In the Matter of the Compensation of
ROBERT W. STAINBROOK, JR., Claimant
WCB Case No. 09-00273
ORDER ON REVIEW
Unrepresented Claimant
Garrett Hemann et al, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant, *pro se*, requests review of Administrative Law Judge (ALJ) Naugle's order that upheld the self-insured employer's denial of his injury/occupational disease claim for a respiratory condition.[1] Claimant also submits a copy of a document that was not admitted at hearing, and requests a "postponement" to obtain additional evidence to support his claim.[2] We treat claimant's submission and request as a motion to remand for further development of the record. *Juan H. Mendez*, 60 Van Natta 3150 (2008). On review, the issues are remand and compensability.

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

Our review is limited to the record developed by the ALJ. 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*

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[1] Although claimant was represented at the hearing level, he is unrepresented on review. Inasmuch as claimant is unrepresented, he may wish to consult the Ombudsman for Injured Workers, whose job it is to assist injured workers. He may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

DEPT OF CONSUMER & BUSINESS SERVICES
OMBUDSMAN FOR INJURED WORKERS
PO BOX 14480
SALEM OR 97309-0405

[2] The document is a Department of Human Services (DHS) news release dated March 25, 2009. We consider this document only for the purpose of determining whether remand is appropriate. *See Connie J. Mosier*, 63 Van Natta 131, 131 n 1 (2011).

Co., 301 Or 641, 646 (1986). Moreover, to merit remand for consideration of additional evidence, it must be clearly shown that material evidence was not obtainable with due diligence at the time of hearing. *Id.*

The March 25, 2009 Department of Human Services (DHS) news release states:

> "* * * State health officials have recommended that bus drivers in the Salem-Keizer school district request that the National Institute for Occupational Safety and Health (NIOSH) conduct a health hazard assessment because NIOSH has the resources and authority to investigate work-related risks from environmental exposures.
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> "A NIOSH health hazard evaluation would include additional sampling on buses to determine whether chemicals related to the fire remain on the buses and, if so, whether they pose a health hazard to drivers and children alike." (Proposed Ex. H-1-2).

The news release was submitted at the August 12, 2009 hearing, but excluded on relevancy grounds. (Opinion and Order at 3; Tr. Vol. I 15-18, 22). Nevertheless, the record was held open for "the potential submission of a report from NIOSH and potential subsequent testimony or expert reports." (Tr. Vol. I 3).

At the February 8, 2010 continued hearing, claimant presented additional witness testimony and evidence. (Tr. Vol. II 1-12). Claimant did not submit a report from NIOSH and specifically indicated that he did not have any other evidence to present. (Tr. Vol. II 13). The employer filed a motion to dismiss the hearing request and uphold the denial. (*Id.*) The ALJ provided claimant time to consult with an attorney and respond to the employer's motion.[3] (Tr. Vol. II 13-14).

On February 15, 2010, claimant retained counsel, who filed an amended request for hearing on February 18. In response to the employer's motion to dismiss, claimant's counsel explained that the amended request for hearing was not an attempt to reopen the record but, rather, to allow claimant's attorney to represent claimant in the hearing. Claimant's counsel further indicated that he was relying on the evidentiary record to establish compensability. (Hearing File).

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[3] Claimant was unrepresented at the August 2009 and February 2010 hearings.

In a May 25, 2010 Interim Order, the ALJ denied the employer's motion to dismiss and indicated that arrangements for telephonic closing arguments would be made in the event that the employer did not have additional evidence to present. The employer did not present additional evidence. (Hearing File).

During June 22, 2010 telephonic closing arguments, claimant's counsel agreed that claimant had "concluded his presentation of evidence on February 8, 2010, and then rested his case[.]" (Tr. Vol. III 1). The parties presented closing arguments and the hearing record was closed. (Tr. Vol. III 6).

Claimant has neither submitted a NIOSH report on Board review, nor explained why such a report was unobtainable with the exercise of due diligence. Moreover, at the February 8, 2010 continued hearing and the June 22, 2010 telephonic closing arguments, claimant did not indicate that he was still attempting to obtain the potential NIOSH report (and subsequent medical opinions) or seeking to further develop the hearing record before the record closed. To the contrary, as noted above, claimant expressly agreed that he had concluded his presentation of evidence at the February 8 continued hearing.

Based on the aforementioned reasoning, we find no compelling basis for remanding and conclude that the case has not been improperly, incompletely, or otherwise insufficiently developed without the additional evidence. Accordingly, we deny the motion to remand. ORS 656.295(5); *Compton*, 301 Or at 646; *Avery*, 167 Or App at 333.

ORDER

The ALJ's order dated July 20, 2010 is affirmed.

Entered at Salem, Oregon on February 8, 2011