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In the Matter of the Compensation of  
**MANUEL M. PUMA, Claimant**  
WCB Case No. 02-01769  
ORDER ON REVIEW (REMANDING)  
Claimant Unrepresented  
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant, *pro se*, requests review of Administrative Law Judge (ALJ) Stephen Brown's order that: (1) denied claimant's request to continue the hearing; and (2) reduced his unscheduled permanent disability award from 7 percent (22.4 degrees), as awarded by an Order on Reconsideration, to zero. Claimant has submitted additional medical reports, which we interpret as a motion to remand to the ALJ. *Judy A. Britton*, 37 Van Natta 1262 (1985). On review, the issues are continuance, and, potentially, remand and extent of unscheduled permanent disability. We vacate and remand.

FINDINGS OF FACT

Claimant compensably injured his low back on January 17, 2001. An October 19, 2001 Notice of Closure awarded temporary disability, but no permanent disability. An Order on Reconsideration dated February 6, 2002 awarded 7 percent unscheduled permanent disability. The insurer requested a hearing from the February 6, 2002 Order on Reconsideration, asserting that the unscheduled permanent disability award should be reduced to zero.

A hearing was initially scheduled for April 25, 2002. The hearing was cancelled based on an announcement from the parties that a settlement had been reached. When no stipulation arrived, the ALJ issued a "Show Cause" order on May 29, 2002. In response, the parties reported that no settlement had been achieved and asked that the hearing be rescheduled. The hearing was rescheduled for August 20, 2002. On August 9, 2002, claimant's former attorney withdrew from representation.

At the August 20, 2002 rescheduled hearing, claimant appeared *pro se*. He stated that he did not have a copy of the exhibits. Claimant explained that he had been required to travel to Stanford University Hospital (in California) for a brain operation for one of his children. He requested a postponement or continuance in

order to prepare his case. Claimant also asked that the permanent disability award in the Order on Reconsideration be increased.

### CONCLUSIONS OF LAW AND OPINION

The ALJ stated that, because the case had been reported settled, a postponement or continuance was not appropriate. In addition, the ALJ denied claimant's request to amend the issues to include a request to increase his permanent disability award, because no request for hearing had been filed by claimant or his former attorney. The ALJ then reduced claimant's unscheduled permanent disability award to zero.

On review, claimant renews his request for a postponement or continuance of his hearing. Based on the following reasoning, we conclude that a continuance of the hearing was warranted.

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. Claimant's motion occurred after the hearing had commenced, and it is therefore actually a motion for continuance pursuant to OAR 438-006-0091.<sup>1</sup> See *Joy A. Kosta*, 53 Van Natta 1205 n1 (2001). We

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<sup>1</sup> The continuance rule, OAR 438-006-0091, provides:

"The parties shall be prepared to present all of their evidence at the scheduled hearing. Continuances are disfavored. The Administrative Law Judge may continue a hearing for further proceedings. The Administrative Law Judge shall state the specific reason for the continuance:

"(1) If the time allocated for the scheduled hearing is insufficient to allow all parties to present their evidence and argument;

"(2) Upon a showing of due diligence if necessary to afford reasonable opportunity to cross-examine on documentary medical or vocational evidence;

"(3) Upon a showing of due diligence if necessary to afford reasonable opportunity for the party bearing the burden of proof to obtain and present final rebuttal evidence or for any party to respond to an issue raised for the first time at a hearing; or

"(4) For any reason that would justify postponement of a schedule hearing under OAR 438-006-0081."

OAR 438-006-0081 provides that a hearing shall not be postponed except upon a finding of extraordinary circumstances beyond the control of the party or parties requesting the postponement.

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review the ALJ's ruling on a motion for continuance for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002).

The ALJ reasoned that the case had been reported settled and the hearing must therefore go forward as scheduled. (Tr. 7). However, the Board's administrative rules do not list such a scenario as one that cannot constitute "extraordinary circumstances" for purposes of considering whether a hearing may be continued.<sup>2</sup> Instead, the ALJ was required to determine whether claimant's request for a continuance met the standard set forth in OAR 438-006-0091.

Moreover, claimant's attorney announced his resignation on August 9, 2002 (11 days before the hearing.) Thus, at the time of the rescheduled hearing, claimant was unrepresented. On review, claimant indicates a desire to seek representation. *See* OAR 438-006-0100(1) ("The Board encourages injured workers also to be represented in formal hearings.") Although claimant did not expressly base his continuance request on the need to obtain legal representation, he did seek delay of the hearing to grant him an opportunity to review the exhibits (copies of which he did not have until the day of the hearing) and to formulate his arguments (including a request for an increased permanent disability award).

In addition, partly due to a need to accompany his child to California for medical treatment at Stanford University Hospital, claimant explained that he did not have any of the exhibits and had not had the opportunity to review the exhibits until the time of hearing. He requested additional time to prepare and potentially submit additional evidence. (Tr. 5).<sup>3</sup>

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<sup>2</sup> The Board discourages continuances. *See* OAR 438-006-0091 ("Continuances are disfavored."). Nonetheless, the fact that a hearing was previously cancelled based on a settlement that did not materialize does not preclude a finding that a continuance is justified. Although the fact that a prior hearing was cancelled based on a "settlement" announcement is certainly a serious component in evaluating whether a subsequent hearing should be continued, such an event is not determinative regarding the "continuance" question, particularly when such a situation is not expressly excluded from the definition of "extraordinary circumstances."

<sup>3</sup> Claimant also indicated a desire to contend that the award in the Order on Reconsideration was inadequate and should be increased. (Tr. 12). The ALJ declined to consider an increase in unscheduled permanent disability as a separate "issue," because claimant or his former attorney had not filed a separate request for hearing challenging the Order on Reconsideration. (Tr. 8). However, it is well settled that a party's timely request for hearing places a permanent disability award at issue, and the ALJ may affirm, increase or decrease the award, even though the other party has not formally cross-appealed the award. *See Pacific Motor Trucking Co. v. Yeager*, 64 Or App 28 (1983); *Karen D. Maloney*, 47 Van Natta 436, 437 (1995).

Based on the above circumstances, we conclude that it was an abuse of discretion for the ALJ to deny a continuance. We find that “extraordinary circumstances” exist to justify a continuance, primarily due to claimant’s attorney’s resigning 11 days before the hearing, and to claimant’s inability to obtain and review the exhibits, partially as a result of a need to be out of state to attend to his child’s medical treatment.

Accordingly, we vacate the ALJ’s order dated November 1, 2002. This matter is remanded to ALJ Stephen Brown to schedule a hearing, at which time the parties will have an opportunity to present their proposed evidence and arguments regarding the issues arising from the Order on Reconsideration and the insurer’s hearing request.<sup>4</sup> That proceeding shall be conducted in a manner that achieves substantial justice. After the record closes, the ALJ shall issue a final, appealable order.<sup>5</sup>

**IT IS SO ORDERED.**

Entered at Salem, Oregon on April 8, 2003

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<sup>4</sup> Because this is an extent of permanent disability proceeding arising out of an Order on Reconsideration, there will be evidentiary restrictions regarding the presentation of any evidence that was not in the reconsideration record. ORS 656.268(7)(h); 656.283(7); *Oliver H. Breuninger*, 55 Van Natta 276 (2003). Although the ALJ will ultimately determine the admissibility of any future proposed exhibits, we conclude that, in addition to determining whether he wishes to be represented by an attorney, claimant should have the opportunity to review the exhibits and to present proposed evidence and argument.

<sup>5</sup> As a result of this resolution of the continuance issue, we do not reach the “remand” and extent of permanent disability issues.