
In the Matter of the Compensation
BRANDON C. LAWLER, Claimant
WCB Case No. 01-09713
ORDER ON REVIEW
Raymond Bradley, Claimant Attorneys
Bruce A Bornholdt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Hoguet's order that dismissed as untimely claimant's hearing request concerning the SAIF Corporation's denial of his bilateral inguinal hernia injury claim. In addition to his briefs, claimant has submitted written materials that were not admitted at hearing. We treat claimant's submissions as a motion to remand to the ALJ for the taking of additional evidence. On review, the issues are timeliness of claimant's request for hearing, remand, and, potentially, compensability.

We deny the motion for remand and adopt and affirm the ALJ's order¹ with the following supplementation.

We begin with a summary of the relevant facts. Claimant filed a claim alleging a work injury in December 2000. SAIF denied the claim on April 6, 2001, on the basis that there was insufficient evidence that claimant's condition was compensably related to his employment. On December 14, 2001, claimant's attorney faxed a cover letter and a request for hearing dated April 17, 2001 to the Workers' Compensation Board.

At hearing, SAIF argued that claimant's request for hearing was not timely. Claimant responded that his hearing request was timely because of his attorney's firm's normal and usual business procedures. (Tr. 16, 17). Based on the preponderance of the evidence, the ALJ concluded that the hearing request was untimely under ORS 656.319(1) and OAR 438-005-0046(1)(b) and dismissed claimant's request for hearing.²

¹ We substitute the following for the second sentence of the "Ultimate Findings of Fact": Claimant's request for hearing was not timely filed pursuant to ORS 656.319(1) and OAR 438-005-0046(1)(d).

² The ALJ also found, in the alternative, that even if the Hearings Division had jurisdiction, the only opinion regarding medical causation established that claimant's bilateral inguinal hernia claim was not work related.

On review, claimant contends that he filed his request for hearing on April 17, 2001, within the required time limit. Claimant argues that his attorney's firm's usual business practice was to mail requests for hearing on the same day as stated on the cover letter and the request for hearing. The cover letter and request for hearing were dated April 17, 2001.

Filing means the physical delivery of a thing to any permanently staffed office of the Board, or the date of mailing. OAR 438-005-0046(1)(a). Filing of a hearing request required to be filed within a prescribed time may be accomplished by mailing by first class mail, postage prepaid. An attorney's certificate that a thing was deposited in the mail on a stated date is proof of mailing on that date. If the thing is not received within the prescribed time and no certificate of mailing is furnished, it shall be presumed that the filing was untimely unless the filing party establishes that the filing was timely. OAR 438-005-0046(1)(d).

Claimant's attorney's cover letter cannot substitute for a certificate of mailing. *See Madewell v. Salvation Army*, 49 Or App 713 (1980) (while there is a presumption that a writing is truly dated, and that a letter directed and mailed was received in the regular course of the mail, there is no presumption that a letter is mailed on the day it is dated or on the day it was written); *see also SAIF v. Tull*, 113 Or App 449, 451 (1992) (same); *Mark Cavazos*, 55 Van Natta 761 (2003) (same). Thus, particularly in light of the testimonial evidence that no request for hearing was received by the Board until December 2001, we decline to presume that the request for hearing was in fact mailed on the "mailing date" listed on the cover letter. Consequently, we find that the cover letter and hearing request dated April 17, 2001 do not establish that claimant's hearing request was filed timely.

Remand

With his request for review, claimant submitted an affidavit, signed by his attorney's paralegal and dated February 14, 2003, that was not previously submitted at hearing.

Our review is limited to the record developed by the ALJ. We treat claimant's request to present additional evidence on review as a motion to remand to the ALJ for the taking of additional evidence. *Tamara J. Fleshman*, 52 Van Natta 1918 (2000); *Judy A. Britton*, 37 Van Natta 1262 (1985). We may remand to the ALJ if the record has been improperly, incompletely or otherwise insufficiently developed. ORS 656.295(5). Remand is appropriate upon a showing of good cause or other compelling basis. *Kienow's Food Stores v. Lyster*, 79 Or App 416

(1986). To merit remand for consideration of additional evidence, it must clearly be shown that material evidence was not obtainable with due diligence at the time of the hearing and that the evidence is reasonably likely to affect the outcome of the case. *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *Metro Machinery Rigging v. Tallent*, 94 Or App 245, 249 (1988). Although evidence that is not generated until after the hearing is "unavailable," it may still be "obtainable" at the time of hearing. *James E. Gore*, 45 Van Natta 1652 (1993).

Here, the hearing took place on January 17, 2003. Claimant did not request a postponement or continuance in order to obtain the affidavit prior to closure of the hearing record. (Tr. 2, 3, 4, 16, 17). Moreover, he provided no reason for his failure to obtain the affidavit to introduce at hearing. Consequently, claimant has not established that this additional evidence was not obtainable with due diligence at the time of the hearing. *Richard Fischer*, 40 Van Natta 75 (1988).

Accordingly, we conclude that the case has not been improperly, incompletely, or otherwise insufficiently developed without the additional evidence, and we deny claimant's motion to remand. ORS 656.295(5).

ORDER

The ALJ's order dated February 6, 2003 is affirmed.

Entered at Salem, Oregon on June 27, 2003