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October 26, 2016

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Fred Bruyns
Workers' Compensation Division
350 Winter St NE
PO Box 14480
Salem, OR 97309-0405
Via Email Also: fred.h.bruyns@oregon.gov

RE: Workers Compensation Division
Proposed Rule Changes to OAR 436-060-0018

Dear Mr. Bruyns,

I attended the public hearing held on October 24, 2016. Although the hearing was brief, I noted that there was no opposition testimony to my prior recommendations regarding reclassification. Further, in addition to my comments submitted on September 30, 2016 and August 23, 2016, I want to offer concrete examples of pending cases that have directly resulted from the concerns expressed in my letters. In short, the Workers' Compensation Division's summary dismissal of cases requesting administrative review of *de facto* refusals to reclassify, and voluntary reclassifications after a request has been initiated, are creating confusion among forums as to which forum has subject matter jurisdiction to address the issues.

For example, I represent a client on behalf of whom I requested administrative review of an insurer's express refusal to reclassify the claim. After the WCD acknowledged the request, the insurer voluntarily issued a modified notice of acceptance, indicating the claim had been accepted for a disabling condition. On March 25, 2016, the WCD summarily, and *sua sponte*, dismissed my client's request for review. The order stated that my client could appeal the order by requesting a hearing with the Worker's Compensation Board's (WCB) Hearings Division. I did so on behalf of my client.

Despite following the stated appeal rights, the WCB dismissed the request for hearing for lack of jurisdiction. Indeed, both the parties and the judge agreed that the WCB lacked jurisdiction to review the WCD's dismissal because it was not an order classifying the claim and ORS 656.277 conferred jurisdiction to the WCB only for appeal of such orders. The matter now languishes back before the WCD to reissue an order with correct appeal rights according to law.

In a different case, a colleague, on behalf of her client, requested a hearing before the WCB for an insurer's failure to respond at all to a request for reclassification. She understood the

WCD's policy of summarily dismissing requests for administrative review in such cases, and asked the WCB for relief. The judge dismissed the dispute for lack of subject matter jurisdiction, stating that the WCD, not the WCB, has initial jurisdiction to consider the issue. Notably, the judge accepted employer's argument that a failure to respond at all to a request for reclassification is "*equivalent to a notice of classification as nondisabling*, which triggers claimant's right to request [WCD] review." (Emphasis added). The judge's reasoning directly conflicts with the WCD's informal policy that the WCD does not have jurisdiction to address an insurer's complete failure to respond to an initial request for reclassification and its policy to not treat that failure as a *de facto* refusal to reclassify.

These are real cases happening right now, and the two examples are not exhaustive. Attorneys on both sides are spending considerable resources and effort attempting to discern which forum has jurisdiction to address grievances regarding claim classification. As it stands, neither the WCD nor the WCB appears willing to assume jurisdiction to resolve such disputes. This not only creates a confusing procedural problem that needs to be resolved, but implicates larger constitutional issues.

My prior recommended changes to OAR 436-060-0018 would alleviate much of that confusion. The recommendations clarify the party's rights and, more importantly, the forums' respective jurisdiction to resolve the disputes. As such, I urge the WCD to implement my recommendations. Ignoring them will simply result in further confusion and litigation.

Thank you for considering of my suggestions. As always, if you have questions, please let me know.

PRESTON BUNNELL, LLP

Theodore P. Heus
tedh@prestonbunnell.com

Enclosures: 3/25/16 WCD Order of Dismissal; 10/7/16 Order – Judge Lipton; 7/19/16 Order – Judge Sencer

Before The Director of the
Department of Consumer and Business Services
of the State of Oregon
Workers' Compensation Division
Dispute Resolution Section

RECEIVED
MAR 28 2016
PRESTON BUNNELL, LLP

In the Matter of Claim Classification for:

March 25, 2016

SIOCHY S ARULONG)
4317 NE 66TH AVE #H-84)
VANCOUVER, WA 98661)
)
)
WCD File No: CBU4425)
Insurer: INSURANCE COMPANY OF THE)
STATE OF PENNSY)
Claim No: 710962296)
Date/Injury: 07/21/2015)

Director's Classification Review
Dismissal Order

Pursuant to ORS 656.277 and OAR 436-030-0007(1)(c), on February 23, 2016, the Appellate Review Unit on behalf of the Director received a request for a Classification Review of the Insurer's Refusal to Reclassify dated February 16, 2016.

Pursuant to ORS 656.277 and OAR 436-030-0007(1)(c), on February 23, 2016, the Appellate Review Unit on behalf of the Director received a request for a Classification Review of the Insurer's Refusal to Reclassify dated February 16, 2016.

The insurer issued a Modified Notice of Acceptance on March 4, 2016, which reclassifies the claim to disabling.

ORDER

Therefore, **IT IS ORDERED** that the request for a Director's Classification Review of the Insurer's Refusal to Reclassify dated February 16, 2016, is dismissed.

Any party to the claim has the right to request a hearing for a period of 30 days from the date of this Order on Reconsideration. A hearing request must be submitted to the Workers' Compensation Board, 2601 25th Street SE, Suite 150, Salem, Oregon 97302-1282.

Dated this 25th day of March, 2016
Department of Consumer and Business Services
Workers' Compensation Division
Appellate Review Unit

CHARITY S DONT HIT, Director Representative

CBU4425 / 2349
cc: PRESTON BUNNELL LLP Attn: THEODORE P HEUS 1200 NW NAITO PKWY STE 690 PORTLAND, OR 97209
INSURANCE COMPANY OF THE STATE OF PENNSY REGULATORY REPORTING DIVISION 100 CONNELL DR STE 2100 BERKELEY HEIGHTS, NJ 07922-2732
AIG CLAIMS, INC. 222 SW COLUMBIA ST STE 700 PORTLAND, OR 97201
QUANTEM AVIATION SERVICES LLC 175 AMMON DR MANCHESTER, NH 03103

- (4) In-person: Workers' Compensation Board office in Salem, Portland, Eugene, or Medford
- (5) Website portal: For attorneys, self-insured employers and insurers that are registered users

You must also provide a copy of your request to all other parties to this proceeding within the same 30-day period. All other parties will have the remainder of the 30-day period, and in no case less than 10 days, to request Board review. The 10-day minimum is provided even if it extends the time allowed to request Board review beyond 30 days.

Failure to provide a timely request for review to the Board and provide copies to all other parties within the time allowed will result in the loss of your right to appeal this Order and the Board will be unable to review the Administrative Law Judge's decision.

Entered at Portland, Oregon, on OCT 07 2016 , with copies mailed to:

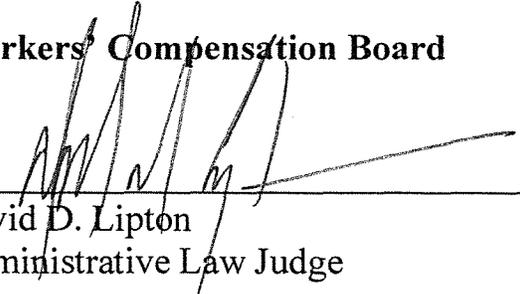
SIOCHY S ARULONG, 4701 NE 72ND AVE # 161, VANCOUVER WA 98661
PRESTON BUNNELL LLP, 1200 NW NAITO PKWY STE 690,
PORTLAND OR 97209-2829

BOREAS HOLDINGS, 175 AMMON DR, MANCHESTER NH 03103-3311
AIG - CHARTIS CLAIMS INC, 222 SW COLUMBIA ST STE 700,
PORTLAND OR 97201-6655

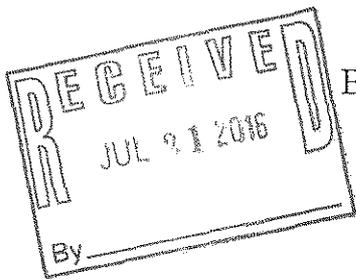
REINISCH WILSON WEIER, 10260 SW GREENBURG RD # 1250,
PORTLAND OR 97223

Info copy electronically transmitted to: DCBS WCD Operations

Workers' Compensation Board



David D. Lipton
Administrative Law Judge



BEFORE THE WORKERS' COMPENSATION BOARD
STATE OF OREGON
HEARINGS DIVISION

In the Matter of the Compensation)	WCB Case No. 16-00513
)	Claim No. 301429399560001
of)	DOI: 9/15/2014
)	WCD File No. ABU6642
)	
TINA L. JUERGENS,)	
Claimant)	ORDER OF DISMISSAL

Pursuant to notice, the hearing in this matter is scheduled to convene on August 16, 2016 before the undersigned Administrative Law Judge. Constance L. Wold represents claimant. Kindra F. Long represents the employer, 7 Eleven – Store #35340H, and its processing agent, Sedgwick CMS.

The employer has moved to dismiss claimant’s request for hearing on the basis of lack of jurisdiction. For the following reasons, the employer’s motion is granted.

Claimant filed a request for hearing on February 3, 2016 raising the issue of “Failure to Respond to 12/14/2015 Request for Reclassification.” The employer notes, and claimant concedes, that claimant never asked the Director of the Department of Consumer and Business Services (the “director”) to review the employer’s classification decision.

Pursuant to ORS 656.277(1), the director has initial jurisdiction to review an employer’s reclassification decision. Under that statute the jurisdiction of the Workers’ Compensation Board (the “Board”) may be invoked by a party who objects to the director’s classification decision. Specifically, the statute provides,

“If any party objects to the classification of the director, the party may request a hearing under ORS656.283 within 30 days from the date of the director’s order.”

Claimant argues that the Board has jurisdiction based on the employer's failure to respond to her request for reclassification. Claimant characterizes the employer's inaction as improper claims processing and an unreasonable resistance to compensation. The employer responds, in effect, that its failure to respond to claimant's request for reclassification within the statutory 14 day period is equivalent to a notice of classification as nondisabling, which triggers claimant's right to request director review.

The Board has previously addressed the issue of its jurisdiction to review an allegedly invalid notice of classification. In *Hope E. Martinez*, 66 Van Natta 1964,1965 (2014), the Board held,

“Pursuant to ORS 656.277(1), claimant must appeal a reclassification decision to WCD. Accordingly, her contentions regarding the procedural validity of the modified acceptance notice (and attendant request for penalties and attorney fees) arising from that “reclassification/validity” question are first subject to WCD’s authority. Likewise, the matter of the insurer’s compliance with the administrative rule regarding simultaneous notice to claimant’s attorney (and related penalty/attorney fee issues) regarding the insurer’s reclassification decision is also first subject to WCD’s authority.”

Consistent with *Martinez*, I conclude that claimants must seek director review of a reclassification dispute. The jurisdiction of the Board over classification issues does not attach until the director has issued an order. *See also, Jeffrey J. McHenry*, 52 Van Natta 2187 (2000)(Failure of insurer to send notice of claim classification to claimant did not allow claimant to bypass statutory procedure in ORS 656.277.)

Based on the foregoing, I conclude that the Hearings Division lacks subject matter jurisdiction over the issue raised in claimant's Request for Hearing. Accordingly claimant's Request for Hearing is dismissed.

IT IS SO ORDERED.

Notice to all parties: If you are dissatisfied with this Order, you may request Board review. A request for review must be submitted within thirty (30) days after the mailing date on this Order. You must timely submit your request for review by any of the following methods:

- (1) Mail: Workers' Compensation Board
2601 25th St SE, Suite 150
Salem, OR 97302-1280
- (2) E-mail: request.wcb@oregon.gov
- (3) Fax: 503-373-1600
- (4) In-person: Workers' Compensation Board office in Salem,
Portland, Eugene, or Medford
- (5) Website portal: For attorneys, self-insured employers and insurers
that are registered users

You must also provide a copy of your request to all other parties to this proceeding within the same 30-day period. All other parties will have the remainder of the 30-day period, and in no case less than 10 days, to request Board review. The 10-day minimum is provided even if it extends the time allowed to request Board review beyond 30 days.

Failure to provide a timely request for review to the Board and provide copies to all other parties within the time allowed will result in the loss of your right to appeal this Order and the Board will be unable to review the Administrative Law Judge's decision.

Entered at Portland, Oregon, on July 19, 2016, with copies mailed to:

TINA L. JUERGENS, 2217 SE KANE AVE., GRESHAM, OR 97080
HOOTON WOLD & OKRENT LLP, PO BOX 569, BEAVERTON, OR 97075
7 ELEVEN - STORE # 35340H, 18222 SE DIVISION ST.,
GRESHAM, OR 90305

SEDGWICK CMS - PORTLAND OR, PO BOX 14514,
LEXINGTON, KY 40512-4514

REINISCH WILSON WEIER, 10260 SW GREENBURG RD., # 1250,
PORTLAND, OR 97223

Info copy electronically transmitted to: DCBS WCD Operations

Workers' Compensation Board



NICHOLAS M. SENCER
Administrative Law Judge