
In the Matter of the Compensation of
ROBERTO S. ARANDA, Claimant
WCB Case No. 10-02175
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Scheminske et al, Defense Attorneys

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

Claimant requests review of that portion of Administrative Law Judge (ALJ) Jacobson's order that declined to address the compensability of a new/omitted medical condition claim for cervical radiculopathy. In its respondent's brief, the employer asks that we affirm the ALJ's order. Alternatively, the employer contends that the claimed radiculopathy condition is not compensable, and that, in any event, claimant's counsel is not entitled to an attorney fee. On review, the issues are the ALJ's procedural ruling, and, potentially, compensability and attorney fees. We reverse in part, modify in part, and affirm in part.

FINDINGS OF FACT

We incorporate the "Findings of Fact" from our previous order (*see Roberto S. Aranda*, 63 Van Natta 2153 (2011) (remanding)), which we summarize and supplement as follows.

On June 24, 2010, claimant requested a hearing for a *de facto* denial of a new/omitted medical condition claim for cervical radiculopathy. His hearing request specifically identified the issues as the compensability of a *de facto* denial of cervical radiculopathy, along with penalties, attorney fees, and costs. This hearing request was consolidated with an earlier request concerning a March 31, 2010 denial of various new/omitted medical conditions claims. The employer did not file a response to claimant's hearing request. *See* OAR 438-006-0036.

A hearing convened on July 15, 2010. The parties agreed that the issues to be determined were the employer's March 30, 2010 denial, the aforementioned "*de facto* denial of cervical radiculopathy," penalties, and attorney fees related to that *de facto* denial. (Tr. I: 4-6). The employer stated that it had no "cross-issues," adding that it "also concede[d] nothing" and "expect[ed] claimant to prove each element of the issues raised by [him]." (Tr. I: 6).

After claimant testified, the hearing was continued and the evidentiary record was left open for multiple depositions of medical experts. Those depositions were completed on November 22, 2010.

After claimant submitted his initial written closing arguments on the compensability and penalty issues, the employer requested, for the first time, that claimant's hearing request on the compensability of the cervical radiculopathy claim be dismissed as "premature." In doing so, the employer contended that the evidentiary record did not include a claim for that condition. Rather than submit a written reply argument, claimant requested a teleconference to address the "premature hearing"/dismissal issue. (Tr. II: 1).

A teleconference was held on January 24, 2011. Claimant objected to the employer raising the "premature hearing"/dismissal issue for the first time in its closing argument. Alternatively, he asked the ALJ to reopen the evidentiary record for the submission of evidence to show that the hearing request was not premature. (Tr. II: 7).

The employer responded that it had no obligation to further specify its position on the alleged *de facto* denial issue until its closing argument because it was claimant's burden to establish all elements of the *de facto* denial and entitlement to any penalties and related attorney fees from such a denial. (Tr. II: 3-5, 8-9). The employer also objected to claimant's request to admit any evidence that a claim was filed. (Tr. II: 4, 9).

By means of a subsequent letter, the ALJ "decline[d] to reopen the record for new evidence from claimant," reasoning that there was no "sufficient reason to justify reopening the record pursuant to OAR 438-007-0025."

Thereafter, the ALJ determined that the compensability of a cervical radiculopathy condition was not "at issue," and also declined to award a penalty and related attorney fees under ORS 656.262(11). Additionally, the ALJ upheld the employer's March 31, 2010 denial of the other claimed new/omitted medical conditions.

Claimant requested review. We vacated the ALJ's order, reasoning that it provided insufficient reasoning for us to conduct our appellate review. *See*

Aranda, 63 Van Natta at 2155.¹ Consequently, we found the record “improperly, incompletely or otherwise insufficiently developed,” such that remand was required. *See id.* (citing ORS 656.295(5)).

On remand, the parties submitted additional arguments and an unrecorded conference call was held on January 17, 2012.

CONCLUSIONS OF LAW AND OPINION

On remand, the ALJ again declined to address claimant’s new/omitted medical condition claim for cervical radiculopathy.² Specifically, the ALJ reasoned that the employer had not “waived any procedural objections to the *de facto* denial” because it “concede[d] nothing” and “expect[ed] claimant to prove each element of the issues raised by claimant.” Consequently, the ALJ continued to decline to “address the compensability of the cervical radiculopathy condition,” and also declined to award penalties pursuant to ORS 656.262(11). The ALJ also upheld the employer’s denial of other claimed new/omitted medical conditions.³

On review, claimant maintains that the employer had an obligation to raise the premature hearing/dismissal issue before closing arguments. As such, he contends that the ALJ should have addressed the compensability of his new/omitted medical condition claim for cervical radiculopathy, and found the claim compensable. The employer responds that it had no obligation to raise the premature hearing/dismissal issue before the evidentiary record had closed (*i.e.*, closing arguments), and that the ALJ properly declined to address the compensability issue. In the event that we address the issue, the employer contends that the claim is not compensable. For the following reasons, we reverse, and find the claim compensable.

¹ We also noted that the ALJ may wish to consider whether claimant’s request was more properly considered a motion to continue the hearing pursuant to OAR 438-006-0091 (as opposed to a request under OAR 438-007-0025 to reopen the record and reconsider her decision before a request for review is filed).

² The ALJ also adhered to her previous decision not “to admit claimant’s additional evidence,” but providing “supplemental reasoning” on why she declined “to reopen the record” under both OAR 438-007-0025 and OAR 438-006-0091. Because claimant has not asked us to review that ruling, we do not.

³ Claimant has not challenged the portions of the ALJ’s order regarding penalties and the compensability of other claimed new/omitted medical conditions; therefore, we affirm those portions of the ALJ’s order.

OAR 438-006-0031 provides:

“Not later than 15 days after the first disclosure of documents under OAR 438-007-0015, the party who requested the hearing shall, on a form prescribed by the Board, file with the Board and simultaneously mail copies to all other parties a specific listing of all issues to be raised at the hearing and all relief requested. Amendments shall be freely allowed up to the date of the hearing. If, during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing. In such a situation, the Administrative Law Judge may continue the hearing upon motion of an adverse party pursuant to OAR 438-006-0091.”

Under OAR 438-006-0036:

“Not later than 15 days after receiving the listing of issues and other information required by OAR 438-006-0031, a party defending against a request for hearing shall, on a form prescribed by the Board, file and simultaneously mail copies to all other parties a response specifying the respondent’s position on the issues raised and relief requested and any additional issues raised and relief requested by the respondent. Amendments shall be freely allowed up to the date of the hearing. If, during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing. In such a situation, the Administrative Law Judge may continue the hearing upon motion of an adverse party pursuant to OAR 438-006-0091.”

Here, the record establishes that on June 21, 2010, claimant filed, “on a form prescribed by the Board * * *, a specific listing of all issues to be raised at the hearing and all relief requested.” *See* OAR 438-006-0031. Specifically, claimant raised the issues of: (1) a *de facto* denial of cervical radiculopathy; (2) penalties; (3) attorney fees; and (4) costs. The record does not establish, however, that the employer filed a response within 15 days of receiving claimant’s

listing of issues, as required by OAR 438-006-0036. The record also does not establish that the employer raised “any additional issues” or “relief requested” during that time period. *See id.*

Moreover, “during the hearing,”⁴ the employer did not “provide a response specifying [its] position on the issues raised and relief requested” by claimant. *See id.* Nor did the employer, “during the hearing,” identify that it had “any additional issues [to be] raised” or “relief requested” (other than upholding its *de facto* denial), such as dismissal of the hearing for a purported premature hearing request. *Id.* Had the employer done so, the ALJ would have had the discretion to allow or disallow that issue being raised. OAR 438-006-0036; *see also Susan D. Troxell*, 42 Van Natta 1300, 1301 (1990) (“whether a party is allowed to raise an issue for the first time during the course of a hearing is a matter within the [ALJ’s] discretion”).

Rather, the employer first raised the premature hearing request, and requested relief in the form of a dismissal of that request on the alleged *de facto* denial, in written closing arguments. We have previously determined that an issue first raised in closing arguments is not raised “during the hearing,” within the meaning of OAR 438-006-0036; thus, such issues are ordinarily not considered.⁵ *Robert S. Masters*, 61 Van Natta 997, 999 (2009); *Lawrence E. Millsap*, 47 Van Natta 2112, 2112-13 (1995). We find no reason to apply an exception to that rule in this case.

In reaching this conclusion, we disagree with the employer’s assertion that a premature hearing request and request for a dismissal was properly raised when it asserted in opening arguments that it “concede[d] nothing” and “expect[ed] claimant to prove each element of the issues raised by [him].” (Tr. I: 6). Under the facts of this case, we do not consider the employer’s comments sufficient to identify the “relief requested by the” employer as encompassing that claimant’s hearing request should be dismissed as premature. *See* OAR 438-006-0036. This is particularly true, given that the employer simultaneously stated in opening arguments that it had no “cross-issues.” (Tr. I: 6).

⁴ As set forth below, for purposes of OAR 438-006-0036 as applied to this case, “during the hearing” would not include closing arguments, at which time the evidentiary record had closed. “During the hearing” would include, however, that period of time for which the hearing had been continued.

⁵ We do not consider raising dismissal of a hearing request as premature to constitute a mere alternative legal “theory” to upholding a *de facto* denial on the merits. *Cf. Daniel B. Covert, recons*, 52 Van Natta 2066 (2000) (alternative legal theories may be considered for the first time on Board review if there is no prejudice to the adverse party).

Thus, under these particular circumstances, the employer's opening argument statements that it "concede[d] nothing" and "expect[ed] claimant to prove each element of the issues raised by claimant" are most reasonably interpreted as concerning the compensability of the new/omitted medical condition claim for cervical radiculopathy, *i.e.*, the existence and cause of that condition, and not as specifically asserting that it had never received such a claim. Indeed, that interpretation is consistent with the parties' actions of continuing the hearing for depositions of four medical experts, all of which concerned the existence of the claimed cervical radiculopathy and its causal relationship to the work injury. (*See, e.g.*, Exs. 42-12, -13, -21 through 37, 43-41-42, -52, 44-7 through 11, -19 through 36, -39, 45-11 through 21, -24 through 30).⁶

In reaching this conclusion, we consider the employer's "perfection/premature hearing" arguments analogous to situations where a carrier has issued a standard compensability denial, but then asserted during closing arguments and after the hearing: (1) that a claimant has not established "subject worker" status (*Charles M. Spivey*, 56 Van Natta 93 n 1 (2004)); (2) that a claim is not supported by "objective findings" (*Lannis W. Warfield, Sr.*, 56 Van Natta 1387, *recons*, 56 Van Natta 1974 n 1 (2004)); or (3) a new basis for a denial (*Michael R. Day*, 56 Van Natta 607, 607-8 (2004)).⁷ Here, the employer's argument is even more problematic, given that one issue raised by claimant concerned a *de facto* denial of a new/omitted medical condition claim, and the employer provided no response "up to the date of the hearing" specifying its position on that denial, as required by our rules (OAR 438-006-0036). In such circumstances, if a carrier's response is that there is no *de facto* denial because it has never received a claim, we would expect that response to be made at the outset of the hearing because, if true, there would be no basis for proceeding to litigate a purported denial of a nonexistent claim.⁸ *See also John R. Nolan*, 46 Van Natta 434 (1994) (declining to consider the carrier's argument raised first on review that the claimant did not file a "legally cognizable claim," and, alternatively finding that by proceeding to litigate the merits of that claim at hearing, the carrier waived any procedural defect regarding a premature hearing request on a "*de facto*" denial).

⁶ Although the depositions also discussed other claimed new/omitted medical conditions, the questions during the depositions largely concerned the cervical radiculopathy condition.

⁷ We have likewise not allowed a claimant to contend, for the first time during closing arguments and after a hearing regarding the compensability of a denied claim, that a carrier's denial of a new/omitted medical condition claim was premature and invalid because there was no claim made for the denied condition. *Richard G. Boyce*, 63 Van Natta 2024, 2026-27 (2011).

⁸ Therefore, we reject the employer's argument that it would have been "premature" to raise the "premature hearing"/dismissal issue before the evidentiary record had closed.

Therefore, under these particular circumstances, we find that the employer did not timely raise the premature hearing request/dismissal issue regarding the alleged *de facto* denial of claimant's new/omitted medical condition claim for cervical radiculopathy. Consistent with our longstanding case precedent, we will not consider the employer's "closing argument" challenge to the validity of the claim. *See Masters*, 61 Van Natta at 999; *Millsap*, 47 Van Natta at 2112-13. Consequently, we reverse that portion of the ALJ's order that declined to address the compensability of claimant's new/omitted medical condition claim for cervical radiculopathy.

We now proceed to the merits of that claim. To prove compensability of his new/omitted medical condition claim, claimant must establish that the claimed cervical radiculopathy condition exists and that the work injury was a material contributing cause of the disability or need for treatment for that condition. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If claimant satisfies that burden, but the employer asserts that the claimed condition is a "combined condition," the employer must prove that: (1) claimant suffers from a statutory "preexisting condition"; (2) claimant's condition is a "combined condition"; and (3) the "otherwise compensable injury" is not the major contributing cause of the disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G Scoggins*, 56 Van Natta 2534, 2535 (2004).

Resolution of those questions involves a complex medical question that must be resolved by expert medical evidence. *Barnett v. SAIF*, 122 Or App 279, 282 (1992). We give more weight to those opinions that are well reasoned and based on the most complete relevant information. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003); *Somers v. SAIF*, 77 Or App 259 (1986).

Dr. Bolstad, who treated claimant from September 2007 to September 2008, concluded that claimant's September 2007 work injury was the major contributing cause of his cervical radiculopathy and need for treatment of that condition, which she described as "[d]ysfunction of a nerve root or irritation of a nerve root." (Exs. 41, 44-19, -20). Dr. Gerry, who treated claimant on one occasion on referral from Dr. Bolstad, agreed that claimant had a cervical radiculopathy, with the September 2007 work injury being the major contributing cause of the need for treatment of that condition. (Exs. 40, 42-12, -24, -25, -32, -33; *see also* Ex. 15). Dr. Button, who treated claimant from April 2010 to August 2010, also stated that claimant had a cervical radiculopathy (pathology and inflammation of a nerve root), and that the work injury was the major cause of the need for treatment and

development of that condition. (Exs. 39, 45-11, -16, 23 through 26). Finally, Dr. Tran, who regularly treated claimant since December 2009, also stated that the September 2007 work injury was the major cause of claimant's need for treatment for cervical radiculopathy. (Exs. 38, 43-41 through 45).

There is no contrary expert medical opinion concerning the cause of claimant's need for treatment of his cervical radiculopathy. Therefore, we find that claimant has established an otherwise compensable injury regarding the claimed cervical radiculopathy.

The employer next contends that we should analyze the otherwise compensable cervical radiculopathy as a "combined condition." As set forth above, such a contention requires the employer to establish that claimant suffers from a statutory "preexisting condition." To qualify as a statutory "preexisting condition" for purposes of this new/omitted medical condition claim, claimant must have been diagnosed with, or obtained medical services for the symptoms of the alleged "preexisting condition," before the September 2007 work injury or onset of a new medical condition, or the "preexisting condition" must be "arthritis or an arthritic condition." ORS 656.005(24)(a).⁹ "Arthritis" is defined as

⁹ ORS 656.005(24) provides:

"(a) "Preexisting condition" means, for all industrial injury claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment, provided that:

"(A) Except for claims in which a preexisting condition is arthritis or an arthritic condition, the worker has been diagnosed with such condition, or has obtained medical services for the symptoms of the condition regardless of diagnosis; and

"(B)(i) In claims for an initial injury or omitted condition, the diagnosis or treatment precedes the initial injury;

"(ii) In claims for a new medical condition, the diagnosis or treatment precedes the onset of the new medical condition; or

"(iii) In claims for a worsening pursuant to ORS 656.273 or 656.278, the diagnosis or treatment precedes the onset of the worsened condition.

"(b) "Preexisting condition" means, for all occupational disease claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment and that precedes the onset of the claimed occupational disease, or precedes a claim for worsening in such claims pursuant to ORS 656.273 or 656.278.

"(c) For the purposes of industrial injury claims, a condition does not contribute to disability or need for treatment if the condition merely renders the worker more susceptible to the injury."

“inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change.”
Hopkins v. SAIF, 349 Or 348, 364 (2010).

The employer has identified the purported “preexisting condition” as “degenerative changes.” The record does not establish, however, that claimant had been diagnosed with, or obtained medical services for the symptoms of “degenerative changes” before the September 2007 work injury. Likewise, although the record establishes that claimant had some cervical degenerative changes that predated the work injury, the record does not persuasively establish that those changes are “arthritis or an arthritic condition,” *i.e.*, that they constitute “inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change.” *See id.*¹⁰ Consequently, the employer has not satisfied its burden of proving, with persuasive medical evidence, that claimant had a statutory “preexisting condition,” a required element of its “combined condition” defense.

In sum, for the foregoing reasons, we find that claimant’s new/omitted medical condition claim for cervical radiculopathy is compensable; therefore, we set aside the employer’s *de facto* denial of that claim.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review regarding the *de facto* denial of claimant’s cervical radiculopathy claim. ORS 656.386(1).¹¹ 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 at hearing, on review, on remand, and again on review is \$25,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant’s appellate briefs, his counsel’s attorney fee submission, and the employer’s objection), the complexity of the issue, the value of the interest involved, the nature of the proceeding, and the risk that counsel may go uncompensated.

¹⁰ The record also indicates that claimant’s degenerative cervical changes “merely render[ed] [him] more susceptible to the injury,” such that those changes did not contribute to his need for treatment. *See* ORS 656.005(24)(c); (*see also* Exs. 38-1, 39-2, 41).

¹¹ We disagree with the employer’s position that claimant has not prevailed over a denial within the meaning of ORS 656.386(1). As set forth above, claimant requested a hearing, specifically identifying the compensability of a *de facto* denial of a new/omitted medical condition claim for cervical radiculopathy. For the reasons expressed above, claimant has prevailed over that denial. Accordingly, an attorney fee award under ORS 656.386(1) is justified.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the *de facto* denial of the cervical radiculopathy claim, to be paid by the employer. See ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 17, 2012 is reversed in part, modified in part, and affirmed in part. That portion of the ALJ's order that declined to address the compensability of claimant's new/omitted medical condition claim for cervical radiculopathy is reversed. The employer's *de facto* denial of that claim is set aside and the claim is remanded to the employer for processing according to law. The remainder of the ALJ's order is affirmed. For services at hearing, on review, on remand, and again on review regarding the cervical radiculopathy claim denial, claimant's attorney is awarded an assessed fee of \$25,000, 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 this *de facto* denial, to be paid by the employer.

Entered at Salem, Oregon on December 7, 2012

Member Lowell, dissenting.

I disagree with the majority's decision to address the compensability of claimant's new/omitted medical condition claim for cervical radiculopathy.¹² I reason as follows.

Claimant requested a hearing alleging a *de facto* denial of a new/omitted medical condition claim for cervical radiculopathy. At hearing, the employer agreed that was the issue in dispute, and expressly stated that it "concede[d] nothing" and "expect[ed] claimant to prove each element of the issues raised by [him]." (Tr. I: 6).

¹² Therefore, I express no opinion on the compensability of that claim.

Because claimant bears the burden of proof on the compensability of an alleged *de facto* denial of a new/omitted medical condition claim, he must affirmatively satisfy all elements establishing compensability of such a claim. ORS 656.266; *see also* ORS 656.262(6)(d); ORS 656.267. Thus, as an initial matter, he must prove the existence of the claim, and that the employer did not accept or deny that claim within 60 days after having notice or knowledge of the claim, resulting in a *de facto* denial. *See* ORS 656.262(6)(a); *SAIF v. Stephens*, 247 Or App 107, 112 (2011) (the failure of a carrier to respond to a new/omitted condition claim by either accepting or denying it within 60 days is a procedural deficiency that gives rise to a denied claim); *Penny I. Cooper*, 64 Van Natta 437, 438 (2012) (same).

Here, because the employer did not concede the existence of a new/omitted medical condition claim for cervical radiculopathy, notice or knowledge of such a claim, or a failure to accept or deny such a claim within 60 days of having such notice or knowledge, claimant was *required*, as part of his case, to prove each of those elements, *in addition to* proving the compensability of the claim itself. Although the employer could have stipulated to those elements, it did not. Rather, the employer stated, in no uncertain terms, that it “expect[ed] claimant to prove each element of the issues raised by [him].” (Tr. I: 6). Thus, when the record closed *without* claimant submitting any evidence on the filing and receipt of the disputed claim, the employer was entitled to point out that deficiency in its closing argument. In other words, I would find that the employer properly preserved *all* available “defenses” at the outset of the hearing, and put claimant *on notice* that it “concede[d] nothing,” such that it was entitled in closing arguments to point out his failure to prove “each element of the issues raised by him.” *Id.*

In reaching a different conclusion, the majority determines that the employer raised a “new issue” for the first time in closing argument—*i.e.*, by asserting that claimant’s hearing request was premature. *See Robert S. Masters*, 61 Van Natta 997, 999 (2009) (an issue first raised in closing arguments is ordinarily not considered); *see also* ORS 656.262(6)(d) (a worker who fails to comply with the communication requirements of that paragraph or ORS 656.267 “may not allege at any hearing or other proceeding on the claim a *de facto* denial of a condition * * *”). Because I would find that *claimant*, not the employer, bore the burden of proving all elements necessary to prevail on his request for hearing, I disagree that the assertion of a premature hearing request in closing arguments constitutes a “new issue.” Therefore, I do not find the principle relied on by the majority applicable.

Thus, when claimant, after the record closed, requested permission to reopen the record/continue the hearing to submit additional evidence to satisfy his burden of proof, a decision by the ALJ on that request is subject to an abuse of discretion standard. *See* OAR 438-006-0091; *SAIF v. Kurcin*, 334 Or 399, 406-07 (2002); *Donald E. Bell*, 64 Van Natta 776, 780 (2012). Under that standard of review, 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; *Bell*, 64 Van Natta at 780.

Although I personally disagree with the ALJ's ruling, in that I do not think it was the most *preferred* decision, I am not willing to say that the ruling constituted an abuse of discretion. Specifically, I recognize that, as a practical matter, parties may often proceed to litigate the compensability of a *de facto* denial of a new/omitted medical condition claim without submitting evidence regarding the existence/receipt of a claim. Consequently, when the employer asserted the absence of such evidence as a basis for not addressing the merits of claimant's claim (after a hearing, a continuance, and multiple depositions), I would have allowed claimant's request to continue the hearing for the purpose of establishing the filing/receipt of the new/omitted medical condition claim. However, given that the employer, at the outset of the hearing, put claimant on notice that it conceded nothing and expected him to prove all elements of his case (which, as set forth above, would include the existence and knowledge/notice of a claim more than 60 days before the request for hearing), I would conclude that the record does support the ALJ's decision to deny the continuance. *See Kurcin*, 334 Or at 406; *Bell*, 64 Van Natta at 780. In short, although I do not find the ALJ's ruling *ideal*, I do find it *permissible*.

Consequently, after affirming the ALJ's continuance ruling, the record does not contain evidence establishing a new/omitted medical condition claim or a *de facto* denial. Therefore, I would affirm the ALJ's decision to not address the compensability of the purported new/omitted medical condition claim. Because the majority determines otherwise, I respectfully dissent.