

In the Matter of the Compensation of  
**WILLIAM S. BAUMHOFER, Claimant**

WCB Case No. 08-00402

ORDER ON REVIEW

Unrepresented Claimant

Jeff R Gerner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant, *pro se*,<sup>1</sup> requests review of Administrative Law Judge (ALJ) Spangler's order that dismissed his hearing request. On review, the issue is the propriety of the ALJ's dismissal order.

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

An October 2, 2008 Notice of Hearing was mailed to claimant's last known address on November 7, 2008. That notice informed claimant of the date, time, and location of a December 4, 2008 hearing. The notice was not returned undelivered by the postal service.

On December 4, 2008, the hearing convened as scheduled. Claimant, *pro se*, did not appear. Because neither claimant nor a legal representative had appeared at the scheduled hearing, the ALJ issued a December 5, 2008 Order of Dismissal dismissing claimant's hearing request as having been abandoned. *See* OAR 438-006-0071(2). That same day, claimant filed a request to reschedule his hearing, which the ALJ construed as a motion for reconsideration of the dismissal order. On December 9, 2008, the ALJ abated his December 5, 2008 order to consider claimant's request.

In his request for a rescheduled hearing, claimant argued that: (1) he was waiting for a "conference" between the SAIF Corporation and Medicare to take place; (2) he received a telephone call on December 4, 2008 that allegedly led him to believe the hearing was set for December 5, 2008; (3) he was sick; and (4) he believed the record was incomplete. (Hearing File).

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<sup>1</sup> Inasmuch as claimant is unrepresented, he may wish to consult the Ombudsman for Injured Workers, whose job it is to assist injured workers in such matters. He may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

DEPT OF CONSUMER & BUSINESS SERVICES  
OMBUDSMAN FOR INJURED WORKERS  
PO BOX 14480  
SALEM OR 97309-0405

After considering claimant's position, and SAIF's response, the ALJ issued a December 18, 2008 Order on Reconsideration that republished the initial dismissal order. In doing so, the ALJ determined that claimant had not established "extraordinary circumstances" justifying his failure to appear at the December 4, 2008 hearing. *See* OAR 438-006-0071(2). Claimant requested review.

Under OAR 438-006-0071(2), when a party requesting a hearing fails to appear, the ALJ shall dismiss the request for hearing as abandoned unless "extraordinary circumstances" justify postponement or continuance of the hearing. A postponement requires "a finding of extraordinary circumstances beyond the control of the party or parties requesting the postponement." OAR 438-006-0081.<sup>2</sup>

On review, claimant states that he "still feels the case(s) was (were) improperly dismissed." However, beyond that, he does not provide any additional explanation for his failure to appear at the scheduled hearing.

Because this matter is before us based on claimant's request for review of the ALJ's dismissal decision, the sole issue at this point is whether extraordinary circumstances existed which justified a postponement or continuance of the

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<sup>2</sup> OAR 438-006-0081 provides for postponement of hearings and states, in relevant part:

"(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 of the party or parties requesting the postponement. 'Extraordinary circumstances' shall not include:

"(a) Failure of the insurer or self-insured employer to refer, or delay in referring, the case or any pertinent information to its representative;

"(b) Unavailability of a party, lay witness or representative due to nonemergency occupational, personal or professional business or appointments, or unwillingness to appear, provided that a postponement may be granted if the unavailable person is a worker who is temporarily working out of state and is reasonably expected to return to the state within a time certain or is a person who has been duly subpoenaed and has failed to comply with the subpoena;

"(c) An attorney's, party's, representative's or witness' conflict with proceedings before another administrative body that are scheduled more than three days after mailing of the Hearings Division's notice of hearing;

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

previously scheduled hearing.<sup>3</sup> That is, we cannot address the merits of claimant's claim unless and until we resolve the question of whether the ALJ properly dismissed his hearing request.

On that issue, we agree with the ALJ that the circumstances described by claimant in his request for a rescheduled hearing do not rise to the level of "extraordinary." See OAR 438-006-0081. To the extent it can be inferred that claimant was unable to attend the hearing due to his noted "post-Thanksgiving sickness," we acknowledge that being under the influence of medication or adverse effects of treatment may justify a failure to appear. See *Bette A. Delgado*, 42 Van Natta 443 (1990) (extraordinary circumstances found where, on the day of the scheduled hearing, the claimant was incapacitated due to illness); *Mark S. Lesowske*, 41 Van Natta 2154 (1989) (finding extraordinary circumstances where the claimant was discharged from two-week stay in the hospital on the day of the hearing). However, claimant also specifically noted in his "request" that he was planning to attend the hearing (albeit on the wrong day). Under such circumstances, without medical verification to support a finding that he was mentally or physically incapable of attending the hearing on the scheduled date, we conclude that an alleged illness in this case does not constitute "extraordinary circumstances" excusing claimant's appearance at the scheduled hearing.

Furthermore, a claimant's confusion regarding the time and place of hearing is generally not an "extraordinary circumstance" that justifies the postponement or continuance of a scheduled hearing. See *Valeria Cabrera-Gallardo*, 58 Van Natta 566 (2006) (the claimant's inability to locate the building where her hearing was scheduled was not an extraordinary circumstance); *Nancy A. Rodriguez*, 55 Van Natta 2394 (2003) (the claimant's mistaken belief that she was to participate by telephone was not an extraordinary circumstance); *Dorothy M. Moody*, 54 Van Natta 1364 (2002) (forgetting to attend the hearing was not an extraordinary circumstance); *Rolando M. Garcilazo*, 49 Van Natta 620 (1997) (the claimant's confusion over the time of the hearing was not an extraordinary circumstance). We apply this rationale to the circumstances of this case.

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<sup>3</sup> Because the ALJ considered claimant's explanation for his failure to appear at the hearing, we can address the question of whether claimant established "extraordinary circumstances." If the ALJ had not done so, a remand to the ALJ would have been necessary. See *Herlinda Rubio*, 60 Van Natta 4 (2008); *Enrique Torralba*, 52 Van Natta 357 (2000).

In sum, based on the reasons set forth in his December 5, 2008 “request,” claimant has not established that extraordinary circumstances prevented his attendance at the December 4, 2008 hearing. Accordingly, we find the ALJ’s dismissal order appropriate and affirm his decision. Because of this finding, we are unable to reach the merits of claimant’s claim at this time.

ORDER

The ALJ’s order dated December 5, 2008, as reconsidered on December 18, 2008, is affirmed.

Entered at Salem, Oregon on May 22, 2009