

In the Matter of the Compensation of
DOLORES CATANA-CORTEZ, Claimant
WCB Case No. 15-03188
ORDER ON REVIEW (REMANDING)
Hitt Hiller Monfils Williams, Claimant Attorneys
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Otto's order that: (1) in effect, consolidated claimant's initial hearing request (which concerned temporary disability, penalties and attorney fees) with a subsequent hearing request (given a separate WCB case number with a different scheduled hearing date), thereby amending the issues to include the employer's compensability denial of her occupational disease claim for a mental disorder; and (2) set aside its denial. On review, the issues are the ALJ's procedural ruling and, potentially, compensability. We vacate and remand.

FINDINGS OF FACT

Claimant sustained a compensable injury on May 6, 2013. (Ex. 1). The employer accepted the claim for left shoulder, left hip, left elbow, and left cervical strains. (*Id.*)

On June 1, 2015, claimant filed an occupational disease claim for multiple emotional conditions. (Ex. 5). The sixtieth day for a response to the claim was July 31, 2015. *See* ORS 656.262(6)(a).

On July 10, 2015, claimant requested a hearing, raising as issues temporary disability, "any existing outstanding denials," penalties, and attorney fees. In response, the Hearings Division issued a Notice of Hearing, acknowledged the request as "WCB Case No. 15-03188," and scheduled the hearing for October 1, 2015.

On July 28, 2015, the employer timely denied claimant's emotional conditions claim. (Ex. 6).

On August 10, 2015, claimant filed a second hearing request, contesting the employer's July 28, 2015 denial, and raised other issues such as temporary disability, "any existing outstanding denials," penalties, and attorney fees. She did not request consolidation with any pending cases, but did request an "all day"

hearing. In response, the Hearings Division issued a second Notice of Hearing, acknowledged the request as “WCB Case No. 15-03661,” and scheduled the “all day hearing” for November 9, 2015.

On October 1, 2015, claimant and her counsel appeared at the first scheduled hearing regarding WCB Case No. 15-03188. Neither the employer nor its counsel were present at the hearing. The ALJ and claimant’s attorney described the issues as the July 28, 2015 denial of claimant’s emotional conditions claim, penalties, and attorney fees. (Tr. 1, 2). Temporary disability entitlement was not addressed. Further, there was no discussion about WCB Case No. 15-03661, which was scheduled for hearing in November 2015.

Thereafter, exhibits were presented and admitted into the record and testimony was taken. Following the testimony and closing argument, the record was closed.

CONCLUSIONS OF LAW AND OPINION

The ALJ’s order set aside the employer’s denial of claimant’s emotional conditions and awarded an employer-paid attorney fee under ORS 656.386(1). The ALJ did not find the employer’s denial to have been unreasonable and, therefore, did not award a penalty and associated attorney fee. The order did not refer to WCB Case No. 15-03661.

On review, the employer challenges the ALJ’s authority to address the compensability denial, which was scheduled for hearing in November 2015 (WCB Case No. 15-03661). Based on the following reasoning, we conclude that remand is warranted.

The record establishes that the present case (WCB Case No. 15-03188) pertained to claimant’s hearing request concerning temporary disability, penalties, and attorney fees.¹ Claimant filed a subsequent hearing request regarding the employer’s compensability denial, but that request was designated as WCB Case No. 15-03661 and the hearing was scheduled for a later date. Thus, when claimant began discussing the denial at hearing, she was, in effect, seeking to consolidate the two cases and amend the issues for the ALJ’s consideration. *See* OAR 438-006-0031; OAR 438-006-0065(5).²

¹ Although the request for hearing also referenced “outstanding denials,” the record establishes that no outstanding denials existed at the time of claimant’s hearing request.

² OAR 438-006-0031 regarding “specification of issues,” provides:

By allowing claimant to present evidence regarding the compensability issue, the ALJ, in effect, consolidated WCB Case Nos. 15-03188 and 15-03661, and amended the issues.³ The ALJ did not make any finding or provide reasoning regarding the consolidation of the hearing request or the amendment of the issues raised by the first request for hearing (which was scheduled for October 2015), with the issues raised by the second request for hearing (which was scheduled for November 2015).⁴

“(1) Consistent with the Board’s policy described in OAR 438-005-0035, the request for hearing under OAR 438-005-0070 filed with the Board shall include, on a form prescribed by the Board, a specific listing of all issues to be raised at the hearing and all relief requested.

“(2) Consistent with the Board’s policy described in OAR 438-005-0035, amendments may be allowed, subject to a motion by an adverse party for a postponement under OAR 438-006-0081 or a continuance under OAR 438-006-0091. 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 pursuant to OAR 438-006-0091.”

OAR 438-006-0065(5) regarding consolidation, provides:

“On his/her own motion or, in response to a party’s written motion filed no less than seven (7) days prior to a scheduled hearing, the assigned Administrative Law Judge or the Presiding Administrative Law Judge or his/her designee may, in the interests of substantial justice to all parties, bifurcate consolidated requests for hearing or consolidate separately scheduled hearings.”

The language of the aforementioned rules is discretionary; *i.e.*, the ALJ “may” allow. Therefore, reviewing the ALJ’s consolidation of hearing requests and amendment of issues requires the application of an “abuse of discretion” standard of review. *See Michael D. Leming*, 68 Van Natta 298, 301 (2016); *Robert S. Masters*, 61 Van Natta 997, 999 (2009).

³ The employer eventually submitted evidence concerning the compensability issue, but had not done so at the time of the October 1, 2015 hearing.

⁴ Where such an amendment is permitted, to afford due process, the responding party must be given an opportunity to respond to the new issues raised. *See* OAR 438-006-0091(4); *Neely v. SAIF*, 43 Or App 319, 323, *rev den* 288 Or 493 (1979) (“If claimant had been given no opportunity to present evidence on [the causation] issue in the hearing below, the proper procedure would be for the Board to remand the case to the referee, ORS 656.295(5), for the taking of evidence on that issue.”); *Sandra L. Shumaker*, 57 Van Natta 2986 (2005); *Gregg Muldrow*, 49 Van Natta 1866, 1896 (1997) (where the claimant was surprised by the compensability issue at hearing, his request for a continuance should have been granted, and remand for further development of the record was appropriate); *see also SAIF v. Ledin*, 149 Or App 94 (1997). In other words, a party’s remedy for surprise and prejudice created by a late-raised issue is a motion for continuance. *See* OAR 438-006-0031; OAR 438-006-0036.

Thus, the ALJ provided no explanation for the amendment of issues/consolidation of the hearing requests, which were scheduled for separate hearing dates. In the absence of such an explanation, we are unable to review the ALJ's ruling for an abuse of discretion. *See Cathy A. Ray*, 55 Van Natta 703, 704 (2003) (where the ALJ did not articulate reasons for denying the claimant's motion for a continuance, the record was insufficient to review for an abuse of discretion); *Richard Gallagher*, 55 Van Natta 3222, 3223 (2003) (remanding for explanation of evidentiary ruling); *Herbert Gray*, 49 Van Natta 714 (1997) (same). Under such circumstances, we find this record "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5); *see Ray*, 55 Van Natta at 704-05; *Gray*, 49 Van Natta at 714. Therefore, remand is appropriate.⁵

Accordingly, we vacate the ALJ's October 13, 2015 order and remand to ALJ Otto for further proceedings consistent with this order. Those proceedings may be conducted in any manner that the ALJ deems will achieve substantial justice. Thereafter, the ALJ shall issue a final appealable Order on Remand addressing the relevant issues.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 15, 2016

⁵ The employer argues that the only potentially viable issues on remand are the issues related to the temporary disability dispute, which were raised in claimant's initial hearing request. In doing so, the employer notes that claimant's hearing request regarding the compensability denial in WCB Case No. 15-03661 has been dismissed by a final, unappealed order. Because this matter is being remanded, we leave consideration of the employer's contention to the ALJ.