

---

In the Matter of the Compensation of  
**DONALD E. BELL, Claimant**  
WCB Case No. 10-00134  
ORDER ON REVIEW (REMANDING)  
Hooton Wold & Okrent LLP, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The self-insured employer requests review of Administrative Law Judge (ALJ) Dougherty's order that: (1) denied its motion to obtain responsive medical evidence while the hearing was continued; and (2) set aside its denial of claimant's new/omitted medical condition claim for a right shoulder SLAP tear. Claimant cross-requests review of that portion of the ALJ's order that awarded a \$6,500 employer-paid attorney fee. On review, the issues are evidence, compensability, and attorney fees. We vacate and remand.<sup>1</sup>

FINDINGS OF FACT

Claimant requested a hearing concerning the employer's denial of his new/omitted medical condition claim for a right shoulder SLAP tear. Before the April 5, 2010 hearing, the employer had knowledge of two expert medical opinions concerning the claimed tear, one by Dr. Wilson, claimant's treating physician, and the other by Dr. McNeill, who examined claimant at the employer's request. (*See* Exs. 38, 40, 45).

Neither Dr. McNeill nor Dr. Wilson concluded that claimant's June 23, 2009 work injury was a material contributing cause of disability/need for treatment for the claimed SLAP tear. (*Id.*) In reaching their conclusions, Drs. McNeill and Wilson emphasized claimant's lack of symptoms and continued ability to work the day of the injury and the following day. (Exs. 38-10 through 13, 40, 45).

At hearing, claimant provided the employer, for the first time, with a medical report from Dr. Puziss, who had performed an examination at claimant's request, unbeknownst to the employer. (Ex. 44B). In that report, Dr. Puziss noted that claimant "was given a Fentanyl patch" on the date of injury, which "would certainly explain why [he] did not have as much pain as he might have otherwise had following this type of injury." (Ex. 44B-6).

---

<sup>1</sup> Therefore, we do not address the merits of claimant's cross-request concerning the amount of the assessed attorney fee.

Off the record, the parties held “a quite lengthy discussion” concerning whether the employer would be entitled “to some kind of rebuttal report” in light of claimant submitting Dr. Puziss’s report “at this late date.” (Tr. 4). Although the hearing was continued so that the employer could cross-examine Dr. Puziss and so that claimant could depose Drs. McNeill and Wilson, the employer expressed concern that claimant would withdraw his request to depose Drs. McNeill and Wilson, which would deprive the employer of the opportunity to present meaningful evidence concerning Dr. Puziss’s report. (Tr. 4) Thus, the ALJ noted, and the parties agreed, that if claimant “canceled” the depositions of Drs. McNeill and Wilson, a teleconference would be held because of the employer’s request to respond to Dr. Puziss’s report, beyond that of cross-examining Dr. Puziss. (Tr. 4-5, 52).

On April 16, 2010, the employer requested that the ALJ expand the purposes for which the record had remained open to permit the employer to submit evidence responsive to Dr. Puziss’s report. The employer explained that, after having had the opportunity to fully review Dr. Puziss’s 19-page report, cross-examination of Dr. Puziss was insufficient to complete its case preparation, with due diligence.

In a May 13, 2010 Interim Order, the ALJ denied the employer’s request, reasoning that the late submission of Dr. Puziss’s report did not “appear to change the issue or present a new issue that would shift the burden of proof in this matter to the employer such that complete case preparation was not possible prior to [the report’s] issuance.” Citing OAR 438-006-0091(2), the ALJ reasoned that the “employer’s remedy for claimant’s at[-]hearing submission [was] cross-examination of Dr. Puziss, which ha[d] already been granted.” At the time of that Interim Order, the depositions of Drs. McNeill and Wilson had been arranged by the employer and were still pending. (*See* August 3, 2010 Affidavit of the employer’s counsel).

The employer cross-examined Dr. Puziss on May 25, 2010. (Ex. 46). In a letter dated June 22, 2010, claimant withdrew his requests to depose Drs. McNeill and Wilson. Claimant also notified the employer that he would be “seeking closing argument with the submission of Dr. Puziss’ deposition.” In a June 30, 2010 letter submitted to claimant and the ALJ, the employer responded that it would request a conference call with the ALJ if claimant “persist[ed] in his intention to withdraw the requests to depose Drs. McNeill and Wilson \* \* \* .”

After an unrecorded July 2010 conference call at which the ALJ apparently adhered to her May 13, 2010 Interim Order, the employer submitted an August 3, 2010 affidavit concerning a “renewed” motion to submit evidence responsive to Dr. Puziss’s report. In its closing argument, the employer renewed its objection to its denied motion to submit a responsive report concerning Dr. Puziss’s opinion.

### CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the employer’s denial, incorporating the earlier May 13, 2010 Interim Order, but did not address the employer’s “renewed” motion to obtain responsive medical evidence.<sup>2</sup> In setting aside the denial, the ALJ found Dr. Puziss’s opinion more persuasive than those of Drs. McNeill and Wilson, in large part because those latter opinions did not rebut or address that aspect of Dr. Puziss’s opinion concerning the Fentanyl patch “masking” claimant’s pain shortly after the work injury.

On review, the employer contends that the ALJ’s ruling that precluded it from obtaining medical evidence to respond to Dr. Puziss’s opinion submitted at hearing constitutes an abuse of discretion. We agree with employer’s contention. Therefore, we vacate and remand, reasoning as follows.

The ALJ is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct a hearing in any manner that will achieve substantial justice. ORS 656.283(6). We review the ALJ’s evidentiary ruling for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399, 409 (2002). Here, we find that the ALJ’s evidentiary ruling constitutes an abuse of discretion.

In denying the employer’s request to obtain responsive medical reports while the hearing was continued so that it could cross-examine Dr. Puziss, the ALJ reasoned that Dr. Puziss’s opinion did not shift the burden to the employer under ORS 656.266(2)(a). The ALJ added that the employer’s “remedy” for the at-hearing submission of Dr. Puziss’s report was to cross-examine Dr. Puziss.

The evidentiary issue before the ALJ, however, was not whether the burden had shifted to the employer so that it was entitled to “the last presentation of evidence.” *See Spyros Kollias*, 62 Van Natta 1175 (2010) (on remand). Rather, the issue was whether, under these particular circumstances, the employer should

---

<sup>2</sup> The ALJ also incorporated an October 15, 2010 Second Interim Order concerning other evidentiary matters. That Second Interim Order is not challenged by either party.

be allowed to present responsive evidence *in the first instance* to a previously-unknown medical report (by a non-treating expert not referenced in the existing record and first disclosed to the employer at the scheduled hearing), which, contrary to the other expert medical evidence, concluded that claimant's claimed SLAP tear was compensable. *See* ORS 656.283(6); *see also* OAR 438-006-0081; OAR 438-006-0091.

Under the specific facts of this particular case, an analysis of whether to allow a responsive medical report should have considered that Dr. Puziss emphasized an issue not identified by any other medical expert as being medically significant (*i.e.*, that claimant's possible use of a Fentanyl patch on the date of injury "masked" claimant's pain shortly after the work injury). Moreover, because the ALJ determined that the persuasiveness of a medical opinion was contingent on addressing such a new theory, it was an abuse of discretion for the ALJ to preclude the employer from obtaining a responsive opinion in the first instance on that new theory, subject to claimant's right to the last presentation of evidence. This is particularly true given that the record remained open for other purposes. In reaching this decision, we emphasize that, until claimant's disclosure of Dr. Puziss's report at the scheduled hearing, the employer previously had no knowledge of that report or theory.

We further note that, from the outset, the employer asserted that cross-examination of Dr. Puziss would be an insufficient remedy to adequately address his report, which claimant first provided at the hearing.<sup>3</sup> The ALJ acknowledged that concern and indicated that the employer could obtain responsive medical evidence at the time that claimant deposed Drs. McNeill and Wilson. (Tr. 4-5, 52). The ALJ also acknowledged the employer's concern that it could be unfairly deprived of obtaining responsive medical evidence if claimant subsequently chose to withdraw those deposition requests. (*Id.*)

At the time that the ALJ issued the May 13, 2010 Interim Order denying the employer's motion to obtain a responsive medical report, claimant had not yet withdrawn his deposition requests. Therefore, the employer retained the opportunity to secure responsive medical evidence by way of the depositions of Drs. McNeill and Wilson.<sup>4</sup>

---

<sup>3</sup> We reiterate that Dr. Puziss was not a treating physician and, before his examination of claimant and issuance of his report, had no involvement in this dispute.

<sup>4</sup> As such, at the initial time of issuance, the May 13, 2010 Interim Order would appear to be within the discretion afforded an ALJ.

However, claimant thereafter withdrew his requests to depose Drs. McNeil and Wilson. Once that occurred, there was no avenue under the ALJ's ruling at hearing and interim order by which the employer could present rebuttal evidence responsive to Dr. Puziss's report, as contemplated at hearing. Although an unrecorded July 2010 teleconference apparently took place to address this change of circumstance, the ALJ did not modify the May 13, 2010 interim order. The ALJ also did not explain, despite the employer's consistent and ongoing request for rebuttal medical opinions and claimant's cancellation of the aforementioned depositions, why the employer should not be entitled to obtain such responsive medical reports, subject to claimant's right to the last presentation of evidence.

We find that, in light of claimant's cancellation of the depositions at which it was understood the employer would be entitled to obtain evidence responsive to Dr. Puziss's report, it was an abuse of discretion for the ALJ to preclude the employer from obtaining the contemplated responsive medical evidence. *See Jamie M. Holly*, 63 Van Natta 1670, 1672 (2011) (it was an abuse of discretion for the ALJ to exclude a party's proposed rebuttal evidence that fell within the scope of the ALJ's express purpose for keeping the record open). *Cf. Bentley J. Brown*, 57 Van Natta 854, 857 (2005) (no abuse of discretion in the ALJ's rulings to allow the carrier's withdrawal of an exhibit and to deny the claimant's request for a continuance to cross-examine the author of the withdrawn exhibit where the claimant conceded that he would not have solicited or submitted any additional evidence had the exhibit not been offered; therefore, the claimant's case preparation was not prejudiced because he was placed in exactly the same position he would have been had the exhibit never been offered).

Accordingly, the ALJ's January 10, 2011 order is vacated. This matter is remanded to ALJ Dougherty for further proceedings consistent with this order. ORS 656.295(5). Those proceedings shall be conducted in any manner that the ALJ deems will achieve substantial justice. At the close of those proceedings, the ALJ shall reconsider the disputed compensability issues and issue a final, appealable order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on October 28, 2011