

In the Matter of the Compensation of
ROBERT G. HANNERS, Claimant

WCB Case No. 03-04452

ORDER ON REVIEW

J Michael Casey, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

The self-insured employer requests review of Administrative Law Judge (ALJ) Sencer's order that: (1) denied the employer's motion for continuance of the hearing to rebut new medical evidence;¹ and (2) set aside the employer's denial of claimant's occupational disease claim for bilateral hearing loss. On review, the issues are continuance and compensability.

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

On March 4, 2004, claimant signed an 801 form providing the employer with notice of an occupational disease claim for bilateral hearing loss. The employer denied the claim, and claimant requested a hearing.

On January 22, 2004, four days before the January 26, 2004 hearing, claimant submitted Exhibits 42 (a letter from claimant's attorney to Dr. Coale, a consulting physician, and claimant's affidavit), 42A (a letter from claimant's attorney to Dr. Coale), 43 (a report from Dr. Coale), 43A–D (medical journal articles on which Dr. Coale based his opinion), and 44 (a report from Dr. Coale). At the January 26, 2004 hearing, the employer moved to continue the hearing on the grounds of extraordinary circumstances: specifically, that the employer had not had adequate opportunity to review and rebut the new exhibits.

Reasoning that claimant, as the party bearing the burden of proof, had the right to last presentation of evidence under OAR 438-007-0023, the ALJ denied the employer's motion, but continued the hearing to allow the employer to depose Dr. Coale. After the employer declined the opportunity to depose Dr. Coale, the ALJ closed the record and found the opinions of Drs. Hodgson and Ediger,

¹ The parties and the ALJ have characterized the motion as one for "postponement" of the hearing. However, because the motion was made after the hearing was convened, it is more appropriately characterized as a motion for a "continuance." *Robin M. Glover*, 56 Van Natta 2408, 2409 (2004).

employer-arranged medical examiners who did not support compensability, unpersuasive because they based their opinions on inaccurate information. Instead, the ALJ found the opinion of Dr. Coale to be the best-reasoned and based on the most complete information and, therefore, the most persuasive. Therefore, the ALJ set aside the employer's denial.

On review, the employer contends that the ALJ should have granted its motion because the late submission of Exhibits 42, 42A, 43, 43A–D, and 44 prevented the employer from adequately reviewing and responding to those exhibits. For the following reasons, we disagree.

The continuance rule, OAR 438-006-0091, provides that a continuance may be granted: if circumstances prevent all parties from presenting their evidence and argument; if necessary, upon a showing of due diligence, to afford reasonable opportunity to cross-examine on documentary medical or vocational evidence; if necessary, upon a showing of due diligence, to afford reasonable opportunity for the party bearing the burden of proof to obtain and present final rebuttal evidence; if a party is surprised and prejudiced by a new issue raised during a hearing, or for any reason that would justify postponement of a scheduled hearing.² OAR 438-006-0091. Continuances are, however, disfavored. *Id.*

The language of the continuance rule is permissive and delegates to the ALJ a range of discretion in granting a continuance. *Robert S. Deputy, Sr.*, 56 Van Natta 1728, 1729 (2004). Therefore, we review an ALJ's ruling on a continuance motion for abuse of discretion. *See Georgia-Pacific Corp. v. Knight*, 126 Or App 244, 246 (1994).

The employer contends that complete case preparation could not have been accomplished because of the short period of time between receipt of the January 22, 2004 exhibits and January 26, 2004, the date of the hearing. However, claimant had previously submitted reports from Dr. Coale supporting compensability. (Exs. 33; 36). The employer had also deposed Dr. Coale before the hearing and submitted reports from Drs. Hodgson and Ediger responding to Dr. Coale's opinion. (Exs. 35; 37; 38; 39). Finally, the ALJ offered the employer an opportunity to depose Dr. Coale again after the hearing. The employer did not avail itself of that opportunity. Under such circumstances, we reject the

² A postponement may be granted under OAR 438-006-0081 if "extraordinary circumstances" are shown. Extraordinary circumstances do not include incomplete case preparation unless completion of the record could not have been accomplished with due diligence. OAR 438-006-0081(1)(b).

employer's argument that the ALJ abused his discretion in denying the employer's motion.

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 on review is \$1,500, payable by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, and the value of the interest involved.

ORDER

The ALJ's order dated May 13, 2004 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$1,500, to be paid by the employer.

Entered at Salem, Oregon on November 17, 2004