

In the Matter of the Compensation of  
**CARMEN M. FRANCISCO, Claimant**

WCB Case No. 14-02542

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Weddell, Johnson, and Somers. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that upheld the self-insured employer's denial of her injury claim for a right shoulder condition. Claimant also challenges the ALJ's ruling granting a continuance of the hearing to allow the employer an opportunity to cross-examine physicians, based on claimant's submission of their reports at the hearing. On review, the issues are the ALJ's procedural ruling and compensability.

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

Claimant, a laundry worker, filed a claim for right shoulder pain, asserting that she injured her shoulder throwing trash into a dumpster. (Ex. 2). On March 26, 2014, based on information that claimant heard a "pop" and had a fair amount of pain in her right shoulder while throwing a heavy garbage bag, Dr. Henderson, claimant's attending physician, assessed a work-related right shoulder/arm strain injury. (Ex. 6).

On May 19, 2014, the employer denied the claim, asserting that there was insufficient evidence that claimant's right shoulder disability and need for treatment arose out of and within the course and scope of employment. (Ex. 33A). Claimant requested a hearing.

On July 18, 2014, Dr. Youngblood, an orthopedic surgeon, performed an examination at the employer's request. Based on information that claimant noted pain in her right shoulder while throwing a bag of adult diapers into a garbage bin, Dr. Youngblood diagnosed a right shoulder strain and bursitis, related to the work event. (Ex. 39-7, -12).

On August 1, 2014, the employer's counsel submitted to the ALJ an indexed packet of documents "for inclusion in the record." (Hearing File). The packet included Dr. Henderson's chart notes and Dr. Youngblood's report. (Exs. 6, 24, 32, 39).

At the hearing, the employer's counsel represented that, under OAR 438-007-0018(4), the employer was not "sponsoring" Dr. Henderson's chart notes or Dr. Youngblood's report.<sup>1</sup> (*Id.*) The ALJ interpreted the representation as a "withdrawal" of those exhibits, whereupon claimant's counsel "reoffered" the exhibits. (Tr. I-3). Asserting the "right to cross-examination," the employer's counsel requested a continuance to cross-examine Drs. Henderson and Youngblood. (Tr. I-3, -5). Claimant's counsel objected, contending that the employer had not shown that it met the continuance rule's "due diligence" requirement. (*Id.*) See OAR 438-006-0091(2). In response, the employer's counsel argued that, under the administrative rules, it had an obligation to "submit everything," and when it confirmed at hearing that claimant was "sponsoring" the documents, it timely preserved its right to cross-examine the authors of those documents.<sup>2</sup> (Tr. I-7).

After considering the circumstances and the parties' respective positions, the ALJ concluded that the employer had acted with "due diligence" in making its "cross-examination" request.<sup>3</sup> (Tr. I-8). See OAR 438-006-0091(2). Accordingly,

---

<sup>1</sup> Specifically, the employer's counsel explained his position as follows,

"My understanding of the new \* \* \* administrative scheme we're dealing with is, the employer never sponsored these exhibits in the first place, they simply prepared an exhibit packet. And at some point the onus is on the parties to accept sponsorship or identify sponsorship. And I acknowledge, I think we're all going to need to modify our practices to do this earlier on in the process. It was not done until this proceeding here today. But so we submitted an exhibit packet and what my position is, is I am willing to sponsor all but [the] chart notes authored by [Dr.] Henderson, and the independent medical examination report authored by Dr. Young." (Tr. 2).

<sup>2</sup> The employer's counsel contended,

"We're dealing with \* \* \* some new administrative rules and \* \* \* the employer now has an obligation under the new scheme to submit everything. And at some point in time – And, again, I would concede, we both – both parties could have done this earlier, is identified which exhibits from the packet each party was going to sponsor. Unfortunately, this didn't happen until the hearing today. And once the employer confirmed that the claimant was going to sponsor the exhibits at issue, then I timely reserved my right to cross-examine the experts associated with those exhibits." (Tr. 7).

<sup>3</sup> The ALJ expressly reasoned as follows,

"\* \* \* I announced the \*\*\* or at least paraphrased the new rule in (4) of 007-0018 a second ago, and then I was just reading from the order

the ALJ overruled claimant's counsel's objection and granted a continuance for the cross-examination of Drs. Henderson and Youngblood. (*Id.*)

Claimant's counsel then asked for a continuance to obtain and present final rebuttal evidence, which the ALJ granted. (Tr. I-13, -14). *See* OAR 438-006-0091(3).

Thereafter, testimony was taken from claimant and Ms. Nueva, claimant's supervisor. Claimant testified that she felt "a little bit of pain" in her right shoulder while tossing the bag of garbage into the dumpster. (Tr. I-20, -26). She did not know how much the bag weighed, but believed it was more than 20 pounds. (Tr. I-25, 26). She acknowledged telling Ms. Nueva that her shoulder "popped" during a massage by a friend. (Tr. I-30). Ms. Nueva testified that the bag would not have weighed more than five and one-half pounds. (Tr. I-36). She also testified that claimant told her that she did not know if she hurt her arm at work because her arm started hurting later that evening when she was at home. (Tr. I-38). On re-direct examination, claimant maintained that she hurt her right shoulder at work. (Tr. I-43).

---

of adoption just a little brief commentary. These amendments are \* \* \* designed to address the occasional procedural issues that arise concerning the right to cross-examine based on the parties filing of a document. This language provides clarification regarding the effect of filing documents and sponsorship of that document for purposes of cross-examination request.

"So the rule was \* \* \* designed to modify the prior background rule, I suppose, in just this instance. I mean, not necessarily by the employer, a request by the employer. But I do find that I still must apply OAR 438-006-0081 and 0091, that's the postponement and continuance rule. And that one does include a due diligence requirement for cross-examination of \* \* \* the author of \* \* \* an exhibit. But it may not be triggered until, and this is consistent with \* \* \* 006-0081 sub \* \* \* (2). That's the due diligence can be satisfied, I'm again paraphrasing, that provided that a request for cross was made no later than seven days after the requesting party, here it's the employer, received from another party a copy of a report accompanied by a written notice that the sending party is submitting the report as a proposed exhibit for admission.

"So what we're technically dealing with here is the claimant's submission today at the date of the hearing, of Exhibits 6, 24, 32 and 39 and 33A, so those include the reports from Dr. Henderson and Dr. Youngblood. And I find this is a new experience for the Hearings Division, but I do find here that there has been due diligence as well, and I'm allowing the continuance request to cross Dr. Henderson and Dr. Youngblood after today." (Tr. 7, 8).

Following the hearing, the parties deposed Drs. Henderson and Youngblood. The physicians changed their opinions on causation based on the testimony of claimant and Ms. Nueva. Dr. Youngblood opined that the work incident was not a material contributing cause of claimant's disability and need for treatment. (Ex. 40-18, -23). Dr. Henderson testified that it was "possible" that claimant strained her right arm/shoulder while throwing the garbage into the dumpster, but "extremely unlikely." (Ex. 41-17, -26).

Transcriptions of the physicians' depositions were submitted to the ALJ, who admitted them into the record. (Tr. II-1). When claimant did not present rebuttal evidence, the ALJ closed the record. (*Id.*)

In upholding the employer's denial, the ALJ relied on the physicians' deposition testimony and concluded that claimant had not persuasively established a compensable right shoulder injury. On review, claimant contends that the continuance should not have been allowed and that the physicians' deposition testimony should not have been considered.

We adopt and affirm the ALJ's compensability decision. For the following reasons, we find no abuse of discretion in the ALJ's rulings.

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 an 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.*

Here, the applicability of ORS 656.310(2) and the Board's rules regarding continuances and evidence are at issue. OAR 438-006-0091(2); OAR 438-007-0018. Under ORS 656.310(2), each party has the right to cross-examine any physician who has authored a medical report presented by the opposing party. ORS 656.310(2);<sup>4</sup> *Williamson v. SAIF*, 10 Or App 504, 508 (1972) ("The plain

---

<sup>4</sup> ORS 656.310(2) provides, in part, that:

"The contents of medical, surgical and hospital reports presented by claimants for compensation shall constitute prima facie evidence as to the

meaning of this language is that a doctor may be cross-examined concerning his surgical or medical reports as a matter of right if they are to be received \* \* \*.”); *William Shelton*, 62 Van Natta 1051, 1056 (2010) (the “prima facie evidence” status of medical and surgical reports is expressly conditioned on the authors of those reports consenting to submit to cross examination). 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).

OAR 438-007-0018 prescribes the procedure for the submission of documentary medical evidence at the hearing. Pursuant to OAR 438-007-0018(1), the employer was required to provide claimant copies of all documents that were relevant and material to the matters in dispute in the hearing. This so-called “filing” does not establish that the carrier is “sponsoring” the documents for purposes of admission into evidence or cross-examination. OAR 438-007-0018(4).

Here, at hearing, the employer took the position that, for purposes of admission into the evidentiary record, it was “sponsoring” all of the submitted documents except for the reports of Drs. Henderson and Youngblood. Claimant then “sponsored” the reports of Drs. Henderson and Youngblood, by seeking their admission into the evidentiary record, at which point the employer asserted its “cross-examination” rights. After considering these particular circumstances, the ALJ found that the employer acted with due diligence in seeking a continuance at that time because it requested cross-examination of those physicians as soon as claimant offered their reports as evidence.<sup>5</sup> Under these particular circumstances, we find no abuse of discretion in the ALJ’s continuance ruling, which allowed the employer to cross-examine Drs. Henderson and Youngblood. OAR 438-006-0091(2). Therefore, we affirm.<sup>6</sup>

---

matter contained therein; so, also, shall such reports presented by the insurer or self-insured employer, provided that the doctor rendering medical and surgical reports consents to submit to cross-examination. \* \* \*

<sup>5</sup> Contrary to the dissent’s representation, the ALJ did not specifically rely on the “7-day rule” to make his “due diligence” finding. Instead, the ALJ also considered the effect of the “sponsorship” rule (OAR 438-007-0018(4)) on the employer’s “pre-hearing” actions and its “cross-examination/continuance” request. After doing so, the ALJ ruled that the “due diligence” requirement for the granting of a continuance had been satisfied.

<sup>6</sup> Citing *Cathy A. Inman*, 47 Van Natta 1316 (1995), *aff’d without opinion*, 144 Or App 192 (1995), the dissent asserts that the employer should have requested cross-examination before claimant submitted Dr. Henderson’s chart notes and Dr. Youngblood’s report for admission into the evidentiary record. We do not find *Inman* to be particularly instructive. There, the claimant waited 17 days after the

---

ORDER

The ALJ's order dated January 13, 2015 is affirmed.

Entered at Salem, Oregon on June 10, 2016

Member Weddell dissenting.

The majority finds no abuse of discretion in the ALJ's "continuance" ruling. I disagree with the majority's analysis, which ignores case precedent, runs contrary to the Board's responsibility to provide timely and impartial resolution of disputes, and promotes gamesmanship. Because I disagree with the majority's analysis, I respectfully dissent.

I agree that a party has the right to cross-examine a physician on a medical report presented by the opposing party, but the right to cross-examine is subject to the procedural limitations regarding the timely scheduling of hearings. ORS 656.283(3)(a) (the hearing must be scheduled no later than 90 days after the Board's receipt of a hearing request and may not be postponed except in extraordinary circumstances beyond the control the requesting party); OAR 438-006-0091(2) (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"). I disagree with the majority's conclusion that it was not an abuse of discretion for the ALJ to determine that the employer satisfied the "due diligence" requirement for the granting of a continuance. See OAR 438-006-0091(2).

The Board's continuance rule requires the parties to be prepared to present all of their evidence at the scheduled hearing. OAR 438-006-0091. Continuances are disfavored. *Id.* Likewise, a hearing may not be postponed, absent a showing of "extraordinary circumstances." OAR 438-006-0081(1). "Incomplete case preparation" does not constitute "extraordinary circumstances," unless the ALJ finds that completion of the record could not be accomplished with "due diligence." OAR 438-006-0081(1)(d).

---

exhibits were submitted for admission into the evidentiary record before requesting cross-examination. The delay was unexplained and the request was considered to be untimely. Here, the employer requested cross-examination immediately after claimant sponsored the documents for admission into the evidentiary record. In requesting cross-examination, the employer relied on the "sponsorship" rule, which was not in effect at the time *Inman* was decided. Furthermore, we had not previously interpreted the "sponsorship" rule in this context. Considering these specific circumstances, particularly the effect of the "sponsorship" rule, we find no abuse of discretion in the ALJ's "continuance/cross-examination/due diligence" ruling.

“‘Due diligence’ means the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation.” OAR 438-005-0040(7); *SAIF v. Kurcin*, 334 Or 399, 407 (2002). As described in OAR 438-006-0081(2), “due diligence” includes, but is not limited to, a party’s inability to produce a medical expert witness for cross-examination at the hearing or by deposition/interrogatories prior to a scheduled hearing, provided that 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.”

The “7-day rule” is a component/corollary of the “continuance/cross-examination” rule. OAR 483-006-0081(2); OAR 438-006-0091(2). Yet, while the “continuance/cross-examination” rule contains “discretionary” language (*i.e.*, a continuance “may” be granted), the “7-day rule” is not framed in discretionary terms. Thus, as a matter of law, a particular scenario either meets the requirements of the “7-day rule” or it does not.

I do not believe this situation is envisioned by the “7-day rule.” To the contrary, because the employer had the documents in its possession and did not receive them from claimant as specified by the rule, the situation does not meet the prerequisites to be deemed “due diligence” under the “7-day rule.” OAR 438-006-0081(2). Because the ALJ’s continuance ruling was partially (if not completely) premised on the carrier’s satisfaction of the “7-day rule,” it necessarily follows that the ALJ’s continuance ruling represents an error of law and, as such, an abuse of discretion.

In reaching its conclusion, the majority does not address the ALJ’s application of the “7-day rule.” *See* OAR 438-006-0081(2). Yet, the ALJ specifically referred to that rule before granting the continuance. (Tr. 8). Specifically, the ALJ paraphrased the “7-day rule” in determining that “due diligence can be satisfied \* \* \* provided that request for cross was made no later than seven days after the requesting party, here it’s the employer, received from another party a copy of a report accompanied by a written notice that the sending party is submitting the report as a proposed exhibit for admission.”<sup>7</sup> (*Id.*) Turning

---

<sup>7</sup> In addressing the interplay between OAR 438-007-0018(4), and OAR 438-006-0081 and OAR 438-006-0091, the ALJ stated:

to claimant's "at-hearing" submissions, the ALJ then concluded that there had been due diligence by the employer for cross-examination purposes.<sup>8</sup> (*Id.*) Under such circumstances, the only reasonable interpretation of the ALJ's ruling is a reliance on the "7-day" rule as the basis for the determination that "due diligence" had been established for purposes of the "continuance/cross-examination" rule. *See* OAR 438-006-0081(2). The ALJ cited no other basis for this "continuance/due diligence" determination.

The parties' positions on review are consistent with this interpretation of the ALJ's ruling. For instance, claimant argues that none of the disputed documents were provided to the employer by claimant with written notice that she was submitting the report as a proposed exhibit; *i.e.*, the "7-day rule" does not apply because the documents were in the employer's possession. In responding, the employer argues that the "7-day rule" applies when a party "sponsors" documents for admission into the evidentiary record at a hearing.

---

" \* \* \* [OAR 438-007-0018(4) is] designed to address the occasional procedural issues that arise concerning the right to cross-examine regarding the effect of filing documents and sponsorship of that document for purposes of cross-examination request.

"So [OAR 438-007-0018(4)] was \* \* \* designed to modify the prior background rule, I suppose in just this instance. I mean, not necessarily by the employer, a request by the employer. But I do find that I still must apply OAR 438-006-0081 and [OAR 438-006]-0091, that's the postponement and continuance rule. And that one does include a due diligence requirement for cross-examination of \* \* \* an exhibit. But it may not be triggered until, and this is consistent with \* \* \* [OAR 438]-006-0081 \* \* \* (2). [That] the due diligence can be satisfied, I'm again paraphrasing, that provided that request for cross was made no later than seven days after the requesting party, here it's the employer, received from another party a copy of a report accompanied by a written notice that the sending party is submitting the report as a proposed exhibit for admission." (Tr. 7, 8).

<sup>8</sup> In concluding that there had been "due diligence," the ALJ stated,

"So what we're technically dealing with here is the claimant's submission today at the date of the hearing, of \* \* \* the reports from Dr. Henderson and Dr. Youngblood. And I find this is a new experience for the hearing's division, but I do find here that there has been due diligence as well, and I'm allowing the continuance request to cross Dr. Henderson and Dr. Youngblood after today." (Tr. 8).

Based on the foregoing, I disagree with the majority's reasoning supporting its conclusion that the ALJ's ruling did not constitute an abuse of discretion. In particular, the majority does not address the basis for the ALJ's "continuance/due diligence" determination; *i.e.*, the "7-day rule."

Additionally, irrespective of the "7-day rule" question, I disagree with the majority's conclusion that the ALJ's continuance ruling was not an abuse of discretion. The majority relies on the ALJ's "finding" that the employer acted with due diligence because it requested cross-examination as soon as claimant offered the reports into evidence. Yet, the ALJ did not identify any actions the employer took, or reasons for not taking action, to complete its case preparation before the hearing.

Under the majority opinion, the "right" to cross-examination would arise only after the physician's report is offered into evidence. However, we have previously observed that ORS 656.310(2) does not preclude a party from requesting cross-examination prior to submission of the physician's report into evidence if the party knows, or reasonably should know, that the report will be offered into evidence. *See Cathy A. Inman*, 47 Van Natta 1316, 1318 (1995), *aff'd without opinion*, 144 Or App 192 (1996) (requiring the moving party to exercise due diligence in pursuing cross-examination of a physician whose report the party knew, or reasonably should have known, would be offered into evidence).

In *Inman*, we reasoned that if a party who is in receipt of adverse reports could wait until those reports are formally offered into evidence before requesting cross-examination, we would be encouraging parties to do nothing until reports are submitted into evidence, resulting in precisely the types of delays which the promulgation of the postponement and continuance rules was designed to avoid.

Here, at least three weeks before the hearing, the employer had possession of Dr. Henderson's chart notes and Dr. Youngblood's report and knew, or reasonably should have known, that those documents would be offered into evidence. At that point, the employer should have requested cross-examination. Alternatively, the employer could have contacted the physicians to obtain supplemental information. Because the employer waited until the hearing to request cross-examination, and offered no explanation for why it did not complete its case preparation prior to the hearing, I would find that it was an abuse of discretion for the ALJ to grant a continuance and admit the cross-examination deposition testimony.

To the extent that the employer relied on the “sponsorship” rule to establish that it acted with “due diligence,” that rule does not provide a reasonable explanation for its delay in pursuing cross-examination or obtaining supplemental information. Instead, the rule simply provides that the carrier’s “filing” of all “relevant and material” documents will not establish that the carrier is the sponsor of those documents for purposes of admission into the evidentiary record or that the claimant is automatically entitled to cross-examine the author of any of those documents. OAR 438-007-0018(4). Thus, the rule does not address the carrier’s entitlement to cross-examine the authors of the carrier-submitted documents or require the carrier to withdraw (or the claimant to reoffer) those documents to trigger the carrier’s entitlement to cross-examination.

Moreover, the employer’s position at the hearing does not support the existence of “due diligence” in its “pre-hearing” actions. In seeking the continuance, the employer asserted that “at some point, the onus is on the parties to accept sponsorship or identify sponsorship” and that “both parties could have done this earlier.” (Tr. 2, 7). Yet, it was incumbent on the employer, as the moving party, to satisfy the “due diligence” requirement. Notwithstanding this evidentiary obligation, the employer did not identify any circumstance that either prevented or delayed it from contacting the physicians in question or from otherwise preparing its case for hearing. For these reasons as well, I would conclude that the ALJ’s “continuance/cross-examination” ruling based on a “due diligence” determination (without consideration of the “7-day rule”) constitutes an abuse of discretion.

Turning to the compensability issue, I would find, based on the record presented at the hearing, that claimant met her burden of proving that her work injury was a material contributing cause of her disability/need for treatment. *See* ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). Claimant satisfied her burden to prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer’s Co-op Creamery*, 53 Or App 618, 621, *rev den*, 291 Or 893 (1981); *Darla Litten*, 55 Van Natta 925, 926 (2003). Her testimony, supported by that of Ms. Nueva, establishes that she engaged in potentially causal work activity (*i.e.*, legal causation). (Tr. I-20, 37-38). Furthermore, Dr. Henderson’s chart notes and Dr. Youngblood’s report establish that the work activity caused her right shoulder condition and need for treatment. (Exs. 6, 39-14).

Accordingly, I would reverse the ALJ’s continuance ruling and set aside the employer’s denial. Because the majority reaches different conclusions, I respectfully dissent.