
In the Matter of the Compensation of
MICHAEL V. LIM, Claimant
WCB Case No. 02-03687, 02-02826
ORDER ON REVIEW
Lauren Paulson, Claimant Attorneys
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

Claimant requests review of ALJ Davis' order that upheld the self-insured employer's denials of claimant's injury claims for his right shoulder, right upper-extremity, and neck conditions. Asserting that the ALJ erred in denying his motion for continuance, claimant moves for remand for the admission of additional evidence. *See* ORS 656.295(5). In addition to opposing the motion, the employer moves to strike the documents attached to claimant's appellant's brief. On review, the issues are motion to strike, continuance, remand, and, potentially, compensability.

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

Continuance

We briefly review the procedural history leading up to the ALJ's denial of claimant's continuance motion based on the employer's alleged discovery violations.

In March 1998, claimant filed an occupational disease claim for a right shoulder condition. (Ex. 2). The claim for "right shoulder strain and/or condition" was denied in June 1998. (Ex. 4). An Opinion and Order issued on June 8, 1999, dismissing claimant's hearing request from the denial as untimely filed. (Ex. 5). The June 1999 order is final as a matter of law.

On November 28, 2001, claimant filed a claim for an injury to his right shoulder area, which allegedly occurred on September 26, 2001 while he was lifting and pulling boxes at work. (Ex. 9). On December 28, 2001, claimant filed a second injury claim for a right upper extremity/cervical condition with right arm radiculopathy that allegedly occurred when claimant slipped and caught himself on a golf cart at work. (Exs. 10; 11; 12; 14; 15).

On December 14, 2001 (prior to the filing of a hearing request with the Hearings Division), claimant, through his attorney, requested discovery from the employer's claim processing agent (ESIS) pursuant to OAR 436-060-0017. In addition to claim documents related to his September 26, 2001 injury claim, claimant requested copies of "any and all claims presented by [claimant]" and asked to be advised of any material being withheld. (Ex. 9B). ESIS directly provided claimant's attorney with seven claim documents, but no medical reports. (Exs. 25; 26). Thereafter, claimant's attorney received discovery regarding both the September 26, 2001 injury claim and the December 18, 2001 injury claim from the employer's attorney pursuant to OAR 436-060-0017(2). (Exs. 25; 27-4, 27-21, 27-27, 27-49, 27-54, 27-57). Claimant did not receive any "new" discovery from his previous March 12, 1998 right shoulder injury claim.¹

The employer issued a denial of claimant's September 26, 2001 injury claim on February 4, 2002 (corrected on February 6, 2002). (Exs. 18; 19). On March 15, 2002, the employer denied claimant's December 2001 injury claim. Claimant requested a hearing on April 4, 2002 regarding the February 2001 denials. (Hearings File). On May 10, 2002, claimant requested a hearing on the March 15, 2002 denial of the December 18, 2001 injury claim. (Hearings File).

On April 18, 2002, the employer's attorney provided additional discovery pursuant to OAR 438-007-0015. (Ex. 27-68). No further discovery was provided until the initial exhibit list was submitted by the employer on June 17, 2002. The employer's exhibit list contained medical and claim documents from the March 12, 1998 right shoulder injury claim. (Exs. 1 through 6).

At hearing, claimant moved to continue the hearing based on the employer's failure to provide full discovery pursuant to OAR 436-060-0017. The ALJ denied the motion, concluding that, once claimant requested a hearing, the applicable discovery rule was OAR 438-007-0015 rather than the general discovery rule under OAR 436-060-0017.² The ALJ reasoned that the employer was not

¹ As previously noted, the March 12, 1998 right shoulder injury claim (with the same employer) had been earlier litigated and claimant's hearing request from the employer's denial had been ultimately dismissed. (Exs. 1 through 6). Claimant's attorney represented claimant in the prior litigation and had received discovery at that time. (Ex. 5-1).

² OAR 436-060-0017(5) provides:

"Once a hearing is requested before the Workers' Compensation Board, the release of documents is controlled by OAR chapter 438. This rule

obligated to provide discovery of prior claims under OAR 438-007-0015 unless *specifically* requested to do so. *See* OAR 438-007-0015(6). The ALJ noted that claimant had made his initial discovery request under the Workers' Compensation Division's general discovery rule, *i.e.*, OAR 436-060-0017, and apparently had not renewed his request for any prior claims under OAR 438-007-0015, until the day before the hearing. (Tr. 28 – 32).³

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. We review the ALJ's ruling on a motion for continuance for abuse of discretion.⁴

OAR 438-006-0091(4) provides that:

“*** [t]he Administrative Law Judge may continue a hearing for further proceedings *** [f]or any reason that would justify postponement of a scheduled hearing under OAR 438-006-0081.”

OAR 438-006-0081 allows for a postponement if there is a finding of “extraordinary circumstances” beyond the control of the party requesting the postponement. Here, we find no abuse of discretion in the ALJ's conclusion that claimant did not establish “extraordinary circumstances” as defined by OAR 438-006-0081(1) through (5). *See Jeff L. Roberts*, 55 Van Natta 288 (2003); *Larry W. Ogburn*, 50 Van Natta 344, 345 (1998).

applies subsequently if the hearing request is withdrawn or when the hearing record is closed, provided a request for documents is renewed.”

The ALJ's ruling was consistent with case precedent. *See Boehr v. Mid-Willamette Valley Food*, 109 Or App 292, 295 (1991), *on remand*, *Margaret Boehr*, 44 Van Natta 2565 (1992) ([OAR 438-007-0015] does not apply because the discovery request was made before a request for hearing was filed); *citing O'Leary v. Valley View Cutting*, 107 Or App 103, 106 (1991); *Lawrence A. Durette*, 42 Van Natta 413 (1990).

³ We interpret the ALJ's ruling to be that a continuance was not justified because claimant had not exercised “due diligence” because he had not made a specific discovery request until just before the hearing date. *See* OAR 438-006-0081(4) (extraordinary circumstances justifying a postponement do not include incomplete case preparation unless the ALJ finds that completion of the record could not be accomplished with due diligence).

⁴ *See SAIF v. Kurcin*, 334 Or 399 (2002); *Manuel M. Puma*, 55 Van Natta 1217, 1219 (2003); *Joy A. Kosta*, 53 Van Natta 1205 n1 (2001).

It is undisputed that claimant did not specifically request discovery of other prior claims until the day before the hearing. In the absence of a specific request, a carrier is not obligated to provide discovery of prior claims. OAR 438-007-0015(6). In light of such circumstances, we find no abuse of discretion in the ALJ's decision to deny claimant's motion for a continuance of the hearing.⁵ Accordingly, we affirm the ALJ's ruling.

Remand

On review, claimant has submitted additional documents, which he received from the employer during a "post-hearing" claim file review on November 20, 2002. (Affidavit of claimant's attorney). Claimant requests remand for admission of these documents and a "new hearing," alleging that they were not previously provided by the employer, despite claimant's pre-hearing discovery requests pursuant to OAR 436-060-0017 and OAR 438-007-0015.

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); *Marvin W. Cross*, 53 Van Natta 1404 (2001).

Even if we were to conclude that claimant had exercised "due diligence" in obtaining the additional evidence, we do not find a compelling reason to remand. Claimant does not refer to a specific report, chart note, or opinion that would affect the compensability decision. Having also found none during our review, we are not persuaded that the consideration of this new evidence is likely to affect the outcome of the case. Therefore, there is no compelling reason to remand. Accordingly, we deny the motion for remand.

⁵ We further note that claimant's attorney had previously received discovery of the March 1998 claim during a prior litigation.

Motion to Strike

We need not address the employer's Motion to Strike the newly discovered evidence submitted with claimant's attorney's Appellant's Brief, because of our determination that remand for the admission of this evidence is not appropriate.⁶

ORDER

The ALJ's order dated August 9, 2002 is affirmed.

Entered at Salem, Oregon on September 19, 2003

⁶ Claimant argues that he is entitled to penalties and related attorney fees for the employer's allegedly unreasonable discovery violation. This issue was not raised at the time of hearing. (Tr. 35-36). Accordingly, we are not inclined to address the issue for the first time on review. See *Stevenson v. Blue Cross of Oregon*, 108 Or App 247 (1991); *Gary Despois*, 55 Van Natta 1105, 1106 (2003). Alternatively, even if the issue had been raised, we have not found the claim to be compensable, and therefore, no basis exists for a penalty award. See *Boehr v. Mid-Willamette Valley Food*, 109 Or App 292 (1991); *Randall v. Liberty Northwest Insurance Corp.*, 107 Or App 599 (1991); *Russell Howerton*, 49 Van Natta 624, 627 (1997).