “timeliness” issue.

In any event, even if we were to find that the ALJ abused his discretion in allowing the new “timeliness” issue to be raised, we would still adopt and affirm the ALJ’s order regarding compensability. In other words, we agree with and adopt the ALJ’s analysis of the relative persuasiveness of the medical opinions in the record. Accordingly, we affirm the ALJ’s order.

ORDER

The ALJ’s order dated January 23, 2003 is affirmed.

Entered at Salem, Oregon on July 30, 2003

³ We acknowledge claimant’s contention that the employer should have been aware (prior to the hearing) that claimant may have “backdated” the second claim form, based on its notation in a Form 1502 that the “claim” was not “reported” until October 9th. (Ex. 8a). However, we do not find that notation (which probably pertained to the *first* claim) sufficient to alert the employer that claimant had “backdated” the second claim form.

⁴ The ALJ noted that the occupational disease theory may have been abandoned in closing argument.