
In the Matter of the Compensation of
DEBORAH J. MOORE, Claimant
WCB Case No. 01-03436
ORDER ON REVIEW
Mustafa T Kasubhai PC, Claimant Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

The self-insured employer requests review of Administrative Law Judge (ALJ) Stephen Brown's order that: (1) denied the employer's motion to continue the hearing for the admission of a report from an employer-arranged medical examiner; (2) denied the employer's motion to exclude testimony from witnesses other than who were present at an earlier hearing; and (3) set aside the employer's denial of claimant's injury/occupational disease claim for a C5-6 disc herniation. On review, the issues are the ALJ's evidentiary rulings and compensability.

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

Analyzing the claim as one for industrial injury instead of occupational disease, the ALJ set aside the employer's denial of claimant's cervical condition. Finding the medical opinion of Dr. Amstutz, who supported compensability, persuasive, the ALJ determined that claimant had sustained her burden of proof under ORS 656.005(7)(a)(B).

On review, the employer argues that the ALJ should have analyzed the claim as an occupational disease under ORS 656.802(2)(b) because claimant's cervical condition was of gradual onset and based on the worsening of a preexisting degenerative condition. Thus, the employer asserts that, because the evidence does not establish that work activities were the major contributing cause of the "combined condition" and its pathological worsening, claimant failed to sustain her burden of proof.

In response to the employer's argument, we assume, without deciding, that the claim is for an occupational disease based on the worsening of a preexisting condition. Even if we make such an assumption, we agree with the ALJ's reasoning that Dr. Amstutz's opinion is persuasive. Moreover, Dr. Amstutz opined that claimant experienced a "pathological change" in the cervical spine and that work activities were the major contributing cause of claimant's pathological condition and its worsening (the herniated disc). (Ex. 24-2). Accordingly, we

conclude that Dr. Amstutz' opinion satisfies the legal standard of ORS 656.802(2)(b), even assuming that it applies.

The employer alternatively contends that the ALJ abused his discretion in not continuing the hearing to allow the admission of a report from an employer-arranged medical examination (IME) and in denying its motion to exclude the testimony of witnesses not present at an earlier continued hearing. For the following reasons, we find no abuse of discretion.

A hearing was scheduled on August 1, 2001, but the ALJ convened and continued the hearing. The employer's request to cross-examine the authors of medical reports was allowed, with the ALJ commenting that "the record was not frozen. You can flog this thing as long as your client can stand to pay for it." (August 1, 2001 hearing, page 3). A hearing was rescheduled on December 13, 2001. In the meantime, the employer scheduled a medical examination with Dr. Rosenbaum for November 8, 2001. Claimant refused to attend the examination and, on November 3, 2001, her attorney moved for a ruling from the ALJ sustaining claimant's objection to the examination.

On November 23, 2001, the ALJ issued a ruling that the December 13, 2001 hearing would not be continued for receipt of a report from an IME. The ALJ reasoned that it was unlikely that an IME could be rescheduled prior to hearing but that if it could, it was almost certain that the hearing would have to be postponed or continued for rebuttal or cross-examination. At the December 13, 2001 hearing, the ALJ reiterated his ruling and further rejected the employer's motion to exclude testimony from any witness not present at the earlier hearing.

We now examine the propriety of the ALJ's rulings. 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 ALJs 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).

In this case, the first hearing had already been continued for the cross-examination of physicians. Although the employer did not require the ALJ's permission for a medical examination, the ALJ could reasonably have concluded that allowing a report from that examination would have resulted in further delay in the proceedings. Under these circumstances, we conclude that the ALJ did not

abuse his discretion in denying the continuance motion.¹ *See SAIF v. Kurcin*, 334 Or 399 (2002) (because Board's continuance rule stated that an ALJ "may" continue a hearing for further proceedings, Board's standard of review of ALJ's continuance ruling was for an abuse of discretion).

Moreover, we find that the ALJ did not abuse his discretion in denying the employer's motion to "freeze" testimony. The ALJ did not initially limit his "continuance" of the first hearing and no testimony was presented at that hearing. Under these circumstances, we conclude that it was reasonable to allow testimony at the "continued" hearing. Accordingly, we find that the ALJ did not abuse his discretion in denying the employer's motion to limit testimony.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). The employer objects to the requested fee of \$2,500, asserting that it is excessive.

In deciding whether the requested fee is appropriate, we consider the factors in OAR 438-015-0010(4), which includes time devoted to the case, the complexity of the issues, the value of the interest involved, the skill of the attorneys, the nature of the proceedings, the benefits secured, and the risk that an attorney's efforts may go uncompensated. *See Schoch v. Leupold & Stevens*, 162 Or App 242 (1999) (Board must explain the reasons why the factors considered lead to the conclusion that a specific fee is reasonable).

Here, claimant submitted a six page respondent's brief on the compensability and evidentiary issues. As compared to typical compensability and evidentiary cases, the issues here were of above average complexity. Because claimant's cervical disc herniation has been found compensable, she is entitled to workers' compensation benefits, and the interest involved and the benefits secured for claimant are substantial. The attorneys involved in this matter are skilled litigators with substantial experience in worker's compensation law. Finally, considering the conflicting medical evidence regarding the compensability issue, there was a risk that claimant's counsel's efforts might have gone uncompensated. No frivolous issues or defenses have been presented on review.

¹ We recognize that the ALJ's comment that the record was not frozen could be construed as giving the employer broad latitude in developing evidence after the first hearing. However, the ALJ's comments were made in the context of granting the employer's counsel permission to cross-examine physicians. Under these circumstances, we are unwilling to find an abuse of discretion in the ALJ's subsequent ruling that any report from an IME would not be allowed into evidence.

Consequently, after considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review regarding the compensability issue is \$2,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the compensability and evidentiary issues (as represented by claimant's respondent's brief and the employer's objections), the complexity of the issues, and the value of the interest involved.

ORDER

The ALJ's order dated January 16, 2002 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,500.

Entered at Salem, Oregon on October 15, 2002