

In the Matter of the Compensation of
ANDREW J. OLIVER, Claimant
WCB Case No. 13-06252
ORDER ON REVIEW
Edward J Hill, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Jacobson's order that: (1) found that claimant had not established extraordinary circumstances for his failure to appear at his scheduled hearing; and (2) dismissed his hearing request as abandoned. 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.

On August 4, 2015, the ALJ convened a hearing, at which neither claimant nor his attorney appeared. (Tr. 1). On August 7, 2015, the ALJ dismissed claimant's hearing request as abandoned under OAR 438-006-0071(2). Thereafter, the ALJ's order was abated to consider claimant's motion for reconsideration.

In his motion, claimant's counsel contended that he reasonably believed that the August 4, 2015 hearing had been consolidated with another case involving the parties, which was set for hearing on August 19, 2015. Claimant's counsel conceded that he had received notice of the August 4, 2015 hearing by May 11, 2015, and he had received notice of the August 19, 2015 hearing on June 8, 2015 (each of which referred to separate WCB case numbers). Claimant's counsel further acknowledged his "incorrect" assumptions that: (1) the hearing set for August 19, 2015 was a "consolidated" hearing concerning both cases; and (2) the scheduling for the August 19, 2015 hearing superseded the previously scheduled August 4, 2015 hearing.

The ALJ concluded that claimant's counsel's explanation for not appearing at the scheduled hearing did not constitute "extraordinary circumstances" which would justify a postponement of the hearing. Accordingly, the ALJ reinstated the dismissal of claimant's hearing request.

On review, claimant renews his assertion that his counsel's "incorrect assumption" concerning the scheduling of the two hearings constitutes "extraordinary circumstances." For the following reasons, we disagree.

OAR 438-006-0071(2) provides:

"Unjustified failure of a party or the party's representative to attend a scheduled hearing is a waiver of appearance. If the party that waives appearance is the party that requested the hearing, the Administrative Law Judge shall dismiss the request for hearing as having been abandoned unless extraordinary circumstances justify postponement or continuance of the hearing."

Here, we acknowledge the existence of some overlap between the issues set for hearing on August 4, 2015 and August 19, 2015, as evidenced by the SAIF Corporation's submission of a similar record for both hearings. Nonetheless, such a situation, in and of itself, does not constitute extraordinary circumstances.

In the hearing request regarding SAIF's subsequent April 2, 2015 denial,¹ claimant's counsel expressly did not seek consolidation with other pending cases. (Claimant's App. Br., Appendix A, p. 10). Moreover, claimant's counsel acknowledged receipt of separate notices of hearing for each case, which reflected different WCB case numbers. Finally, no order or notice of consolidation of the pending hearing had been issued.² Under such circumstances, claimant's counsel's "consolidation" assumption was not justified.

The ALJ's decision is also consistent with case precedent applying OAR 438-006-0071(2). *See, e.g., Amos K. Tilford*, 64 Van Natta 2035, 2036-37 (2012) (the claimant's alleged confusion regarding the time and place of a scheduled hearing was not sufficient to establish "extraordinary circumstances"). Moreover, we have consistently held that a calendaring error by a claimant's attorney is not an "extraordinary circumstance" justifying a postponement. *See Ethan W. Fitch*, 58 Van Natta 2702 (2006) (calendaring error by the claimant's

¹ The current case pertains to claimant's hearing request regarding SAIF's December 2013 denial.

² There is no indication that claimant's counsel attempted to contact the Hearings Division for clarification of his ill-founded "consolidation" assumption.

counsel not an extraordinary circumstance justifying a postponement under OAR 438-006-0071(2)); *cf. Scott P. Pachal*, 64 Van Natta 1657 (2012) (the claimant’s incarceration at time of scheduled hearing constituted “extraordinary circumstances” beyond his control that justified a postponement under OAR 438-006-0081(1)).

In conclusion, based on the aforementioned reasoning, we agree with the ALJ’s determination that “extraordinary circumstances” did not justify the postponement of claimant’s scheduled hearing or excuse his appearance at hearing. *See* OAR 438-006-0071(2); OAR 438-006-0081(1). Accordingly, we affirm.

ORDER

The ALJ’s order dated November 17, 2015 is affirmed.

Entered at Salem, Oregon on May 10, 2016