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In the Matter of the Compensation of  
**PATRICK SHIPPY, Claimant**  
WCB Case No. 15-03608  
ORDER ON REVIEW  
Roger Ousey PC, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Curey and Lanning. Member Curey specially concurs.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Smith's order that: (1) denied its motion to continue the hearing for the deposition of a physician who authored a report, which had been generated by the employer, but submitted by claimant; (2) set aside the employer's denial of claimant's new/omitted medical condition claim for right shoulder conditions; and (3) awarded a penalty-related attorney fee for the employer's allegedly unreasonable denial. On review, the issues are the ALJ's evidentiary ruling, compensability, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the ALJ's evidentiary ruling.

On January 27, 1999, claimant, a delivery truck driver, injured his right shoulder while stacking pallets. (Ex. 2). The employer accepted a right shoulder sprain and a right "long thoracic nerve of bell neuropathy" condition. (Ex. 79).

On May 13, 2015, an MRI showed a right shoulder supraspinatus tear. (Ex. 102-13).

On June 23, 2015, Dr. Erkkila performed an examination at the employer's request. (Ex. 106). Dr. Erkkila assessed a right rotator cuff tear as a consequence of the work injury, and right acromioclavicular joint arthritis, unrelated to the injury. (Ex 106-18). The employer received Dr. Erkkila's report on July 6, 2015. (*Id.*)

On August 7, 2015, claimant initiated a new/omitted medical condition claim for right shoulder rotator cuff tear and impingement syndrome. (Ex. 108). In doing so, claimant's counsel's letter referred to Dr. Erkkila's opinion "explaining how a rotator cuff tear and an impingement syndrome were caused in major part by the altered mechanics of the shoulder flowing from the long thoracic nerve injury." (*Id.*)

On October 6, 2015, the carrier denied responsibility for the new/omitted medical condition claim.<sup>1</sup> (Ex. 110). Claimant requested a hearing. He asked that his request be joined and consolidated with a hearing that had been scheduled for October 27, 2015. (Hearing File).

On October 14, 2015, the employer's counsel submitted an indexed packet of documents for "inclusion in the record." (Hearing File). The packet included Dr. Erkkila's June 23, 2015 report, claimant's counsel's August 7, 2015 letter (*i.e.*, the new/omitted medical condition claim), and the October 6, 2015 denial. (Exs. 106, 108, 110).

On October 19, 2015, the employer's counsel faxed a letter to the ALJ representing that the employer had submitted an "exhibit list in accordance with the Board's rules[,] but was not sponsoring Dr. Erkkila's report. (Hearing File). The employer further "reserve[d] all rights to cross-examination/submittal of rebuttal evidence if claimant intends to rely on the opinions of Dr. Erkkila \* \* \* to support compensability of the disputed conditions." (*Id.*) The employer also moved for postponement of the hearing.

On October 20, 2015, the ALJ held a conference call to consider the employer's postponement motion. (Hearing File). Based, in part, on information that the employer had cancelled employer-requested examinations on September 29, 2015 and October 3, 2015, and had not rescheduled either examination, the ALJ denied the motion. (*Id.*) The ALJ's "interim order" did not mention the employer's October 19, 2015 letter.

At the hearing, the employer's counsel confirmed that, under OAR 438-007-0018(4)(a), the employer was not "sponsoring" Dr. Erkkila's report and asserted a right to cross-examine Dr. Erkkila. (Tr. 3). In response, claimant's counsel represented that claimant would "sponsor" the document, but argued that his sponsorship did not give the employer an "automatic right to cross-examination of a report that they've had \* \* \* for more than four months now, and for which they had indicated they weren't going to sponsor it seven days ago." (*Id.*) Noting that there was "absolutely nothing in this file that indicates that they've tried to go back to their own IME physician to test his opinion in any way, shape, or form[,] claimant's counsel argued that there was no "due diligence" to justify a continuance. (Tr. 4). The employer's counsel countered that it had no notice that claimant intended to rely on Dr. Erkkila's report and its non-sponsorship created

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<sup>1</sup> The carrier amended the denial at hearing to include a compensability defense. (Tr. 6).

an “entitlement to, essentially, cross-examination[.]” (Tr. 5). Claimant’s counsel replied that the only reasonable interpretation of his August 7, 2015 letter (referring to Dr. Erkkila’s report relating claimant’s “current problems” to his work injury) was that claimant was relying on the document in initiating the new/omitted medical condition claim.

The ALJ agreed with claimant’s counsel’s interpretation of the August 7, 2015 letter and denied the employer’s motion for a continuance of the hearing to depose Dr. Erkkila. (Tr. 5). In doing so, the ALJ reasoned that the employer had retained Dr. Erkkila, submitted his report for “inclusion in the record,” and had made no showing of Dr. Erkkila’s unavailability or other evidence of due diligence to justify a continuance. (Tr. 6).

Based on the unrebutted opinions of Dr. Erkkila and Dr. Foreman, claimant’s attending physician, the ALJ set aside the employer’s denial of the new/omitted right shoulder conditions. Finally, finding that there was no legitimate doubt concerning the employer’s liability, the ALJ concluded that the employer’s denial was unreasonable. In the absence of amounts “then due” to claimant, the ALJ awarded a penalty-based attorney fee, but no penalty. *See SAIF v. Traner*, 270 Or App 67 (2014).

On review, the employer argues that the ALJ abused his discretion in denying its “legal right to cross examine Dr. Erkkila.”<sup>2</sup> On review, for the first time, the employer refers to the “7-day rule” (OAR 438-006-0081(2)) and contends that it “clearly exercised due diligence” by immediately requesting cross-examination upon claimant’s submission of the report for admission into the evidentiary record.<sup>3</sup>

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<sup>2</sup> The employer also asserts that it “renews” its objection to the inclusion of Dr. Erkkila’s report. Citing *William Shelton*, 62 Van Natta 1051, 1059 (2010), the employer argues that cross-examination is a “statutory right.” *See Williamson v. SAIF*, 10 Or App 504, 508 (1972) (“The plain meaning of [ORS 656.310(2)] is that a doctor may be cross-examined concerning his surgical and medical reports as a matter of right if they are to be received \* \* \*”). However, the employer did not object at hearing to the inclusion of Dr. Erkkila’s report. Thus, we decline to consider this objection, raised for the first time on review. *See Fister v. South Hills Heath Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing); *Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing).

<sup>3</sup> The employer also challenges the ALJ’s compensability decision and penalty-related attorney fee award. We adopt and affirm those portions of the ALJ’s order.

We do not address the employer's reliance on the "7-day rule" because the application of that rule was neither raised at the hearing nor employed by the ALJ in his evidentiary ruling. *Fister*, 149 Or App at 218-19; *Stevenson*, 108 Or App at 252. For the following reasons, we find no abuse of discretion in the ALJ's ruling.

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). That statute gives the ALJ broad discretion on determinations concerning the admissibility of evidence. See *Brown v. SAIF*, 51 Or App 389, 394 (1981). We review the ALJ's continuance and evidentiary rulings for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002). In doing so, we consider whether the record supports the ALJ's decision. *Id.* at 406. If the record would support the ALJ's decision, but would also support a different decision, there is no abuse of discretion. *Id.*

A continuance may be granted "upon a showing of due diligence, as described in OAR 438-006-0081(2), if necessary to afford reasonable opportunity to cross-examine on documentary medical \* \* \* evidence." OAR 438-006-0091(2).

Here, the record does not establish that, during the 16 weeks between the employer's receipt of the report in question and the hearing, the employer made any attempt to clarify/supplement Dr. Erkkila's opinion.<sup>4</sup> Under such circumstances, we find no abuse of discretion in the ALJ's ruling that a continuance of the hearing for the purpose of cross-examination was not justified because the employer had not met the "due diligence" requirement of OAR 438-006-0091(2).<sup>5</sup>

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<sup>4</sup> The employer scheduled examinations with other physicians on September 29, 2015 and October 3, 2015, but those examinations were cancelled. (Hearing File). The ALJ denied the employer's motion to postpone the hearing, but stated that he would entertain motions at the hearing to leave the record open for further response from claimant's physician and/or another medical examination. (*Id.*) At the hearing, the employer did not move to leave the record open for either of these purposes.

<sup>5</sup> We acknowledge that, in *Carmen Francisco*, 68 Van Natta 297 (2016), the majority of the review panel found no abuse of discretion in an ALJ's ruling that allowed a continuance under circumstances similar to the case presently before us. Nevertheless, our review is limited to whether this particular record supports the ALJ's ruling that denied a continuance/cross-examination. For the reasons previously expressed, we find no abuse of discretion in the ALJ's reasoning and decision.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2), (3). 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 on review 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), the complexity of the issues, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the employer's denial of the new/omitted medical condition claims for a right shoulder rotator cuff tear and impingement syndrome, 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 described in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated November 16, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$5,000, payable 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 aforementioned denial, to be paid by the employer.

Entered at Salem, Oregon on August 17, 2016

Member Curey specially concurring.

While I agree with the lead opinion's conclusions, I write separately to comment on the applicability of the "7-day rule" where a party requests a continuance for purposes of cross-examination of the author of a report it filed under OAR 438-007-0018, subsequently withdraws that report, and another party sponsors the report for submission into the hearing record.

By its express terms, the "7-day rule" applies to situations where "the request for cross-examination was made no later than seven (7) days *after the requesting party received from another party* a copy of the report from the medical or vocational expert witness accompanied by written notice that the sending party is submitting the report as a proposed exhibit for admission into evidence at a scheduled hearing." OAR 438-006-0081(2) (Emphasis supplied).

Here, in contrast to such a situation, the employer requested an independent medical examination, obtained the physician's report, and provided it to claimant as part of the exhibit packet it was required to file under OAR 438-007-0018(1). In other words, the employer did not first receive Dr. Erkkila's report from claimant; rather, it generated the report in preparation for litigation to support its denial and disclosed the report to claimant in advance of the scheduled hearing.

I would interpret the "7-day rule" to apply to situations where the requesting party has received the disputed medical report, *for the first time*, from another party who expresses an intention to rely on the document. To interpret the rule otherwise would ignore the express language of the rule. Thus, I would conclude that the employer's request for cross-examination of a report it generated and disclosed prior to the scheduled hearing, following its subsequent "withdrawal" of the report and claimant's "sponsorship" of the report for submission into the hearing record, does not satisfy the criteria for "due diligence" under the "7-day rule."<sup>6</sup>

I would further find that the "sponsorship" rule simply provides that the employer must file all relevant and material documents. It does *not* mean that a party is automatically entitled to cross-examine the authors of any of those documents. *See* OAR 438-007-0018(4).

My analysis concerning the "7-day" and "sponsorship" rules does not, in general, preclude a party from seeking/obtaining a continuance of the hearing for purposes of cross-examining the admitted report's author. Rather, it requires the party requesting a continuance for cross-examination to satisfy the "due diligence" requirement of OAR 438-006-0091(2), without reliance on the "7-day rule" or the "sponsorship" rule.

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<sup>6</sup> Under these particular circumstances, the record also does not support a conclusion that the employer was surprised by claimant's submission of this report.