

In the Matter of the Compensation of  
**JUSTIN L. DEMING, Claimant**  
WCB Case No. 01-08851, 01-08850  
ORDER ON REVIEW  
Goldberg Mechanic Stuart & Gibson, Claimant Attorneys  
Kilpatrick, Defense Attorneys  
Dept Of Justice - GCD-BAS, Defense Attorneys

Reviewing Panel: Members Langer and Phillips Polich.

Hansen Contracting, Inc., an alleged noncomplying employer (NCE), requests review of those portions of Administrative Law Judge (ALJ) Brazeau's order that: (1) affirmed the Department's Proposed and Final Order declaring the employer to be noncomplying; and (2) affirmed the statutory processing agent's, Johnston and Culberson, Inc.'s (JCI's), acceptance of claimant's injury claim for a "disabling mild brain injury, lumbar strain, cervical strain, left forehead laceration, and traumatic rotator cuff tendinitis/bursistis, right shoulder." With its appellant's brief, the employer has submitted evidence not admitted at hearing. We treat such submissions as a motion for remand. On review, the issues are remand, subjectivity, and compensability.

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

On review, the employer has requested that we "re-open the record" to admit into evidence an unsigned note dated June 18, 2001 and a June 2000 hospital admission record. In addition, the employer has proffered the post-hearing medical opinion of Drs. Jones and Gardner. We treat such submissions as a motion for remand. *See Michael A. Crause*, 49 Van Natta 1022 (1997); *Judy A. Britton*, 37 Van Natta 1262 (1985).

Our review is limited to the record developed at hearing. ORS 656.295(4). We may only remand to the ALJ should we find that the hearings record has been "improperly, incompletely or otherwise insufficiently developed." (*Id.*). 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 shown that the 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. *See Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *Ralph C. Crawford*, 54 Van Natta 2631 (2002).

Here, it is apparent that the note and hospital admissions record existed prior to the February 2002 hearing. The employer has not represented that either document was unobtainable with due diligence at the time of hearing. Although the medical opinion from Drs. Jones and Gardner was obtained after the hearing, the employer has not explained why it was unobtainable with due diligence prior to the proceeding. *See Michael A. Crause*, 49 Van Natta at 1023; *Karen P. Wagner*, 46 Van Natta 453, 454 (1994) (although post-hearing medical report was not available at the time of hearing, it was obtainable). Under such circumstances, we conclude that the employer has not established that any of the submitted documents was unobtainable with due diligence at the time of the hearing.

Moreover, even if each of the documents described was unobtainable at the time of the hearing, none is reasonably likely to have affected the hearing result. The only issue litigated at hearing was whether claimant was a “subject worker” under ORS 656.005(28) or instead was a “nonsubject worker” as described in ORS 656.027(10) which provides in pertinent portion:

“All workers are subject to this chapter except those nonsubject workers described in the following subsections:

“ \* \* \* \* \*

“(10) Except as provided in subsection (24) of this section, corporate officers *who are directors* of the corporation *and* who have a substantial ownership interest in the corporation, regardless of the nature of the work performed by such officers, \* \* \*

“ \* \* \* \* \*.” (Emphasis supplied).

The dispute centered on whether claimant was a corporate officer, director, and substantial owner of the employer’s business. Because the documents proffered have no tendency to prove or disprove such facts, the employer has not established that their admission would be reasonably likely to affect the outcome of the case. Accordingly, we deny the motion for remand.

In addition, we supplement the ALJ’s reasoning with respect to the determination that claimant is a “subject worker” and is not excluded from that class by application of ORS 656.027(10). We expressly adopt the ALJ’s analysis regarding the nature of claimant’s ownership interest in the corporation and status as a corporate officer. We further find that the evidence does not establish that

claimant was a director in the corporate enterprise. Such a position is a prerequisite to classification as a “nonsubject worker” under ORS 656.027(10).

If accepted at face value, corporate documents identified claimant as an officer of and shareholder in the employer’s business. However, no document admitted at hearing included mention of claimant’s election, appointment or designation as a director of the corporation. Corporate by-laws did not operate to confer the position upon him. While the by-laws dictate the number of directors governing the enterprise, they do not restrict those eligible to serve as directors to shareholders or corporate officers. (Ex. 1A-3, 4). Consequently, even if we accept the employer’s arguments concerning claimant’s election as an officer and substantial ownership interest, without more, this record does not establish his status as a director. Accordingly, in addition to the reasons articulated by the ALJ, we conclude that the absence of evidence establishing claimant as a director of the employer’s corporation defeats the employer’s contention that claimant was a “nonsubject worker” under ORS 656.027(10).

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 at hearing and on review is \$1,760, payable by JCI, on behalf of the NCE. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s counsel’s contribution to the respondent’s brief and fee request), the complexity of the issue, and the value of the interest involved. Claimant is not entitled to an attorney fee for his counsel’s services on review regarding a request for an attorney fee.

### ORDER

The ALJ’s order dated July 23, 2003, as corrected on August 8, 2002, and as reconsidered on September 6, 2002, is affirmed. For services on review, claimant’s attorney is awarded a \$1,760 attorney fee, payable by JCI on behalf of the NCE.

Entered at Salem, Oregon on March 7, 2003