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

Reviewing Panel: Members Lowell, Biehl, and Herman. Member Lowell dissents.

On November 4, 2011, the Board abated its October 28, 2011 order that vacated an Administrative Law Judge's (ALJ's) order that set aside the self-insured employer's denial of claimant's new/omitted medical condition claim for a right shoulder SLAP tear. This action was taken to address claimant's request for reconsideration, which challenged the Board's decision that it was an abuse of discretion for the ALJ to have denied the employer's motion to continue the hearing for the purpose of obtaining additional medical evidence. Having received the employer's response and claimant's reply, and reconsidered the matter, the Board's October 28, 2011 order is replaced by the following order.

The employer requests review of ALJ Dougherty's order that: (1) denied its motion to continue the hearing for purposes of obtaining additional medical evidence; 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 affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized and supplemented as follows.

Before the work injury, claimant received treatment for cervical complaints, including multiple surgeries. Before going to work on June 23, 2009, he reported to a clinic for a follow up regarding his cervical pain and medication. (*See* Ex. 10-2). The chart note for that visit indicates that he had been taking MS Contin and Percocet. (*Id.*) Claimant was prescribed and used a Fentanyl patch that morning. (*Id.*; *see also* Tr. 8).

Claimant went to work on the afternoon of June 23, 2009. That day, he was compensably injured when he caught a falling “spool” that he was attempting to remove on a “unitizer.” The employer accepted a disabling right shoulder strain, and that claim closed August 25, 2009.

Claimant reported the incident on that day and finished his shift. He also worked the following day. (Tr. 11, 14-15). On June 25, 2009, he treated for right shoulder pain. (Ex. 10A). A July 1, 2009 MRI was interpreted as showing a SLAP tear. (Ex. 15).

Dr. Dickerman performed a record review at the employer’s request. (Ex. 29). He opined that the SLAP tear was unrelated to the work incident, reasoning that claimant was asymptomatic for two days, and that “there was only a small joint effusion,” whereas a “new” SLAP tear “would have resulted in a significant effusion acutely.” M (Ex. 29-3, -4). Dr. Wilson, who treated claimant, concurred with Dr. Dickerman’s opinion. (Ex. 31).

In November 2009, Dr. McNeill examined claimant at the employer’s request. (Ex. 38). He concluded that the work injury did not materially contribute to the SLAP tear, or any disability/need for treatment. (Ex. 38). As part of that opinion, Dr. McNeill questioned the accuracy of the purported mechanism of injury. (Ex. 38-11). Dr. Wilson concurred with Dr. McNeill’s opinion. (Ex. 40).

The employer denied claimant’s new/omitted medical condition claim for a SLAP tear. (Ex. 39). Claimant requested a hearing, which was scheduled for Monday, April 5, 2010.

On Friday, April 2, 2010, both parties submitted additional medical evidence to the ALJ.¹ The employer submitted a supplemental opinion from Dr. McNeill. (Ex. 45). In that report, Dr. McNeill considered that the reported mechanism of injury was correct, but maintained that the work injury did not contribute to the SLAP tear or any disability/need for treatment, reasoning that: (1) the mechanism of catching the spool was insufficient to have caused a SLAP tear; (2) if claimant had acutely torn his labrum in such a manner, he would likely not have been able to continue his shift and work the following day; and (3) an acute labrum tear would likely have produced significant effusion on physical examination and significant fluid/bright signal on the July 1, 2009 MRI, neither of which were recorded. (Ex. 45-3).

¹ The record indicates that the employer did not receive claimant’s additional medical evidence until the day of hearing.

Claimant submitted a report from Dr. Puziss, who had performed an examination on March 31, 2010, at claimant's request. (Ex. 44B). In that report, Dr. Puziss disagreed with the opinions of Drs. Dickerman, McNeill, and Wilson that the SLAP tear predated the work injury. (Ex. 44B-7). According to Dr. Puziss, such an assertion was highly unlikely due to the lack of: (1) a history of prior major injury; (2) prior popping, especially painful popping; (3) numbness and tingling sensations with shoulder instability sensations; and (4) previous shoulder pain or disability. (*Id.*)

Dr. Puziss further stated the mechanism of injury was consistent with a SLAP tear, explaining that the injury caused a "pulling down of the biceps tendon ripping off the superior labrum and anterior and posterior labrum." (Ex. 44B-7, -8). Dr. Puziss noted that claimant had an "initial pain and pop[,] indicating that this [was] the precise time when he tore his labrum." (Ex. 44B-8). Dr. Puziss offered two explanations as to why claimant would have been able to complete his shift and work the following day: (1) the injury did not immediately result in the maximum pain, as pain tends to increase in the next day or two as inflammation increases; and/or (2) claimant "was on a Fentanyl patch at the time." (*Id.*)

With respect to the purported lack of effusion noted by Drs. Dickerman and McNeill, Dr. Puziss stated that there was no effusion to be noted on the MRI because the study was an "arthrogram" with "dye in the joint," meaning that it could not "be discerned whether or not there was, or was not, an effusion of an injury." (Ex. 44B-6, -7).

The April 5, 2010 hearing convened, and all of the aforementioned medical opinions were admitted. The hearing was continued for the purposes of: (1) the employer's potential cross-examination of Dr. Puziss; (2) claimant's cross-examination of Drs. McNeill and Wilson; and (3) claimant obtaining a potential rebuttal report from Dr. Puziss regarding Dr. McNeill's recently-admitted report. (Tr. 4).

The ALJ also noted that the parties had 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." (*Id.*) The ALJ further stated that, for the time being, the hearing would be continued for the aforementioned limited purposes, and that a teleconference would be held in the event that claimant "canceled" the depositions of Drs. McNeill and Wilson. (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 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.

The employer cross-examined Dr. Puziss on May 25, 2010. (Ex. 46). Dr. Puziss adhered to his opinion that claimant sustained a SLAP tear as a result of the June 23, 2009 work injury.

Thereafter, 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." 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 a 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.

On October 15, 2010, the ALJ issued a Second Interim Order that acknowledged the employer's renewed motion to seek and submit additional evidence, but that adhered to the May 13 Interim Order.

CONCLUSIONS OF LAW AND OPINION

The ALJ incorporated her May 13, and October 15, 2010 Interim Orders, which denied the employer's motion to continue the hearing, into the final order.

Addressing the compensability issue, the ALJ set aside the employer's denial, finding Dr. Puziss's opinion persuasive.

On review, the employer objected to the ALJ's denial of its motion to continue the hearing, and requested that we remand the matter to the ALJ so that it could obtain additional medical evidence in support of its denial. Alternatively, the employer contended that Dr. Puziss's opinion was insufficient to satisfy claimant's burden of proof, particularly when compared to the opinions of Drs. Dickerman, Wilson, and McNeill.

As indicated above, our initial order found an abuse of discretion in denying the employer's continuance motion, in light of claimant's subsequent cancellation of the depositions of Drs. McNeill and Wilson. Therefore, the ALJ's order was vacated and the case was remanded to the ALJ for further proceedings.

On reconsideration, claimant contends that our order did not specify the continuance rule on which it was premised. He further argues that, under those rules, the ALJ's ruling did not amount to an abuse of discretion. In response, the employer asserts that our order was consistent with the applicable administrative rules and achieved substantial justice.

Having completed our reconsideration, we conclude that the continuance ruling was within the ALJ's discretion. We reason as follows.

An ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. ORS 656.283(6). Under the authority granted in ORS 656.726(5), we have promulgated administrative rules that govern hearing procedures, including the granting or denying of motions for continuances. *See* OAR 438-006-0091; *SAIF v. Kurcin*, 334 Or 399, 403 (2002). Our continuance rule (OAR 438-006-0091) "vests authority to make the discretionary decision regarding a continuance with the legal officer who is responsible for the efficient administration of the evidentiary hearing: the ALJ." *Kurcin*, 334 Or at 406-07. Consequently, we review an ALJ's ruling on a request for a continuance for an abuse of discretion. *Kurcin*, 334 Or at 406; *Scarlet M. Allen*, 58 Van Natta 3049, 3050-51 (2006). If the record would support a decision by the ALJ to either grant or deny a continuance, then the ALJ's ruling is not an abuse of discretion. *Kurcin*, 334 Or at 406; *Andrea Z. Rocha*, 56 Van Natta 2998 (2004).

With that framework in mind, we address the employer's contention that the ALJ was required to grant its continuance motion pursuant to OAR 438-006-0091(1) or (5).² We address each rule, in turn.

Under OAR 438-006-0091:

“[t]he parties shall be prepared to present all of their evidence at the scheduled hearing. Continuances are disfavored. The Administrative Law Judge may continue a hearing for further proceedings. If a continuance is granted, the Administrative Law Judge shall state the specific reason for the continuance.”

Under OAR 438-006-0091(1), “[a] continuance *may* be granted [i]f circumstances, including the time allocated for the scheduled hearing, prevent all parties from presenting their evidence and argument.” (Emphasis added). Here, the employer contends that its continuance motion *must* be granted because it could not have anticipated the submission of a report from Dr. Puziss, or the contents of any such report.

We disagree with the premise of the employer's contention; namely, that it is *entitled* to a continuance to obtain additional evidence of its choosing any time that a claimant, who has the burden of proof and the right to the last presentation of evidence under OAR 438-007-0023, provides evidence on the date of hearing that the employer was not anticipating. The record demonstrates that the employer has been aware, from the outset, that claimant was claiming compensability of a SLAP tear by way of a new/omitted medical condition claim. The employer conducted its investigation and obtained evidence, including an employer-requested examination by Dr. McNeill, supporting its position that the claim was not compensable. (*See Ex. 38; see also Ex. 40.*)

² The dissent raises questions regarding the ALJ's admission of Dr. Puziss's report. Yet, neither on review, nor on reconsideration, has the employer challenged the ALJ's admission of this report. Presumably, the employer has chosen not to raise such an issue because it is undisputed that claimant disclosed the report and presented it for admission into the record within seven days of his counsel's receipt of the report. *See OAR 438-007-0015(4)*. Under such circumstances, the report may not be excluded. *See Ramona Andrews*, 48 Van Natta 1652, 1653 (1996); *Nancy G. Brown*, 48 Van Natta 363, 364 (1996); *Phyllis J Weaver*, 44 Van Natta 970, 971 (1992); *Oliver F. Coon*, 42 Van Natta 1845 (1990).

Analyzing that same record, Dr. Puziss arrived at a conclusion that claimant's condition was related to the work incident. (*See Ex. 44B*). Claimant's timely disclosure/submission of that report immediately before/at the hearing establishes its admission into the record. OAR 438-007-0015(4); *Andrews*, 48 Van Natta at 1653. Consistent with our rules, the employer was subsequently granted a continuance under OAR 438-006-0091(2) for the purpose of cross-examining Dr. Puziss, which it did in detail.³ (*See Ex. 46*). The record does not establish that the carrier was "prevented" from presenting any evidence or argument in violation of our rules.

The employer specifically contends that it was prevented from presenting evidence on the effect of the Fentanyl patch because Dr. Puziss's report, of which it was unaware until the day of hearing, was the first medical report to discuss that factor. Yet, before going to work on the day of his injury (June 23, 2009), claimant began using a prescribed Fentanyl patch. (*Ex. 10-2*). The opinions expressed by Drs. McNeill and Wilson were presented after that June 23, 2009 chart note issued and were based on their review of claimant's medical history and record. Under such circumstances, claimant's use of the Fentanyl patch was available to the physicians with which the employer consulted. Consequently, we do not agree with the employer that the ALJ did not have the discretion to deny its continuance motion under OAR 438-006-0091(1) to also obtain additional medical reports in support of its denial.

The employer next argues that the ALJ was *required* to grant its continuance motion under OAR 438-006-0091(5), which provides that an ALJ *may* grant a continuance "[f]or any reason that would justify postponement of a scheduled hearing under OAR 438-006-0081." As relevant here, OAR 438-006-0081 provides:

“(1) A scheduled hearing shall not be postponed except by order of an Administrative Law Judge upon a finding of extraordinary circumstances beyond the control

³ Under OAR 438-006-0091(2), the ALJ has the discretion to grant a continuance “[u]pon a showing of due diligence if necessary to afford reasonable opportunity to cross-examine on documentary medical or vocational evidence.” Likewise, the ALJ has broad discretion to frame the parameters of the continuance ruling for a precise evidentiary purpose; *e.g.*, to allow a party to secure a particular physician's deposition or submit a specific physician's report. Consistent with this authority, the ALJ's continuance ruling for a specified purpose for one party does not simultaneously provide the other party with an unfettered right to procure and present additional evidence for admission into the record. Instead, any such submissions must be approved by the ALJ after further application of the continuance requirements of OAR 438-006-0091.

of the party or parties requesting the postponement.
“Extraordinary circumstances “shall not include: * * *

“(d) Incomplete case preparation, unless the
Administrative Law Judge finds that completion of the
record could not be accomplished with due diligence.”

The employer effectively contends that its case preparation was incomplete, and that its “completion” necessarily required obtaining additional evidence that would be responsive to Dr. Puziss’s opinion. It argues that it could not have obtained that evidence “with due diligence,” without knowing that claimant would submit a report from Dr. Puziss.

Again, we disagree with the premise of the employer’s argument, *i.e.*, that the ALJ was *required* to find “extraordinary circumstances beyond the [employer’s] control,” such that it was *entitled* to a continuance for purposes of obtaining additional medical evidence in support of its denial. The employer was required under the rules to be prepared to present all of its evidence in support of its denial at the hearing. *See* OAR 438-006-0091. Although the employer may not have been aware of the specifics of evidence that claimant intended to present at the hearing, it does not necessarily follow that the employer was entitled to a postponement/continuance to garner additional evidence in support of its denial. Rather, consistent with our rules, the employer was granted a continuance for the purpose of cross-examining Dr. Puziss regarding his report. *See* OAR 438-006-0091(2). Under such circumstances, we are unable to conclude that the ALJ was without the discretion to deny the employer’s motion to continue the hearing to also obtain additional evidence from Dr. McNeill and/or Dr. Wilson.

The employer also argues that, notwithstanding our rules, the ALJ’s continuance ruling must “achieve substantial justice.” *See* ORS 656.283(6). We agree. However, consistent with our authority under ORS 656.726(5), we have adopted rules of practice and procedure to “achieve substantial justice” in particular circumstances, including the standards under which an ALJ may, in the ALJ’s discretion, grant or deny a continuance motion. *See* OAR 438-006-0091. So long as the record supports an ALJ’s continuance ruling that is consistent with our rules, that ruling satisfies the “substantial justice” requirement of ORS 656.283(6).

We also note that the submission of “last-minute” medical evidence is not infrequent in our proceedings. Indeed, here, both the employer and claimant submitted new medical evidence effectively on the date of the hearing.⁴ In such situations, disclosure/submission of such proposed evidence within seven days of its receipt mandates its admission into the record. OAR 438-007-0015(4); *Andrews*, 48 Van Natta at 1653. Thereafter, parties are generally granted the right to cross-examine the authors of such reports. *See* OAR 438-006-0091(2); *see also* OAR 438-006-0081(2). Additionally, because the party with the burden of proof is entitled to the last presentation of evidence, that party (which may be either a claimant or a carrier depending on the dispute) is typically afforded the opportunity to obtain a “rebuttal” report. *See* OAR 438-006-0091(3).

Here, the burden of proof did not rest with the employer. Moreover, the existence of the fentanyl patch was mentioned in the record before the issuance of Dr. Puziss’s report.⁵ (Ex. 10-2). Dr. Puziss’s integration of the patch into his analysis does not insert a new issue or fact into a record that already included such information. To be sure, Dr. Puziss’s opinion elevates the significance of the patch to a level not previously expressed (even by Dr. Wilson, the physician who prescribed the medication). Nonetheless, such circumstances do not necessarily lead to the conclusion that the employer was *prevented* from submitting, in advance of the hearing, a medical report that discussed the effect, if any, the fentanyl patch, may have had on claimant’s shoulder complaints following the work incident, as well as further analysis concerning the mechanics of the work incident and claimant’s shoulder complaints.⁶ *See* OAR 438-006-0091(1).

Accordingly, on reconsideration, we find no abuse of discretion in the ALJ’s continuance ruling, which allowed the employer to cross-examine Dr. Puziss, but did not permit the admission of rebuttal reports from Drs. McNeill and Wilson.⁷

⁴ The parties “submitted” those reports to the ALJ on the Friday before the Monday hearing.

⁵ Likewise, Dr. Puziss’s reporting of a “popping sensation” in claimant’s shoulder while lifting the spool is reminiscent of Dr. Wilson’s references to a “tear feeling” and “could feel click.” (Ex. 19A-1). In addition, Dr. McNeill referred to “a sharp pain in the upper arm.” (Ex. 38-6).

⁶ It can also be argued that the lack of “pre-hearing” discussion and analysis concerning the patch (particularly by the physician who prescribed it) lends credence to the proposition that other medical experts believed that the patch provided minimal, if any, explanation for claimant’s apparent lack of immediate shoulder complaints.

⁷ We acknowledge the employer’s contention concerning the relationship between the ALJ’s continuance ruling and the reasoning used to set aside the denial. Namely, the ALJ’s order reasoned that the opinions of Drs. McNeill and Wilson were unpersuasive because they did not “respond to or rebut”

We now turn to the employer's alternative argument that its denial of claimant's new/omitted medical condition claim should be upheld. We affirm the ALJ's compensability decision, reasoning as follows.⁸

To prevail on his new/omitted medical condition claim for a SLAP tear, claimant must establish that the work injury is a material contributing cause of his disability/need for treatment for that condition. ORS 656.005(7)(a); ORS 656.266(1).⁹ Because of the divergent medical opinions regarding the cause of the disability/need for treatment of the claimed condition, expert medical opinion must be used to resolve the compensability issue. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 11 Or App 259, 263 (1986).

Here, we are persuaded by Dr. Puziss's opinion. According to Dr. Puziss, the mechanism of injury was consistent with a SLAP tear, in that the injury caused a "pulling down of the biceps tendon ripping off the superior labrum and anterior and posterior labrum." (Ex. 44B-7, -8; *see also* Ex. 46-20, -21, -48 through 50, -58, -59). Dr. Puziss noted that claimant had an "initial pain and pop[,] indicating that this [was] the precise time when he tore his labrum." (Ex. 44B-8). Dr. Puziss added that claimant continued to have popping in the shoulder, and that such popping was not present before the work injury. (Exs. 44B-8, 46-46, -56, -57).

In contrast, Dr. McNeill opined that the mechanism of injury lacked the "traction force" to cause or contribute to a SLAP tear. (Ex. 45-2). He explained that, if such force were present, claimant would also have "disrupted the long head of the biceps tendon." (*Id.*)

Dr. Puziss's opinion, particularly with respect to the effect of claimant's use of the Fentanyl patch. As set forth below, however, we do not adopt that portion of the ALJ's reasoning. Moreover, our determination that Dr. Puziss's opinion is persuasive is not primarily premised on the "fentanyl patch" theory.

⁸ We adopt and affirm that portion of the ALJ's order concerning the assessed attorney fee under ORS 656.386(1).

⁹ The parties do not dispute, and we find, that the claimed SLAP tear exists. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (proof of the existence of the condition is a fact necessary to establish the compensability of a new/omitted medical condition).

Dr. Puziss convincingly explained, however, that it was “by far” more common to sustain a SLAP tear *without* any injury to the biceps tendon. (Ex. 46-49). Specifically, Dr. Puziss reasoned that it was very difficult to simultaneously cause a disruption to the labrum and biceps tendon because

“if the bicep tendon [was] strong enough not to be disrupted, then it pulls off the superior labrum[,] which is not as strong as the bicep tendon itself[. Or,] the tendon itself rips because it’s already degenerated. But the two do not usually occur together.” (*Id.*)

We find Dr. Puziss’s opinion on that issue well explained and persuasive. Moreover, we find his opinion concerning the manner in which the work injury more probably caused the claimed SLAP tear more detailed and convincing than the contrary opinions of Drs. Dickerman and McNeill. (*Compare* Exs. 44-7, -8, 46-48 through 50, 58 through 61 *with* Exs. 29-4, 38-8, 45-2).

Additionally, as noted above, Drs. Dickerman, McNeill, and Wilson, opined that the SLAP tear preexisted the work injury. (*See* Exs. 29, 31, 38, 40, 45). Dr. Puziss persuasively explained, however, that such a conclusion, although possible, was highly unlikely. (Exs. 44B-8, 46-34, -44, -48 through 50, -56, -57). Specifically, he reasoned that, before the work injury, claimant: (1) had no history of a prior major injury; (2) did not experience shoulder popping, especially painful popping; (3) did not have numbness and tingling sensations with right shoulder instability sensations; and (4) did not right shoulder pain or any disability. (*Id.*)¹⁰ In any event, Dr. Puziss explained that, even if claimant had some “pre-injury” degenerative tearing, he was asymptomatic regarding that SLAP tear, and the work injury was the cause of the disability/need for treatment of the claimed SLAP tear. (Ex. 46-57, -58).

Moreover, Dr. Puziss persuasively explained why claimant was able to complete his shift on the date of injury and work the following day. Specifically, Dr. Puziss reasoned that: (1) injuries do not always cause the maximum pain right away, as pain tends to increase in the next day or two as inflammation increases; and (2) claimant “was on a Fentanyl patch at the time,” which he described as a “potent” medication that would “mask” the pain. (Exs. 44B-8, 46-21 through 26, -51 through 54).

¹⁰ Although Dr. Puziss acknowledged that some chart notes recorded “radicular-type” complaints in the right arm that “could” reflect a “masking [of] shoulder-related pathology” (Ex. 46-64, -65), he did not change his opinion that it was unlikely that claimant’s SLAP tear predated the work injury.

With respect to the Fentanyl patch, the employer asked Dr. Puziss whether any pain “masking” would have been minimal, given claimant’s pre-injury use of narcotic pain medications. (Ex. 46-22). Dr. Puziss agreed that such a theory was “plausible” and worth “some consideration.” (Ex. 46-22, -23). He nevertheless did not change his opinion regarding the effect of the Fentanyl patch, and, in any event, set forth a separate persuasive explanation for claimant’s ability to complete his shift and work the subsequent day, despite suffering a SLAP tear (*i.e.*, that the pain increased commensurate with the increase in inflammation and edema in the days following the trauma). (*See* Exs. 44B-7, -8, 46-50-51).

Moreover, Dr. Puziss provided the more detailed explanation concerning the lack of effusion on the July 1, 2009 MRI, when compared with the opinions of Drs. Dickerman, Wilson, and McNeill. Those latter medical experts concluded that the MRI did not support the presence of an acute SLAP tear on the date of injury, because the MRI did not show a “significant effusion” that would indicate such an acute injury. (*See* Exs. 29-4, 31, 38-11, -13, 40, 45-3). Dr. Puziss persuasively explained, however, that the “dye in the joint” in the MRI arthrogram made it “impossible” to determine how much fluid in the joint was edema, as opposed to dye. (Exs. 44B-6, -7, 46-47, -48). Consequently, Dr. Puziss reasoned that it could not be discerned whether or not the MRI showed an effusion indicative of an injury. (*Id.*)

Notwithstanding the foregoing, the employer contends that Dr. Puziss’s opinion is too “internally inconsistent” to be persuasive. Specifically, the employer contends that Dr. Puziss opined that labral tears do not result in bleeding, but also “cited to the presence” of bleeding to explain the increase in claimant’s pain after the work incident.

We disagree with the employer’s characterization of Dr. Puziss’s opinion. Dr. Puziss did not assert that labral tears *never* resulted in bleeding. His opinion was more nuanced than that, and explained that such tears did not *always* cause effusion or bleeding. (Ex. 44B-7). Therefore, according to Dr. Puziss, the lack of bleeding or effusion on an MRI was not dispositive as to whether a tear was “acute” or “chronic.” Moreover, and more significantly, Dr. Puziss explained that the question of effusion being present on the MRI was “moot” because the dye obscured any effusion that may have been in the joint. (*Id.*)¹¹

¹¹ The employer also argues that Dr. Puziss’s opinion is inconsistent because he purportedly also relied on the MRI findings in reaching his conclusion. As set forth above, however, Dr. Puziss’s opinion was not contingent on MRI findings; indeed, he persuasively minimized the relevance of such findings

The employer also contends that we should not rely on Dr. Puziss's opinion because that opinion was based on claimant feeling a "pop" at the time of the work incident. According to the employer, that history is inaccurate because: (1) Dr. Puziss was the only provider who obtained such a history; and (2) claimant did not testify that he experienced a pop at the time of the injury.

We disagree with the assertion that a history is necessarily inaccurate because only one provider obtained that history. Here, Dr. Puziss's original examination report noted that claimant "heard a pop" at the time of the work incident; in his deposition, Dr. Puziss confirmed that it was his practice to specifically determine whether there was a "pop." (Exs. 44B-6, 46-61 through 63). Moreover, neither Dr. McNeill's nor Dr. Wilson's reports denied that claimant experienced a "pop."¹² Likewise, at hearing, claimant was not asked about a "pop." Therefore, we do not agree that Dr. Puziss's history was at odds with the work injury. Under such circumstances, we do not conclude that Dr. Puziss's opinion was based on a materially inaccurate history, such that his opinion may not be relied on.

In sum, for the aforementioned reasons, we find that Dr. Puziss provided the more convincing opinion concerning the disability/need for treatment of the claimed SLAP tear. Therefore, we affirm.¹³

Claimant's attorney is entitled to an assessed fee for services on review and reconsideration. 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

in this case. It does not logically follow that his opinion should be disregarded to the extent that he interpreted the MRI (with its minimal value) as supporting an acute injury.

Likewise, the employer contends that Dr. Puziss did not explain why claimant experienced pain at the time of the incident while also asserting that the Fentanyl "masked" the pain of the tear thereafter. Thus, the employer contends that the "Fentanyl patch theory" is necessarily unpersuasive. We do not agree with the employer that such an explanation on that issue was *per se* necessary to find Dr. Puziss's opinion more persuasive than the opposing opinions. In any event, as set forth above, Dr. Puziss provided an additional and well reasoned explanation as to why claimant would have been able to complete his shift on the day of injury and work the following shift. That separate explanation (that the pain would increase in the days following the trauma) did not involve claimant's use of a Fentanyl patch. Therefore, we do not agree with the contention that Dr. Puziss's entire opinion is unpersuasive because it did not also provide a more detailed explanation concerning the relationship of the Fentanyl patch and claimant's pain presentation.

¹² To the contrary, Dr. Wilson noted that claimant described a "tear feeling" and "could feel click." (Ex. 19A-1).

¹³ We also adopt and affirm the ALJ's attorney fee award.

fee for claimant's attorney's services on review and reconsideration is \$5,000 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, his counsel's uncontested submission, and his briefs on reconsideration), the complexity of the issues, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.¹⁴

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. See ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated January 20, 2011 is affirmed. For services on review and reconsideration, claimant's attorney is awarded an assessed fee of \$5,000, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on April 26, 2012

Member Lowell dissenting.

I disagree with the majority's determination to withdraw and replace the Board's earlier order, which held that the ALJ's evidentiary ruling constituted an abuse of discretion. I would adhere to that decision, with the following supplementation.

Claimant's reconsideration request is premised on the assertion that the prior order did not specify the continuance rule on which it vacated the ALJ's order. The majority agrees with that contention. I do not.

The Board's earlier order rightly understood the ALJ's ruling to be an *evidentiary* one. See *Donald E. Bell*, 64 Van Natta 2148, 2150 (2011). Claimant (and now the majority) assert that, although the hearing *had already*

¹⁴ Claimant's counsel is not entitled to an attorney fee for services on review regarding the ALJ's attorney fee award.

been continued, the employer's motion to submit a piece of evidence during that continuance period should be treated as its own separate motion for a continuance. I do not believe that such a holding is consistent with our rules governing the admission of evidence at hearing or the requirement that a hearing must "achieve substantial justice." *See* ORS 656.283(6). I believe that the ALJ's ruling should be analyzed as follows.

An ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. ORS 656.283(6). Thus, that statute "gives the [ALJ] broad discretion concerning the admission of evidence at the hearing." *Brown v. SAIF*, 51 Or App 389, 394 (1981). That discretion, however, is not unfettered, as an ALJ's evidentiary ruling is limited "by the consideration that the hearing as a whole achieve substantial justice." *Id.*

Under the authority granted in ORS 656.726(5), the Board has promulgated administrative rules that govern hearing procedures, including the timely disclosure of documents and exchange of exhibits. *See* OAR 438-007-0015; OAR 438-007-0018. Those rules set forth the following procedures.

Once a claimant properly mails a request for hearing (or other qualifying documents) to a carrier, the carrier has 15 days to provide claimant with copies of all documents pertaining to the claim. OAR 438-007-0015(2). Likewise, within 15 days of a carrier mailing a demand to a claimant, the claimant must provide the carrier with all documents pertaining to the claim that the claimant did not receive from the carrier. OAR 438-007-0015(3). Any documents acquired by either party after these initial exchanges, shall be provided to the other side within seven days. OAR 438-007-0015(4).

If a party does not disclose a document in accordance with these rules, the ALJ has the discretion to admit such documents, but only after determining "whether material prejudice has resulted from the timing of the disclosure and, if so, whether there is good cause for the failure to timely disclose that outweighs any prejudice to the other party or parties." OAR 438-007-0018(4). If material prejudice has occurred, the ALJ may exclude the document or continue the hearing for such action as is appropriate to cure that material prejudice. *Id.*

In addition to those *disclosure* requirements, we have also promulgated rules concerning the "Exchange and Admission of Exhibits at Hearing," once a hearing is scheduled. OAR 438-007-0018. Under those rules, a carrier "shall provide the

claimant * * * copies of all documents that are relevant and material to the matters in dispute in the hearing, together with an index.” OAR 438-007-0018(1). Those documents must be provided “[n]ot later than 28 days before the hearing.” *Id.* Thereafter, and “[n]ot less than 14 days before hearing, or within seven days of receipt of the insurer document index and documents, whichever is later, the claimant shall provide to the [carrier] legible copies of any additional documents that are relevant and material to the matters in dispute in the hearing.” OAR 438-007-0018(2).

The rules then provide that, “[b]efore or at the hearing, the parties shall delete from their indexes and packets of document those documents which [*sic*] are cumulative, or which [*sic*] no party can in good faith represent to be relevant and material to the issues, and the revised indexes and packets of documents shall be submitted to the [ALJ].” OAR 438-007-0018(3). Although, as noted above, the rules provide for the admission of additional documents not properly *disclosed* pursuant to OAR 438-007-0015 (OAR 438-007-0018(4)), the rules do not mention the standards under which an ALJ may admit exhibits not timely *exchanged* under OAR 438-007-0018(1) or (2).

Here, consistent with OAR 438-007-0018(1), the employer provided claimant with documents and an index 28 days before the hearing.¹⁵ Claimant, however, provided no documents to the carrier by 14 days before the hearing. *See* OAR 438-007-0018(2). Rather, he first provided a report on the day of hearing from Dr. Puziss, a physician with no previous involvement in claimant’s work injury or medical history. When claimant sought to have that report admitted as an exhibit, the employer objected, contending that any admission of that exhibit should be contingent on the employer being permitted to: (1) submit a responsive report from Dr. McNeill; and (2) cross-examine Dr. Puziss. (Tr. 4-5, 52; August 3, 2010 Affidavit of the employer’s counsel).

The ALJ nevertheless admitted Dr. Puziss’s report, with the caveat that the employer could cross-examine Dr. Puziss while the hearing was continued so that claimant could depose Drs. McNeill and Wilson. The ALJ also appeared to recognize the validity of the employer being entitled to a responsive report due to “Dr. Puziss’s report being submitted at this late date.” (Tr. 4). The ALJ noted, however, that the employer could effectively obtain that information when claimant deposed Drs. McNeill and Wilson. (Tr. 4-5, 52).

¹⁵ After the 28-day cutoff, the employer also provided claimant with additional exhibits. Claimant, however, did not object that those exhibits were untimely exchanged.

The employer anticipated that claimant might then elect to cancel the depositions of Drs. McNeill and Wilson, thereby depriving the employer of the opportunity to obtain responsive evidence as a remedy to claimant's late-submitted report. (*Id.*) The ALJ acknowledged that concern, but noted that claimant's counsel had "indicated that [those] depositions [were] likely to go forward." (Tr. 5; *see also* Tr. 52). The ALJ stated that a conference call would be held if claimant opted to cancel those depositions. (Tr. 5, 52).

While the hearing was continued and at a time where the scheduled depositions of Drs. McNeill and Wilson were still pending, the employer moved for permission to submit evidence responsive to Dr. Puziss's report. By way of a May 13, 2010 Interim Order, the ALJ denied that request. Of course, as set forth in our prior order, at that point, such a denial would appear to be within the ALJ's discretion, because the employer would be able to effectively obtain responsive evidence by way of Drs. McNeill's and Wilson's depositions. *See Bell*, 63 Van Natta at 2151 n 3.

Circumstances changed, however, when claimant, as the employer feared, canceled the scheduled depositions of Drs. McNeill and Wilson, leaving the employer no avenue by which it could obtain a medical report to respond to Dr. Puziss's report. Pursuant to the ALJ's instructions at hearing, the employer initiated a teleconference to inform the ALJ of claimant's conduct, and to obtain permission to submit a responsive report, as anticipated at hearing. That teleconference was unrecorded, but the ALJ apparently denied the employer's request.¹⁶ In the ALJ's final order, the ALJ merely incorporated the earlier May 2010 Interim Order, which had denied the employer's evidentiary request at a time when the depositions of Drs. McNeill and Wilson had not yet been canceled, into the final order. Thus, the ALJ never issued an order explaining why the employer was not entitled to submit a responsive report, *in light of* claimant's cancellations of the depositions at which the employer was to be provided its requested remedy of obtaining evidence responsive to claimant's late-submitted report.

The majority concludes that the ALJ did not exceed the scope of her discretion. The majority reaches this conclusion by finding that the ALJ's ruling was discretionarily permitted under the Board's continuance rules.

¹⁶ Given the significance of this dispute, recording this proceeding would have been preferable.

As set forth above, however, the Board's continuance rules do not provide the proper starting point for analyzing this dispute. Rather, the proper starting point is the Board's rules concerning the exchange and admission of exhibits at the hearing. *See* OAR 438-007-0018. Under those rules, it is undisputed that claimant did not timely provide Dr. Puziss's report within the required 14-day period. OAR 438-007-0018(2).

As previously noted, the rules do not expressly state under what circumstances an ALJ may nevertheless admit such a report, or what remedy may be provided to the opposing party objecting to that report. However, the rules do set firm deadlines by which both parties must exchange relevant and material documents concerning matters in dispute at the hearing. OAR 438-007-0018(1), (2).

Here, the ALJ appeared to presume that claimant's late submission of Dr. Puziss's report was permissible, so long as the employer was granted some sort of remedy. Because the Board's rules do not set forth any specific standards on what would satisfy a party's burden for a late-submitted report under OAR 438-007-0018(1), (2), or the scope of potential remedies for the objecting opposing party, the ALJ's rulings on those issues would be governed by whether or not they "achieve[d] substantial justice." ORS 656.283(6). I would not find that the ALJ's ruling, which barred the employer from obtaining a responsive medical report in the first instance (subject to claimant's right to the last presentation of evidence), satisfied that standard.

The ALJ initially granted the employer a form of an acceptable remedy due to claimant's untimely submitted report. Namely, the ALJ ruled that the employer could obtain responsive medical evidence when claimant deposed Drs. McNeill and Wilson. When claimant subsequently canceled those depositions, however, the ALJ did not provide a ruling that addressed those changed circumstances or explain why, in light of the cancellations, the employer was not entitled to the other remedy contemplated at hearing, *i.e.*, the right to submit a responsive medical report. Under such circumstances, I would not find that the ALJ's decision "achieve[d] substantial justice." ORS 656.283(6). Consequently, I would adhere to our earlier determination, as supplemented herein, and remand the matter to the ALJ.

In reaching a different result, the majority concludes that, under the Board's continuance rules, the ALJ did not abuse her discretion in denying the employer's motion for a continuance. I do not believe that the employer's request to submit

responsive medical evidence should be limited to the continuance rules. As set forth above, I would analyze this issue in light of the Board's rules concerning the timely exchange of documents *before the hearing*. See OAR 438-007-0018. Indeed, those rules are intended to prevent the type of problem presently before us—*i.e.*, the late obtaining or exchanging of documentary evidence that a party wishes to use at a scheduled hearing.

In any event, I would conclude that, under these facts, “substantial justice” requires that the employer be permitted to submit, in the first instance, evidence to respond to Dr. Puziss’s report.¹⁷ Because the majority determines otherwise, I respectfully dissent.

¹⁷ Therefore, I express no opinion on the merits of claimant’s new/omitted medical condition claim.