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In the Matter of the Compensation of  
**MICHAEL A. SELL, Claimant**  
WCB Case No. 01-02935, 01-02675, 01-02674, 01-02673, 00-08334, 00-07815,  
00-02643

ORDER ON REVIEW

Stebbins & Coffey, Claimant Attorneys  
Scheminske et al, Defense Attorneys  
Reinisch Mackenzie et al, Defense Attorneys  
Thaddeus J Hettle & Assoc, Defense Attorneys  
Alice M Bartelt, SAIF Legal, Defense Attorneys  
Mark P Bronstein, Defense Attorneys  
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Lowell, Bock, and Biehl. Member Biehl chose not to sign the order.

Claimant requests review of Administrative Law Judge (ALJ) Podnar's order that: (1) declined to reopen the record to admit "post-hearing" medical reports; (2) declined claimant's request to generate an additional report from Dr. Bernstein and to allow the insurer(s) to cross-examine Dr. Bernstein and/or Dr. Bert on the new exhibits; and (3) upheld the compensability and responsibility denials from Liberty Mutual/ UPS, the SAIF Corporation/Kirkpatrick Logging, SAIF/Madroak Logging, Liberty Northwest/Schaffer Logging, SAIF/B & B Logging and SAIF/Ken Sorenson Logging, of claimant's occupational disease claim for degenerative disc disease in the low back, including herniated discs at L1-2 and L2-3. On review, the issues are evidence/continuance, compensability and, potentially, responsibility. We affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Evidence/Continuance

On December 18, 2001, the ALJ continued the hearing for a deposition of Dr. Bernstein scheduled for February 7, 2002. (Tr. 6-7, 10). On January 29, 2002, SAIF/Sorenson withdrew its request to cross-examine Dr. Bernstein and cancelled the deposition.

On February 12, 2002, claimant's attorney wrote to the ALJ and acknowledged that the request to depose Dr. Bernstein had been withdrawn. He requested a continuance to: (1) submit additional records of claimant's "post-hearing" medical treatment, including his December 20, 2001 "post-hearing" back surgery; (2) submit a copy of the hearing transcript that was prepared for Dr. Bernstein's deposition; (3) allow claimant to generate a new report from Dr. Bernstein in light of the additional records related to claimant's "post-hearing" surgery; and (4) allow the carriers' attorneys to cross-examine Dr. Bernstein and/or Dr. Bert on the proposed to-be-generated exhibits.

SAIF/Kirkpatrick Logging, SAIF/Madroak and SAIF/B & B objected to claimant's motion. SAIF/Sorenson objected to the proposed exhibits with the exception of the MRI report. Liberty/UPS did not object to the additional exhibits or a report from Dr. Bernstein, but reserved its right to cross-examine the doctor. Liberty/Shaffer did not object to claimant's motion, but requested that the hearing be continued for 90 days for the parties to supplement the record with additional evidence. No party objected to submission of the hearing transcript.

The exhibits submitted by claimant included proposed Exhibit 61A, an October 4, 2001 ambulance report regarding claimant's severe leg pain and inability to walk; proposed Exhibit 61B, an October 4, 2001 emergency room report regarding the same incident; proposed Exhibit 65, a December 17, 2001 lumbar spine MRI report; and proposed Exhibit 66, hospital records from December 20, 2001 to December 23, 2001, including a December 20, 2001 surgical report from Dr. Bert pertaining to claimant's laminectomy, discectomy and foraminotomy at L1-2 and L2-3.

The ALJ responded to claimant's request on March 12, 2002, stating:

"I am in receipt of your request for continuance in this matter as well as your request to admit newly submitted exhibits, namely Exhibits 61A, 61B, 65 and 66.

"I have also received responses from six defense counsel.

"My understanding of the reason not to close the record at the time of hearing on December 18, 2001 was for the sole purpose of obtaining the deposition of Dr. Bernstein.

"The request for that deposition has been withdrawn.

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“Your request for the submission of various documents as well as for a continuance is respectfully denied.”

In the Opinion and Order, the ALJ reiterated this ruling. (O & O at 12).

On review, claimant argues that the ALJ’s March 12, 2002 rulings and his order provided no explanation of why the proposed exhibits should not be admitted, why Dr. Bernstein should not be deposed or why a separate report from Dr. Bernstein could not be admitted, allowing the other parties an opportunity to respond. Claimant contends that it was an abuse of discretion to decline to admit the proposed records and to allow follow-up evidence from Dr. Bernstein without an adequate explanation. None of the carriers has responded to claimant’s argument on Board review.

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 ALJ has broad discretion with regard to the admissibility of evidence at hearing. *Brown v. SAIF*, 51 Or App 389, 394 (1981). We review the ALJ’s rulings on motions for continuance and his evidentiary rulings for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002); *Jesus M. Delatorre*, 51 Van Natta 728 (1999); *James D. Brusseau II*, 43 Van Natta 541 (1991).

OAR 438-006-0091 provides:

“The parties shall be prepared to present all of their evidence at the scheduled hearing. Continuances are disfavored. The Administrative Law Judge may continue a hearing for further proceedings. The Administrative Law Judge shall state the specific reason for the continuance:

“(1) If the time allocated for the scheduled hearing is insufficient to allow all parties to present their evidence and argument;

“(2) Upon a showing of due diligence if necessary to afford reasonable opportunity to cross-examine on documentary medical or vocational evidence;

“(3) Upon a showing of due diligence if necessary to afford reasonable opportunity for the party bearing the burden of proof to obtain and present final rebuttal evidence or for any party to respond to an issue raised for the first time at a hearing; or

“(4) For any reason that would justify postponement of a scheduled hearing under OAR 438-006-0081.”

In *Kurcin*, 334 Or at 406, a decision issued subsequent to the ALJ’s evidentiary ruling, the Supreme Court explained that OAR 438-006-0091 grants discretion to the ALJ to decide whether a hearing should be continued for further proceedings, subject to review by the Board to determine whether the ALJ abused his or her discretion. The Court said that “[i]f the record would support a decision by the ALJ either to grant or to deny a continuance, then the Board on review must conclude that the ALJ’s choice is not an abuse of discretion.” *Id.*

Here, there are three evidentiary or continuance issues on review: (1) whether claimant’s post-hearing medical records should be admitted; (2) whether a continuance should have been granted for claimant to generate a new report from Dr. Bernstein in light of additional records related to claimant’s “post-hearing” surgery; and (3) whether the insurers’ attorneys should be allowed to cross-examine Dr. Bernstein and/or Dr. Bert on the to-be-generated exhibits.

Claimant argued to the ALJ that there were discussions at the hearing about submitting claimant’s most recent treatment records and circulating the records to the insurers’ attorneys to determine if there were any objections. However, the hearing transcript does not confirm that any such discussion took place. Instead, the transcript of the hearing supports the ALJ’s statement that the record was left open for Dr. Bernstein’s deposition. (Tr. 6). Because the record supports the ALJ’s ruling that the hearing was continued only for Dr. Bernstein’s deposition (and that the request for that deposition had been withdrawn), we conclude that it was within the ALJ’s discretion to exclude the evidence that did not fall within that limited purpose. *See Cindy L. Ramsey*, 53 Van Natta 1539 (2001); *Clifford L. Conradi*, 46 Van Natta 854 (1994) (when an ALJ leaves the record open for a limited purpose, it is within the ALJ’s discretion to exclude evidence that does not comport with that purpose). Accordingly, because the record remained open for a specific purpose, the ALJ did not abuse his discretion in refusing to admit evidence beyond that purpose. *David W. Keller*, 52 Van Natta 1559 (2000).

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Compensability/Responsibility

Claimant relies on the last injurious exposure rule (LIER) as a rule of proof to establish compensability of his occupational disease claim for degenerative disease in the lumbar spine and disc herniations at L1-2 and L2-3. Claimant contends that his 30 years of work in the logging industry caused his conditions. In *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997), the Court described the last injurious exposure rule as follows:

“[The last injurious exposure rule] imposes full responsibility on the last employer, from the time of the onset on the disability, if the claimant was exposed there to working conditions that could have caused the type of disease suffered by the claimant. The last injurious exposure rule is a rule of proof and a rule of assignment of responsibility.

“As a rule of proof, the last injurious exposure rule allows a claimant to prove the compensability of an injury without having to prove the degree, if any, to which exposure to disease-causing conditions at a particular employment actually caused the disease. The claimant need prove only that the disease was caused by employment-related exposure.” (Citations omitted).

We examine the medical evidence to determine whether the medical evidence supports compensability of claimant’s occupational disease claim. Several physicians address the cause of claimant’s L1-2 and L2-3 disc herniations. Dr. Rosenbaum, a neurosurgeon, examined claimant on behalf of Liberty/UPS. Dr. Rosenbaum indicated that in the absence of a specific injurious event or the specific time onset, there was no persuasive evidence that the major contributing cause of claimant’s disc conditions was his work activity. (Ex. 33-4). Dr. Rosenbaum explained that in claimant’s case, there was no history of an injurious event. Therefore, Dr. Rosenbaum believed that claimant’s disc herniations were idiopathic. (Ex. 35-2).

Dr. Bert, claimant’s orthopedist, initially attributed claimant’s disc herniations to a September 1999 injury when he was doing a lot of heavy lifting and a number of packages came down on top of him. (Ex. 36). In a subsequent summary report prepared by claimant’s attorney, Dr. Bert agreed that claimant’s

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lumbar disc conditions were the result of repetitive lifting activities at Liberty/UPS, rather than an acute injury. (Ex. 39).

Dr. Fuller, an orthopedic surgeon, examined claimant on behalf of Liberty/UPS. Dr. Fuller opined that it was medically probable that the disc conditions were degenerative with no contribution from claimant's work activities. (Ex. 40-11). Dr. Fuller and Dr. Radecki examined claimant on behalf of Liberty/Shaffer and prepared a report dated October 4, 2000. They opined that the multilevel discopathy in claimant's lumbar spine was age related and that it was not caused by claimant's activity or injury at Liberty/UPS. (Ex. 43-6).

In a summary prepared by claimant's attorney, Dr. Bert stated that the major contributing cause of claimant's disc herniations at L1-2 and L2-3 was his work activity at UPS, including repetitive lifting, twisting with heavy boxes and having heavy boxes strike claimant in the back. Dr. Bert disagreed with Dr. Fuller's conclusions and indicated that claimant's symptoms were consistent with the disc herniations. (Ex. 46A).

Dr. Fuller examined claimant on behalf of SAIF/Sorenson on March 7, 2001. Dr. Fuller opined that the major contributing cause of claimant's back symptoms was degenerative discopathy that was present prior to his employment with SAIF/Sorenson. Dr. Fuller believed that claimant's lower lumbar back ache was caused by longstanding preexisting degenerative discopathy at L4-5 and L5-S1. (Ex. 54A).

Dr. Young, a radiologist, performed a review of claimant's medical records on behalf of Liberty/Shaffer. Dr. Young opined that claimant had substantial preexisting degenerative disease at multiple levels in his lumbar spine which predated and preexisted his September 7, 1999 injury. He further indicated that the disc herniations at L1-2 and L2-3 were degenerative in nature and not secondary to the injury. (Ex. 59). Dr. Fuller concurred with Dr. Young's opinion. (Ex. 60).

Dr. Bernstein, a neurologist, previously treated claimant for a seizure disorder. Dr. Bernstein stated that claimant had a preexisting condition that combined with his work exposure to cause a worsening of his disc pathology at L1-2 and L2-3. Dr. Bernstein agreed with Drs. Rosenbaum, Fuller and Young that the bulk of what was seen on claimant's MRI was not due to his work exposure. Dr. Bernstein indicated that claimant had central canal spinal stenosis at two levels and that it would take very little traumatic change to produce symptoms. Dr. Bernstein opined that the most likely mechanism for claimant's symptomatology and need for treatment was his 1999 injury. Dr. Bernstein

indicated that claimant's preexisting anatomy at L1-2 and L2-3 predisposed him to developing symptomatic radiculopathic compression from a minor industrially related change to his anatomy. (Ex. 61).

Dr. Bernstein clarified that claimant's symptoms (of pain in the back and right anterolateral thigh to the mid portion and decreased pinprick in the right anterolateral thigh) were consistent with L3 nerve impingement seen on MRI. Dr. Bernstein also indicated that there was extensive epidemiologic literature supporting the relationship between heavy physical work and degenerative spine disease. Dr. Bernstein indicated that he believed claimant's work as a logger was most likely the major contributing cause of his degenerative spine disease. (Ex. 62).

Dr. Fuller disagreed with Dr. Bernstein's opinion that the major contributing cause of claimant's symptoms was his 1999 exposure. Dr. Fuller believed that the 1999 mechanism of injury was fairly minor compared to the severity of claimant's preexisting condition. (Ex. 62A).

Dr. Bernstein examined claimant and provided a report dated November 14, 2001. Dr. Bernstein believed that claimant's degenerative disease was caused by his work as a logger which involved repetitive, heavy lifting over nearly three decades. (Ex. 63).

Dr. Fuller reviewed claimant's medical records on behalf of SAIF/Kirkpatrick on December 5, 2001. Dr. Fuller did not believe that claimant's employment at Kirkpatrick Logging had any independent contribution to his disc conditions at L1-2 and L2-3. (Ex. 64).

After reviewing this record, we are not persuaded that claimant has established compensability. In this regard, we are not persuaded by the medical evidence supporting claimant's claim. With regard to Dr. Bert, we find his opinions to be inconsistent and poorly explained. Dr. Bert initially attributed claimant's disc herniations to a September 1999 injury when he was doing a lot of heavy lifting and a number of packages came down on top of him. Later, in a summary prepared by claimant's attorney, Dr. Bert agreed that claimant's lumbar disc conditions were the result of repetitive lifting activities at Liberty/UPS rather than an acute injury. Finally, Dr. Bert attributed claimant's condition to work activity at UPS, including repetitive lifting, twisting with heavy boxes and having heavy boxes strike claimant in the back. Dr. Bert attributes claimant's conditions variously to trauma, then to work activity only and then finally to a combination of work activities and trauma. Dr. Bert does not comment on whether claimant's

30 years of work in the logging industry is the major contributing cause of his degenerative disease including L1-2 and L2-3 disc herniations. Dr. Bert never specifically addresses the cause of claimant's degenerative disease. Under such circumstances, we find Dr. Bert's opinions to be inconsistent and poorly explained.

We also find Dr. Bernstein's opinion unpersuasive. In his initial opinion, Dr. Bernstein indicated he believed that claimant had a preexisting condition that combined with his work exposure to cause a worsening of his disc pathology at L1-2 and L2-3 and agreed with Drs. Rosenbaum, Fuller and Young that the bulk of what was seen on claimant's MRI was not due to his work exposure. Dr. Bernstein indicated that claimant had central canal spinal stenosis at two levels and that it would take very little traumatic change to produce symptoms. Dr. Bernstein opined that the most likely mechanism for claimant's symptomatology and need for treatment was his 1999 injury. Dr. Bernstein also indicated that claimant's preexisting anatomy at L1-2 and L2-3 predisposed him to developing symptomatic radiculopathic compression from a minor industrially related change to his anatomy. Dr. Bernstein also noted that there was extensive epidemiologic literature supporting the relationship between heavy physical work and degenerative spine disease. In a later opinion, Dr. Bernstein commented that claimant's work as a logger was most likely the major contributing cause of his degenerative spine disease. (Ex. 62). After examining claimant, Dr. Bernstein opined that claimant's degenerative disease was caused by his work as a logger which involved repetitive, heavy lifting over nearly three decades. (Ex. 63).

Dr. Bernstein's opinions seem potentially inconsistent. The doctor first attributed claimant's disc conditions to the 1999 injury, indicating that the bulk of claimant's MRI findings were not due to his work exposure. He then, with little explanation, attributed claimant's degenerative disease to claimant's work activities over the years as a logger. We find Dr. Bernstein's latter opinion attributing the degenerative condition to claimant's logging work to be conclusory and inadequately explained. Under such circumstances, we are not persuaded by Dr. Bernstein's opinion. The remaining medical evidence in the record does not support compensability of claimant's occupational disease claim. Accordingly, because we conclude that claimant's claim is not compensable, we do not reach the issue of responsibility.

### ORDER

The ALJ's order dated May 28, 2002 is affirmed.

Entered at Salem, Oregon on March 4, 2003