

In the Matter of the Compensation of
KATHRYN D. MCMAHON, Claimant

WCB Case No. 09-04215

ORDER ON REVIEW

G Joseph Gorciak III, Claimant Attorneys
Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Ogawa's order that affirmed an Order on Reconsideration that awarded 10 percent whole person impairment for claimant's cervical condition. With its brief, the employer has submitted a physician's deposition that was not admitted into the record at hearing. We treat this submission as a motion to remand to the ALJ for the taking of additional evidence. *See Judy A. Britton*, 37 Van Natta 1262 (1985). On review, the issues are remand and extent of permanent disability (impairment).

We deny the motion to remand, and adopt and affirm the ALJ's order with the following supplementation regarding remand.

On review, the employer submits a June 11, 2010 deposition of Dr. Sandquist. (Proposed Exhibit 81). Claimant objects to the employer's submission, arguing that the proposed exhibit was not part of the reconsideration record.

The employer's submission of the June 11, 2010 deposition, which was not included in the "reconsideration record" of the June 24, 2009 Order on Reconsideration, constitutes a motion for remand to the ALJ for consideration of the proposed evidence. We may remand to the ALJ if we find that the case has been "improperly, incompletely or otherwise insufficiently developed[.]" ORS 656.295(5). There must be a compelling reason for remand to the ALJ for the taking of additional evidence. *SAIF v. Avery*, 167 Or App 327, 333 (2000). A compelling reason exists when the new evidence (1) concerns disability; (2) was not obtainable at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Id.*; *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986).

Because the issues at hearing pertained to the Notice of Closure, we are statutorily limited to the record developed during the reconsideration proceeding. ORS 656.268(7)(h) (after reconsideration, no subsequent medical evidence of the

worker's impairment is admissible for purposes of making findings of impairment on the claim closure); ORS 656.283(6) (evidence on issue regarding notice of closure not submitted at the reconsideration is not admissible). Neither the ALJ nor the Board may consider evidence outside the reconsideration record. *See Sandi Jones*, 59 Van Natta 44 (2007). The employer's recent submission was not part of the reconsideration proceeding and, therefore, we may not consider that submission.

Consequently, there is no compelling reason to remand this matter to the ALJ for further proceedings. *See Compton*, 301 Or at 646; *Jones*, 59 Van Natta at 45. Under these circumstances, we deny the employer's motion to remand.

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 \$2,500, payable by the 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 issue, and the value of the interest involved.

ORDER

The ALJ's order dated May 11, 2010 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,500, payable by the employer.

Entered at Salem, Oregon on November 23, 2010