

In the Matter of the Compensation of
FRANK G. INGRAM, Claimant

WCB Case No. 98-03307

ORDER ON REVIEW

Michael B Dye, Claimant Attorneys

J Keene, Reinisch et al, Defense Attorneys

Reviewing Panel: *En Banc*.¹ Board Chair Bock² and Member Langer. Member Lowell concurring. Members Biehl and Phillips Polich dissenting³.

Claimant requests review of Administrative Law Judge (ALJ) Brazeau's order that: (1) declined to admit Exhibits 43 through 46 into evidence; and (2) upheld the insurer's denial of his right shoulder condition. On review, the issues are the ALJ's evidentiary ruling and compensability.

¹ Based on the reasoning expressed in *James R. Dunn*, 54 Van Natta 1490 (2002) and *Pablo Contreras*, 54 Van Natta 1623 (2002), this case has been reviewed by all five members. Although reviewed in this manner, the members agree that this case does not involve an issue of first impression that has a profound impact on the workers' compensation system.

² In fulfilling my duty as the administrative head of the Workers' Compensation Board, I had contact with Mr. Keene, wherein he sought clarification regarding the applicable procedure to follow to raise questions regarding an ALJ's conduct.

Inasmuch as the exchange did not concern any substantive matters or issues on the merits regarding a pending case, it does not represent an "ex parte contact." See Code of Conduct (Board Members), Section 2-102(B). At most, the contact merely represents an administrative communication that did not deal with substantive matters or issues on the merits. Thus it did not provide a procedural or tactical advantage to any party. Code of Conduct, Section 2-102(C).

Because my fellow members are equally divided regarding the disposition of this appeal, my recusal from participating in this review is not an option. Under such circumstances, my involvement in this proceeding is required by means of the "rule of necessity." See *Oregon State Police Officers' Association v. State of Oregon*, 323 Or 356, 361 n. 2 (1996) (notwithstanding each Justice's potential financial interest in the outcome of cases involving the Public Employees' Retirement System, the Supreme Court was authorized to adjudicate the claim under the "rule of necessity"). In accordance with that principle, I have participated in the review of this case and the disposition of the disputed issues. AG Opinion 6511, June 9, 1994.

³ Board Member Phillips Polich is aware of a potential ex-parte contact that is not reflected in the file documents. Erring on the side of caution, she felt it was appropriate to include as part of our Order on Review this information. On June 22, 1999, Board Member Phillips Polich attended the interviews of ALJ candidates. During those interviews, a hypothetical was posed to all candidates paralleling the facts in this case.

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

A hearing was originally convened in January 1999 before a prior ALJ. Claimant appeared *pro se* and was advised by the prior ALJ that the record as developed would probably cause him to lose. (Tr. 37). The prior ALJ subsequently wrote a physician requesting additional information regarding the major contributing cause of claimant's right shoulder condition. That physician responded with Exhibits 43 and 44. The insurer objected to the admission of the exhibits and eventually moved to recuse the prior ALJ.

The prior ALJ denied the insurer's motion for recusal and admitted Exhibits 43 and 44 into evidence. The insurer continued to object to admission of the disputed exhibits, but submitted proposed Exhibits 45 and 46 in response to Exhibits 43 and 44. In addition, the insurer filed a motion with the Presiding ALJ, requesting assignment of a new ALJ.

The Presiding ALJ issued an Interim Order, removing the prior ALJ from the case and reassigning the case to ALJ Brazeau to "complete the record in whatever manner he deems appropriate."

ALJ Brazeau determined that Exhibits 43 and 44 should be excluded from the record. Citing *John Ames*, 44 Van Natta 682, *on recon* 44 Van Natta 916 (1992), the ALJ reasoned that it was an abuse of discretion for the prior ALJ to have sought evidence to cure a basic failure of proof. Moreover, because Exhibits 45 and 46 were obtained in response to Exhibits 43 and 44, the ALJ excluded them as well. Finally, the ALJ upheld the insurer's denial based on the admissible evidence.

On review, claimant contends that the ALJ abused his discretion by excluding exhibits 43 and 44. Specifically, claimant argues that *Ames* is distinguishable from this case. For the following reasons, we disagree with claimant's contentions.

At the outset, we note that claimant does not challenge the Presiding ALJ's Interim Order removing the prior ALJ from the case and reassigning the case to another ALJ. As a result of the Presiding ALJ's unchallenged ruling, ALJ Brazeau was placed in the same position as the prior ALJ. Because of this, ALJ Brazeau was authorized to address the parties' motions, objections, and requests regarding the issues and exhibits presented at the hearing level. Accordingly, our review is limited to ALJ's Brazeau's November 20, 2000 Opinion and Order, and does not

extend to the prior ALJ's evidentiary rulings, including his decision to solicit a medical report from Dr. Baum, except as reconsidered by ALJ Brazeau.

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. That statute gives an ALJ broad discretion on determinations concerning the admissibility of evidence. *See, e.g., Brown v. SAIF*, 51 Or App 389, 394 (1981). We, therefore, review ALJ Brazeau's evidentiary rulings for abuse of discretion. *Rose M. LeMasters*, 46 Van Natta 1533 (1994), *aff'd mem* 133 Or App 258 (1995). Under that standard, we must look at ALJ Brazeau's action to determine whether it was within the bounds of his authority; that is, whether it fell within his "power to choose among several courses of action, any one of which is legally permissible." *Liberty Northwest Insurance Co. v. Jacobson*, 164 Or App 37, 45 (1999).

Relying upon *Ames*, ALJ Brazeau ruled that Exhibits 43 and 44 were obtained impermissibly to "cure a basic failure of proof" and, therefore, were inadmissible. For the following reasons, we find that ruling consistent with our precedent and conclude that it withstands the abuse-of-discretion standard of review.

In *Ames*, we excluded a medical report solicited by a then-referee in a case that concerned the claimant's extent of disability. We discussed the role of a hearings referee in developing a record in a workers' compensation case. We acknowledged the referee's responsibility to develop a record that would fully reveal the facts necessary for consideration of all issues properly raised. We also acknowledged, however, that the referee must conduct the hearing in a manner that will achieve substantial justice, as required by ORS 656.283(7). We concluded that, because the claimant was represented by counsel and the parties had ample opportunity to prepare their cases, any effort by the referee to cure those shortcomings was improper. 44 Van Natta at 685-86. *See also Richard A. Stalling*, 44 Van Natta 1706 (1992) (same).

Claimant attempts to distinguish *Ames* upon the following grounds: Claimant did not have an attorney at the hearing; the report solicited from Dr. Baum merely was to clarify the doctor's opinion; the evidentiary issue addressed in *Ames* was resolved by a statutory amendment, ORS 656.283(7), that limits evidence admissible at a hearing in cases arising out of reconsideration proceedings concerning the extent of disability.

The fact that claimant was not represented by an attorney at the hearing does not absolve him from his responsibility to prepare his case and meet his burden to prove a compensable claim. *See Rhoades v. SAIF*, 169 Or App 329, 334 n 2 (2000) (the Board has authority to hold attorneys and non-attorneys who undertake to file hearing requests to same standard). Moreover, the prior ALJ offered claimant to postpone the hearing until he obtained an attorney. Claimant declined and wanted to proceed with the hearing. (Tr. 1-3). In light of claimant's voluntary and informed decision to proceed without an attorney, we find his argument on review unpersuasive.

We also find unpersuasive claimant's other arguments attempting to distinguish *Ames*. Although there the issue was the extent of disability, the principle that an ALJ should not solicit evidence on behalf of a party to cure a basic failure of proof applies equally in cases where compensability is at issue. Moreover, the legislature's decision to limit admissibility of evidence pursuant to ORS 656.283(7) has nothing in common with our reasoning in *Ames*. We conclude that ALJ Brazeau did not err in relying upon *Ames* and did not abuse his discretion in excluding exhibits solicited by the prior ALJ.

Claimant further argues that the exhibits the prior ALJ solicited from Dr. Baum are admissible pursuant to OAR 438-007-0005(5), which provides:

“The Administrative Law Judge may appoint a medical or vocational expert to examine the claimant and to file a report with the Administrative Law Judge. The parties may also agree in advance to be bound by such expert's findings. The cost of examination and reports under this rule shall be paid by the insurer.”

ALJ Brazeau, whose order we are reviewing, did not address admissibility of the exhibits in question under that rule. Given the facts of this case, we conclude the rule does not apply here. The rule contemplates the appointment of a physician to examine the claimant and submit a report. The prior ALJ did not obtain Exhibits 43 and 44 by appointing an expert to examine claimant and file a report. Instead, he requested an additional report from claimant's treating physician who had previously examined claimant. The treating physician submitted a report without re-examining claimant. Moreover, even assuming that rule applies in this case, because the rule is couched in terms of discretion (“may”), we do not

consider it to have been an abuse of discretion for ALJ Brazeau to have excluded the proposed exhibits.⁴

In summary, we find no abuse of discretion in the ALJ's decision to exclude the disputed exhibits from Dr. Baum. Moreover, because Exhibits 45 and 46 were submitted in response to those reports, we further hold that ALJ Brazeau did not abuse his discretion in declining to admit them. Therefore, we affirm ALJ Brazeau's evidentiary rulings as well as his decision regarding compensability of claimant's shoulder condition.

Alternatively, even if we considered the excluded exhibits, we would conclude that the record still is insufficient to establish a compensable claim. We begin by briefly reviewing the history of the claim.

Claimant sustained a compensable injury in a motor vehicle accident (MVA) occurring on July 22, 1997. The claim was ultimately accepted as a cervicothoracic and lumbar strain. Claimant began having right shoulder pain on the date of injury. Dr. Richardson and his assistant (Mr. Fong) provided claimant's initial treatment, but claimant eventually came under the care of Dr. Baum in February 1998.

On March 19, 1998, Dr. Farris, an examining physician, evaluated claimant's right shoulder condition and diagnosed a right shoulder strain that had

⁴ The dissent asserts that our decision represents a nullification of OAR 438-007-0005(5). In doing so, the dissent misinterprets our reasoning. As explained above, our conclusion is premised on the following grounds.

First, because consideration of the excluded reports would not alter the ALJ's ultimate compensability decision, it is unnecessary to address the evidentiary issue. In light of such reasoning, a discussion of OAR 438-007-0005(5) is not required.

Second, because the first ALJ did not "appoint" a medical expert, the express prerequisites for the application of the above rule did not occur. Thus, once again, it is not necessary to analyze the aforementioned rule.

Third, even if the first ALJ's action came within the parameters of the rule, our decision is not based on that ruling, but rather is confined to the issue of whether it was an abuse of discretion for the second ALJ to have reconsidered the first ALJ's evidentiary ruling and to exclude the disputed reports.

In conclusion, the primary bases for our ultimate decision to affirm the ALJ's order did not concern the application of OAR 438-007-0005(5) and none of our reasoning invalidated (either expressly or implicitly) the rule itself. Consequently, we disagree with the dissent's characterization of our decision.

resolved. Dr. Farris also found a preexisting partial thickness degenerative tear of the supraspinatus tendon of the right shoulder, as well as preexisting degenerative arthritis of the right shoulder AC joint. According to Dr. Farris, the degenerative arthritis was causing claimant's current right shoulder problems and the mechanism of claimant's work injury was inconsistent with the development of the right rotator cuff tear.

The insurer denied the right shoulder condition on April 9, 1998. Claimant requested a hearing.

On May 21, 1998, Dr. Baum was unable to state to a degree of medical probability whether claimant's right rotator cuff tear was related to his work injury. Dr. Baum further advised that it was possible that the tear preexisted the work injury and was caused by degenerative factors.

On June 10, 1998, Dr. Richardson opined that it was "very unlikely" that claimant suffered a right rotator cuff tear during his injury and that it was probable that the tear was caused by another incident of injury or by a degenerative process.

On January 4, 1999, Dr. Baum performed right shoulder surgery, removing an acromial spur and repairing claimant's rotator cuff. Dr. Baum then changed his earlier opinion, concluding on January 15, 1999 that claimant's MVA was responsible for causing the acromial spur to cut his rotator cuff.

In upholding the insurer's denial based on the admissible evidence, the ALJ noted that both Dr. Richardson and Dr. Farris attributed claimant's right shoulder condition to preexisting degenerative conditions. The ALJ reasoned that Dr. Baum's opinion was inconsistent in that he initially opined that he could not determine whether claimant's injury caused the right shoulder condition, but later opined that it did. Moreover, the ALJ reasoned that Dr. Baum's opinion was also unpersuasive because it failed to discuss the effect of claimant's degenerative condition on the right shoulder condition.

We agree with the ALJ's reasoning with respect to the record as it exists without consideration of Exhibits 43 through 46. Dr. Baum, however, responded to the prior ALJ's letter requesting information about the major contributing cause of the rotator cuff tear. (Ex. 43). In that February 3, 1999 report, Dr. Baum concluded that the July 22, 1997 MVA was the major contributing cause of the rotator cuff tear. Dr. Baum reasoned that claimant had preexisting conditions in the right shoulder, including a spur of the acromion. According to Dr. Baum,

claimant's right arm was driven upwards during the MVA and that this caused the acromion spur to lacerate the rotator cuff. Dr. Baum further reasoned that this explanation made the most sense in light of the fact that claimant had no previous problem with the right shoulder and persistent problems ever since.

Dr. Baum's "post-hearing" report was rebutted, however, by Dr. Farris in a May 5, 1999 report. (Ex. 46). In that report, Dr. Farris disagreed with the conclusions expressed in Dr. Baum's February 1999 report. Dr. Farris noted that claimant's upper extremities were not in an elevated position at the time of impact and that it was, thus, improbable that any significant contact occurred between the acromion and the rotator cuff tendon as a result of the accident. Dr. Farris emphasized that x-rays showed degenerative changes so advanced that the "odds are overwhelming that the rotator cuff tear pre-existed the motor vehicle accident of July 22, 1997." (Ex. 46-2).

Having reviewed the disputed "post-hearing" evidence, we find that Dr. Farris persuasively rebutted Dr. Baum's report submitted at the prior ALJ's request. Given our agreement with ALJ Brazeau's evaluation of "pre-hearing" evidence, we conclude that the entire record, including the excluded exhibits, does not establish the compensability of claimant's right shoulder rotator cuff condition. Thus, even if disputed Exhibits 43-46 are considered, we would find that the result in this case would not be different.

ORDER

The ALJ's order dated November 20, 2000 is affirmed.

Entered at Salem, Oregon on January 10, 2003

Member Lowell concurring.

I concur with the lead opinion's decision to affirm the ALJ's order. I write separately to clarify that my opinion is based on a conclusion that it was not an abuse of discretion for ALJ Brazeau to reconsider the prior ALJ's ruling and to exclude the previously admitted reports.

Board Members Biehl and Phillips Polich dissenting.

The majority affirms ALJ Brazeau's decision to exclude Exhibits 43 through 46 from the record. Because we would instead find that ALJ Brazeau abused his

discretion in declining to admit the disputed exhibits, we dissent. We reason as follows.

ORS 656.283(7) gives an ALJ broad discretion when making determinations concerning the admissibility of evidence. The majority wrongly concludes, however, that the ALJ did not err in relying on *John Ames*, 44 Van Natta 682, *on recon* 44 Van Natta 916 (1992), a case wherein we concluded that an ALJ should not exercise his or her discretion to cure a basic failure of proof, given the adversary nature of this system. 44 Van Natta at 686.

Claimant argues that *Ames* is distinguishable because, unlike the claimant in *Ames*, he was unrepresented at the original hearing. Moreover, claimant notes that the issue in *Ames* was extent of permanent disability, not compensability. In light of claimant's arguments, our decision in *Ames* requires close scrutiny.

In *Ames*, an ALJ solicited a post-hearing medical report from the claimant's treating physician because the admitted reports did not contain range of motion findings or detailed sensory and motor studies and because a physical therapist's listing of functional limitations could not be used to rate impairment under the disability "standards." We noted that, because a complete record is an essential element of a sound decision, few would dispute that an ALJ has the responsibility to develop a record that will fully reveal the facts necessary for consideration of all issues properly before him or her consistent with ORS 656.012(2)(b).⁵ Because of this responsibility, which we noted is especially important whenever a claimant is unrepresented by counsel at hearing, we observed that an ALJ may be required to ask witnesses questions or to include documentary evidence in the record not offered by one of the parties. 44 Van Natta at 685; *see Dennis v. Employment Div.*, 302 Or 160 (1986).

In *Ames*, we also noted that an ALJ's obligation to develop a complete record is not without limits. We recognized that, while not bound by technical or formal rules of procedure, an ALJ must conduct the hearing in a manner that will achieve substantial justice. *See* ORS 656.283(7). Accordingly, in fulfilling the duty to ensure that the facts are fully developed, we cautioned in *Ames* that an ALJ should avoid encroaching on the domain of counsel. Because the claimant was

⁵ That statute provides that one of the objectives of Workers' Compensation Law is to "provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable."

represented by counsel throughout the process, and because the parties had ample opportunity to prepare their cases, we found that any effort by the ALJ to cure evidentiary shortcomings was improper. Noting that it is the claimant's responsibility under ORS 656.266 to establish the extent and nature of any permanent disability, we concluded that an ALJ should not exercise his or her discretion to cure a basic failure of proof, given the adversary nature of the workers' compensation system. 44 Van Natta at 686.

After further considering our holding in *Ames*, we do not find that case controlling under the particular circumstances of this case. The most significant reason for so finding is that, in contrast to *Ames*, claimant was not represented by counsel in this case. As we noted in *Ames*, because a complete record is an essential element of a sound decision, an ALJ has the responsibility to develop a record that will fully reveal the facts necessary for consideration of all issues properly before the forum. As we further emphasized in *Ames*, this responsibility is especially important whenever, as here, a claimant is unrepresented by counsel at hearing. While an ALJ should ordinarily not attempt to cure a perceived failure of proof given the adversary nature of the system, we conclude that ALJ Brazeau abused his discretion in declining to admit the disputed exhibits given the fact that claimant was unrepresented at hearing. Therefore, contrary to the majority's reasoning, we would find that, in the interests of substantial justice, ALJ Brazeau should have admitted Exhibits 43 through 46.

In support of this conclusion, we observe that, pursuant to OAR 438-007-0005(5), an ALJ may appoint a medical or vocational expert to examine the claimant and to file a report with the ALJ. Given that this rule allows an ALJ to appoint a medical expert, we cannot say, as does the majority, that the prior ALJ abused his discretion in using a valid administrative rule when soliciting medical evidence in a case involving an unrepresented claimant. Therefore, the prior ALJ did not abuse his discretion by using a valid OAR.

OAR 438-007-0005(5) is not founded upon any express statutory authority but rather flows from our rule providing for full and complete disclosure of facts and opinion and the more general legislative directive that hearings be conducted "in any manner that will achieve substantial justice." See ORS 656.283(7). In *Ames*, we observed that, under certain circumstances, the solicitation of additional evidence from a treating or examining physician may be proper. 44 Van Natta at 685. We believe that this situation was one of those circumstances.

Furthermore, to decide otherwise would render OAR 438-007-0005(5) meaningless and ineffective, and would be contrary to ORS 656.283(7), which specifically directs an ALJ to conduct a hearing in a manner that will achieve substantial justice.⁶

Accordingly, for the reasons set forth herein, we dissent.

⁶ The majority's application of OAR 438-007-0005(5) essentially results in a *de facto* repeal of the rule. We find this troubling in light of the fact that repeal of the rule was considered and rejected during rule-making proceedings.