
In the Matter of the Compensation of
BENTLEY J. BROWN, Claimant
WCB Case No. 03-08833
ORDER ON REVIEW (REMANDING)
Arthur P Klosterman, Claimant Attorneys
VavRosky MacColl Olson et al, Defense Attorneys

Reviewing Panel: Members Kasubhai and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Howell's order that: (1) closed the record without allowing claimant an opportunity to cross-examine his attending physician, as the ALJ had previously ruled; and (2) upheld the insurer's denial of claimant's occupational disease claim for a low back condition. On review, the issues are evidence, remand, and, potentially, compensability. We vacate and remand.

FINDINGS OF FACT

At the March 8, 2004 hearing, the ALJ admitted Exhibits 1 through 49 into evidence, with no objections from the parties. (Tr. 1). Exhibit 49 is a February 19, 2004 concurrence letter from claimant's treating physician, Dr. Tsang, submitted by the insurer. Claimant requested a continuance to cross-examine Dr. Tsang regarding Exhibit 49. The insurer did not object to claimant's request. The ALJ granted claimant's request for a continuance for that purpose. (Tr. 1).

On March 16, 2004, claimant notified the ALJ, the insurer, and the insurer's attorney, that Dr. Tsang's deposition had been scheduled for April 29, 2004. (Hearing file).

On April 2, 2004, the insurer's attorney advised the ALJ that he was withdrawing Exhibit 49. Additionally, the insurer's attorney requested that the record be closed and closing arguments scheduled as he "[did] not believe there [were] any other reasons that would justify a continuance of the hearing."

Claimant objected to the insurer's withdrawal of Exhibit 49. Claimant did not wish to offer Exhibit 49 into evidence. The ALJ overruled claimant's objection and Exhibit 49 was removed from the record. The hearing record closed on May 17, 2004, following unrecorded closing arguments. (O & O p. 1).

CONCLUSIONS OF LAW AND OPINION

On review, claimant contends that the ALJ abused his discretion by allowing the withdrawal of Exhibit 49 because the ALJ's ruling did not "achieve substantial justice" for claimant. Among other requests, claimant seeks the opportunity to cross-examine Dr. Tsang, as the ALJ previously ruled.

In response, the insurer contends that the ALJ correctly ruled that, as the party submitting the exhibit, the insurer had the right to withdraw it. Because there were no other reasons to keep the record open, the insurer argues that the ALJ correctly decided that closing arguments could be scheduled.

It is well-settled that we review an ALJ's evidentiary ruling for abuse of discretion. *See Richard Gallagher*, 55 Van Natta 3222 (2003); *Allan Coman*, 48 Van Natta 1882 (1996). However, without some explanation of the ALJ's decision to permit the withdrawal of the exhibit and deny the continuance, we are unable to review for abuse of discretion. *See Herbert Gray*, 49 Van Natta 714 (1997).

Here, the ALJ provided no explanation of his decision to permit the withdrawal of Exhibit 49 and deny the continuance for cross-examination." ORS 656.295(3). *Id.* at 714. Under such circumstances, we consider it appropriate to remand to the ALJ for reconsideration. On reconsideration, the parties should also address to the ALJ the effect, if any, *Jack R. Cooper*, 47 Van Natta 678, *on recon*, 47 Van Natta 863 (1995) has on this matter.¹

¹ In *Cooper*, in a pre-hearing conference, the claimant moved for a continuance of the hearing to cross-examine the authors of medical reports that had been submitted by the insurer for admission at the upcoming hearing. At the hearing, the insurer withdrew the exhibits authored by the doctors that the claimant had requested the right to cross-examine. The claimant subsequently submitted the reports withdrawn by the insurer and renewed his motion for a continuance in order to depose the doctors. The ALJ (then referee) denied the claimant's motion, reasoning that the claimant had become the "sponsor" of the physician's reports.

On review, in *Cooper*, we reasoned that, at the pre-hearing conference, the insurer had not objected to the claimant's cross-examination request nor had it preserved its option to withdraw sponsorship of the reports at the upcoming hearing. Because the reports had been solicited by the insurer, and the insurer had never suggested that it would not be presenting the reports at the upcoming hearing, we concluded that the reports should be considered to have been sponsored by the insurer (rather than by the claimant).

In reaching our conclusion, we stated, "[t]o do otherwise would permit the insurer to take a position at hearing that was incongruent with its clear and unqualified position at the pre-hearing conference." *Cooper*, 47 Van Natta at 680. We recognized that it was not uncommon for a party to

Accordingly, the ALJ's order dated May 28, 2004 is vacated. This matter is remanded to ALJ Howell for further action consistent with this order. Those actions may be taken in any manner that the ALJ deems achieves substantial justice. Thereafter, the ALJ shall issue a final, appealable order.

IT IS SO ORDERED.

Entered at Salem, Oregon on November 2, 2004

withdraw an exhibit at hearing, and for another party to then present the exhibit for admission into evidence, with the "sponsoring" party having no right to cross-examine its own witness. However, under the particular circumstances in *Cooper*, we considered the insurer's subsequent withdrawal of the exhibit at the hearing to be "inconsistent with the goals of substantial justice." *Id.*

Finally, inasmuch as the ALJ in *Cooper* did not have the opportunity to rule on the claimant's request for cross-examination of those physicians based on the assumption that the insurer was the proponent of their medical reports, we remanded to the ALJ for reconsideration of the claimant's request for cross-examination.