

In the Matter of the Compensation of  
**TERESA A. BEARDEN, Claimant**  
WCB Case No. 02-09464  
ORDER ON REVIEW  
Nyla Jebousek, Claimant Attorneys  
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Marshall's order that: (1) declined to reopen the record to admit evidence offered by claimant regarding the self-insured employer's notice of her omitted medical condition claim; and (2) declined to assess penalties or award attorney fees for the employer's allegedly untimely claims processing. In her brief, claimant also requests remand to submit additional evidence. In the employer's brief, it moves to dismiss claimant's request for review as untimely. On review, the issues are motion to dismiss, remand, evidence, penalties and attorney fees. We deny the motion to dismiss and the motion for remand, and affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes. In the third sentence of the findings of fact on page 1, we change the doctor's name to "Kauffman." In the second full paragraph on page 2, we change the second sentence to read: "In March 2002, Dr. Lewis recommended surgery." In the third full paragraph on page 2, we change the dates in the last two sentences to "March 14, 2003" and "March 12, 2003" respectively.

CONCLUSIONS OF LAW AND OPINION

Motion to Dismiss

On May 13, 2003, claimant filed a request for review of "the Administrative Law Judge's Opinion and Order dated April 11, 2003, regarding attorney fees." Claimant's request, however, did not refer to a WCB case number.

In the employer's brief, it moves to dismiss on the basis that claimant failed to timely request review of this particular case number. The employer asserts that claimant instead requested review of ALJ Marshall's dismissal order in WCB Case No. 03-02669.

The employer's motion to dismiss is denied. It is well-established that the Board's appellate authority is based on appealed ALJ orders, not case or claim numbers. *See* ORS 656.295(1) (request for review need only state that party requests review of "the order"); *John J. Dronkers*, 50 Van Natta 954 (1998); *Dorothy I. Adams*, 48 Van Natta 2190, 2191 (1996). That authority necessarily includes determining the order to which claimant's appeal was directed (irrespective of whether the case and claim numbers noted in the request correspond to the numbers listed in the ALJ's order). *Adams*, 48 Van Natta at 2191.

Here, claimant's May 13, 2003 request for review clearly referenced an April 11, 2003 Opinion and Order regarding attorney fees. The request did not identify a case or claim number. We acknowledge that there are two orders from ALJ Marshall dated April 11, 2003 that involve claimant and the employer. (WCB Case Nos. 02-09464 and 03-02669). However, only one order was entitled "Opinion and Order" and pertained to attorney fees. The ALJ's Opinion and Order carrier the case number of WCB 02-09464. (The other April 11, 2003 order was entitled "Order of Dismissal (Transfer to WCD)" and did not concern attorney fees.)

Under these circumstances, we find that claimant's request for review pertained to the ALJ's April 11, 2003 Opinion and Order in WCB case number 02-09464. Accordingly, claimant's failure to reference the correct case number on her request for review is not fatal to her appeal. *See Dorothy I. Adams*, 48 Van Natta at 2191.

### Evidence

On review, claimant argues that the ALJ erred by not allowing the record to "stay open" to receive evidence of the date she submitted her request for an omitted medical condition to the employer.

ORS 656.283(7) provides that the ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. We review the ALJ's evidentiary ruling for abuse of discretion. *E.g., Rose M. Lemasters*, 46 Van Natta 1533 (1994), *aff'd mem Lemasters v. Tri-Met, Inc.*, 133 Or App 258 (1995).

At hearing, claimant argued that she was entitled to a penalty for the employer's allegedly untimely processing of her claim for sciatica and a disc

condition. She relied on her letter to the employer dated November 19, 2002, which asked the employer to accept omitted conditions of sciatica secondary to a bulging and or herniated disc. (Ex. 47). Claimant's attorney waived an opening statement and indicated that she would rely on the exhibits. (Tr. 5-6). Claimant then rested her case without presenting any testimonial or other documentary evidence. (*Id.*) Likewise, the employer's attorney did not offer any testimonial or additional documentary evidence and rested its case. (Tr. 6).

The parties proceeded to closing arguments and claimant expressly waived closing argument. (Tr. 6). The employer argued, among other things, that claimant had failed to prove untimely claim processing or entitlement to an attorney fee for prevailing over a "de facto" denial because she had failed to prove when her claim for acceptance of the omitted medical condition was received by employer or its insurer. (Closing argument Tr. 3-5). On rebuttal, claimant asked permission to "keep the record open" to submit evidence concerning the employer's receipt of the request for an omitted medical condition. (*Id.* at 6). The ALJ denied claimant's request. (*Id.* at 6-7).

Although claimant asked the ALJ to "keep the record open," claimant had rested her case and the record was already closed. (Tr. 5-6). On review, claimant contends that the employer did not raise the defense that the claim was not transmitted or received on the date of the November 19, 2002 letter. To the extent that claimant is arguing that the employer raised a "new issue" in closing argument, we disagree. To establish entitlement to a penalty and/or attorney fee, claimant had the burden of proving that the employer's processing of her claim for sciatica and a disc condition was untimely. In closing argument, the employer did not raise a "new issue." Rather, the employer argued that claimant had failed to establish the necessary elements for a penalty or attorney fee. Under these circumstances, we find that the ALJ did not abuse his discretion by failing to reopen the record for additional evidence.

### Remand

Alternatively, claimant requests remand to allow the admission of evidence to establish when the employer received her request for an omitted medical condition.

Our review is limited to the record developed by the ALJ. We may remand to the ALJ if we find that the case has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). There must be a compelling reason for remand to the ALJ for the taking of additional evidence. *SAIF v. Avery*,

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167 Or App 327, 333 (2000). A compelling reason exists when the new evidence: (1) concerns disability; (2) was not obtainable at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Id.*; *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986).

Here, claimant has not established that the evidence she wishes to submit was unobtainable with due diligence at the time of the hearing. In other words, there is no explanation of why the necessary evidence could not have been presented at hearing. Accordingly, we deny claimant's motion to remand.

#### Penalties/Attorney Fees

We adopt and affirm the ALJ's reasoning and conclusion that claimant has not sustained her burden of proving that she is entitled to penalties or attorney fees for the employer's allegedly unreasonable claims processing.

#### ORDER

The ALJ's order dated April 11, 2003 is affirmed.

Entered at Salem, Oregon on October 8, 2003