

In the Matter of the Compensation of  
**STEVEN D. PHELPS, Claimant**

WCB Case No. 06-02104, 06-01383, 06-00382, 06-00331, 06-00330, 06-00329

**ORDER ON RECONSIDERATION (REMANDING)**

Law Offices of Karl G Anuta PC, Claimant Attorneys

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Reviewing Panel: Members Biehl and Langer.

On January 16, 2009, we withdrew our December 18, 2008 order that vacated an Administrative Law Judge's (ALJ's) order regarding the compensability of claimant's occupational disease claim for metastatic renal cell carcinoma. We took this action to consider the employer's motion for reconsideration. Having received claimant's response, we proceed with our reconsideration.

In our prior order, we vacated the ALJ's order based on our finding that the ALJ had impermissibly limited the proposed evidence for admission at hearing by way of an April 2007 ruling that barred the admission of compensability evidence regarding the employer's denial. Reasoning that the record was insufficiently developed, we remanded.

On reconsideration, the employer asserts that the ALJ had reversed the April 2007 evidentiary ruling that formed the basis for our remand. Therefore, the employer contends, remand is not appropriate.

After further considering this record and the parties' positions, we disagree with the employer's characterization of the ALJ's actions. As set forth in our December 18, 2008 order, the April 2007 evidentiary ruling improperly limited the submission of evidence regarding compensability of the claimed condition. At an October 5, 2007 conference, the ALJ observed that, subsequent to his ruling, the matter "had morphed into a much more complex proceeding \* \* \*." (Tr. 27).<sup>1</sup>

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<sup>1</sup> We note that the transcript page numbers regarding the October 5, 2007 conference, which are cited in the employer's brief, do not correspond with the official transcript pages that we use herein. However, we have not identified any discrepancies in the transcript content, with the exception of the pagination.

Presented with these complications, the ALJ suggested: (1) holding a hearing limited to the disputed outstanding stipulations; or (2) reversing the April 2007 ruling and holding a hearing “on everything.” (Tr. 29).

Although the ALJ’s comment could be viewed as an invitation for the parties to seek reconsideration or modification of the April 2007 ruling, neither party made such a request; to the contrary, both parties rejected a proposal that would have rescinded that ruling. (Tr. 29-34). The ALJ then unequivocally stated that he was not invalidating his ruling; therefore, it remained intact. (Tr. 36-38). Thus, based on the ALJ’s express affirmation of the continuing validity of the April 2007 evidentiary ruling, the record does not support the employer’s assertion that the ALJ nullified or “withdrew” the ruling that was at issue in our December 18, 2008 order.

Nor do we agree that the ALJ’s evidentiary ruling was meaningfully different from the evidentiary rulings that the employer objected to, and we found impermissible, in two related cases, *Gary L. Evans, Dcd.*, 60 Van Natta 3327 (2008) and *Ronnie L. Nielson, Dcd.*, 60 Van Natta 2878 (2008). Indeed, the ALJ expressed his understanding that the April 2007 ruling would be subject to whatever we eventually ruled in the *Evans* matter, and cautioned the parties that, if we found the evidentiary ruling in *Evans* “inappropriate,” then the parties might be “back to square one with full evidentiary hearings.” (Tr. 38-39). Thereafter, as postulated by the ALJ, we vacated the evidentiary ruling in *Evans* for the reasons set forth in *Nielson*.<sup>2</sup>

In sum, we conclude that the ALJ did not rescind the April 2007 evidentiary ruling. We also maintain that the ruling is essentially indistinguishable from that found impermissible in *Nielson*.<sup>3</sup> Consequently, for the reasons set forth above and in our initial order, we adhere to our conclusion that remand is appropriate.<sup>4</sup>

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<sup>2</sup> The employer did not seek reconsideration in either *Nielson* or *Evans*, nor does the employer assert that remand was inappropriate in either of those cases.

<sup>3</sup> We do not agree that, by merely contemplating a reversal of the April 2007 ruling, the ALJ ultimately afforded the parties a full hearing in accordance with the principles set forth in *Nielson*. As explained above, the ALJ mentioned some potential alternative ways of proceeding. Nevertheless, he ultimately adhered to the April 2007 ruling that requires remand in accordance with the rationale set forth in *Nielson* and *Evans*.

<sup>4</sup> In response to the employer’s observation that *Nielson* and *Evans* are distinguishable because this ALJ rejected claimant’s “offer of proof,” the *Nielson* holding did not rest on the claimant preserving an “offer of proof” after being limited by the ALJ’s evidentiary ruling. Instead, as explained above, the *Nielson* rationale is premised on the fundamental infirmity of the evidentiary ruling; namely, that the

Accordingly, on reconsideration, as supplemented herein, we republish our December 18, 2008 order. The parties' rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on February 13, 2009

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exclusion of certain proposed evidence that was otherwise admissible prevented the record from being properly, completely and sufficiently developed so that we could effectively conduct a meaningful review. *See* ORS 656.295(5); *Evans*, 60 Van Natta at 3339-41; *Nielson*, 60 Van Natta at 2880-84.