
In the Matter of the Compensation
SUZANNE M. WILSON, Claimant
WCB Case No. 01-01410
ORDER ON REVIEW
Daniel Snyder, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Phillips Polich.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that:¹ (1) declined to admit "post hearing" evidence; and (2) upheld the SAIF Corporation's denial of claimant's claims for neck and back strains, anxiety, depression, stress, and post traumatic stress syndrome. We treat claimant's arguments based on evidence that was not admitted at hearing as a motion to remand. *Judy A. Britton*, 37 Van Natta 1262 (1985).² On review, the issues are evidence, remand, and compensability.³

We adopt and affirm the ALJ's order, with the following supplementation, regarding the evidence and remand issues.

On review, claimant argues that SAIF's denial of her psychological conditions should be set aside, based primarily on "newly discovered" evidence that the ALJ declined to admit after the record closed. Claimant contends that the ALJ should have admitted the latter proposed evidence,⁴ because it was not available at the time of hearing.

¹ Claimant also argues that the ALJ erred in denying her motion to "quash" the SAIF Corporation's request that she attend an insurer-arranged "post denial" medical examination. We agree with the ALJ's ruling and adopt his opinion and conclusions on the issue. *See Pamela L. Darling*, 53 Van Natta 1110, 1111-12 (2001) (citing *Ronald C. Fuller*, 49 Van Natta 2067, 2071 (1997)).

² Our review must be based on the record certified to us. *See* ORS 656.295(5). Accordingly, we consider the proffered evidence only for the purpose of determining whether remand is appropriate.

³ SAIF moves to strike claimant's references to evidence outside the record. In light of our decision not to remand for admission of additional evidence, we need not address the motion. *See Daniel J. Hidy*, 49 Van Natta 527 (1997) (no need to strike portions of brief, because parties' arguments considered only insofar as they are supported by the record).

⁴ The disputed proposed evidence consists of Proposed Exhibits 1B, 2B, C, 27A, 60A, 62A, 63A, 67A, 75A, 90A, 91B, 93A, 93B, 95A-E, 96A, 96B, 97A-C, 98A, 98B, 99A, 99 B, 99D-F, 100A, 104A-C, 105A-C, 125, and 126—all documents related to claimant's civil case against the employer and its managers. Claimant also argues that the ALJ should have admitted the testimony of Lisa Irwin, taken during the civil trial.

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. The statute has been interpreted to give an ALJ broad discretion in admitting or excluding evidence. *See Brown v. SAIF*, 51 Or App 389, 394 (1981); *Jesus J. Ferrer*, 53 Van Natta 703 (2001).

Under OAR 438-007-0025, the ALJ may reopen the record and reconsider his decision based upon newly-discovered evidence where the motion to reconsider states the nature of the new evidence and explains why it could not have been reasonably discovered and produced at hearing. We review the ALJ's evidentiary ruling regarding reopening the record for abuse of discretion. *See Gary Nored*, 52 Van Natta 920, 921 (2000); *Rose M. LeMasters*, 46 Van Natta 1533 (1994), *aff'd mem* 133 Or App 258 (1995).

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 be clearly shown that material evidence was not obtainable with due diligence at the time of hearing. *Compton v. Weyerhaeuser Co.*, 301 Or 641 (1986); see *SAIF v. Avery*, 167 Or App 327, 333-34 (2000) (approving Board's reliance on "remand standards" set out in *Compton*, "by analogy").

Although evidence that is not generated until after the hearing is "unavailable," it may still have been "obtainable" at the time of hearing. *Compton*, 301 Or at 648-49 (neither erroneous factual foundation nor change of opinion creates unobtainable evidence; thus, even though certain medical reports were not available at the time of hearing, the substance of the reports was obtainable); *William R. Wallace*, 49 Van Natta 1078 (1997), *aff'd mem Wallace v. Owens-Illinois, Inc.*, 136 Or App 547 (1995), *rev den*, 322 Or 490 (1996); *James E. Gore*, 45 Van Natta 1652 (1993) ("Evidence is not newly discovered merely because it was generated after the hearing.").

In this case, we are not persuaded that the substance of the proposed evidence was unobtainable prior to the hearing in this matter.⁵

⁵ In an affidavit (dated October 2002) attached to her motion for reconsideration before the ALJ, claimant alleged *for the first time* that her co-worker Lisa Irwin "would not appear voluntarily" at the

See Kienows Food Stores, 79 Or App at 420 n.2 (medical report obtainable because it "only needed to have been requested at the appropriate time."). Consequently, we conclude that the ALJ did not abuse his discretion in refusing to reopen the record for its admission and there is no compelling basis for remand.

ORDER

The ALJ's order dated September 24, 2002, as reconsidered November 18, 2002, is affirmed.

Entered at Salem, Oregon on May 29, 2003

workers' compensation hearing. This allegation is at least potentially inconsistent with the ALJ's heretofore uncontested comments: "SAIF correctly notes that claimant 'does not state that Ms. Irwin would have required a subpoena to attend the hearing. There is no statement in her motion [to reopen the record for Irwin's "post workers' compensation hearing" civil testimony] that claimant attempted to have Ms. Irwin attend the hearing and that Ms. Irwin refused.'" (Opinion and Order, p. 7, citation omitted). Thus, in our view, claimant failed to establish *at hearing* (on February 6, 2002) that she had exercised due diligence in attempting to obtain Irwin's testimony. Accordingly, we do not find that the ALJ abused his discretion in denying claimant's motion to reopen the record for witness Irwin's "post hearing" civil testimony.