

In the Matter of the Compensation of  
**DAVID J. BOSWELL, Claimant**  
WCB Case No. 15-03647  
ORDER ON REVIEW  
Miller Law, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Otto's order that: (1) denied its motion to postpone/continue the hearing; (2) awarded claimant's counsel a carrier-paid attorney fee for obtaining a "pre-hearing" rescission of SAIF's *de facto* denial of an injury claim for claimant's left shoulder condition; (3) awarded additional temporary disability benefits; and (4) assessed penalties and related attorney fees for allegedly unreasonable claim processing. On review, the issues are the ALJ's procedural ruling, claim processing, penalties, and attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

On April 6, 2015, claimant sought treatment for left shoulder pain. (Exs. 1, 2, 3). On May 7, Dr. Seymour noted claimant's reports that his left shoulder had been hurting for an indefinite period of time, and that he did not recall a specific injury. (Ex. 4). That same day, claimant filed an 827 form indicating a "First report of injury or disease" on March 23, 2015. (Ex. 5). By May 18, 2015, both claimant and an employer representative signed an 801 form, also listing a "Date of injury or disease" of March 23, 2015. (Ex. 6).

Thereafter, SAIF began its claim investigation. (Ex. 7). In a June 2, 2015 investigative statement, claimant described a gradual onset of left shoulder pain in January or February 2015 with work activities, and that he felt "something happen" in his shoulder when setting pipes in shafts, but kept working until he could no longer lift with his left arm/shoulder. (Ex. 11-6-7).

On June 17, 2015, claimant was examined by Dr. Brenneke at SAIF's request, specifically to "determine the compensability of an occupational disease" related to his left shoulder. (Ex. 13-1). Dr. Brenneke noted claimant's reports

of a gradual onset of pain, and an incident occurring on “one particular day.” (Ex. 13-2). He noted that claimant’s shoulder became painful and that claimant could not lift with his left arm. (*Id.*)

On June 29, 2015, based on Dr. Brenneke’s conclusion that claimant’s left shoulder rotator cuff tear condition was related to past trauma, and not to his lifetime work exposure, SAIF denied claimant’s left shoulder condition “claim for an occupational disease” on the basis that his “work [was] not the major contributing cause of [his] disease.” (Exs. 13-9-10, 14).

On July 28, 2015, claimant began treating with Dr. Di Paola, who noted his history of a progressive onset of left shoulder pain in January or February 2015 that gradually worsened until “one day,” he could not lift the pipe up at work. (Exs. 15-1, 17). Claimant described specific work activities of running cast iron pipe in a shaft with a coworker when his shoulder “gave out.” (Exs. 15-2, 17). Dr. Di Paola opined that claimant’s work activities with SAIF’s insured were the major contributing cause of his left shoulder supraspinatus tear condition and need for treatment. (Ex. 15-4).<sup>1</sup> That same day, claimant and Dr. Di Paola signed an 827 form, which listed a date of injury of March 23, 2015 and described working in shafts/plumbing. (Ex. 16).

On August 10, 2015, claimant filed a request for hearing, related to SAIF’s “complete claim denial,” asserting (among other things) entitlement to a penalty and related attorney fee for unreasonable claim processing. (Hearing File). The hearing was set for November 2, 2015. (Hearing File). In its August 26, 2015 Response to Issues, SAIF denied that claimant “sustained a work-related accidental injury or occupational disease,” as well as his entitlement to penalties, attorney fees, and costs. (Ex. 17A).

Thereafter, SAIF became aware that claimant was pursuing an injury theory related to its June 2015 denial of claimant’s claim. (Tr. 8). Pursuant to a “pre-hearing” October 30, 2015 telephone conference call, a prior ALJ granted SAIF’s request for postponement of the scheduled hearing (over claimant’s objection) for a “new issue/theory raised.” (Hearing File). The hearing was rescheduled for February 22, 2016. (Hearing File).

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<sup>1</sup> Dr. Di Paola stated that claimant had a preexisting left shoulder subscapularis rotator cuff tear, that was not causing any complaints or physical findings. (*Id.*)

On December 22, 2015, SAIF accepted an injury claim for claimant's left shoulder sprain related to a March 23, 2015 date of injury. (Ex. 18F). In a 1502 form, SAIF indicated that it first received claimant's claim on October 28, 2015, and that it began timely paying temporary disability benefits beginning on October 31, 2015. (Ex. 18F-6).

On January 17, 2016, claimant filed a supplemental request for hearing, alleging a *de facto* and "complete claim denial," entitlement to procedural temporary disability benefits from May 7, 2015 through October 31, 2015, penalties, and attorney fees. (Hearing File). Claimant also requested that the request for hearing be consolidated with the already-pending hearing. (*Id.*)

### CONCLUSIONS OF LAW AND OPINION

We adopt and affirm those portions of the ALJ's order related to the temporary disability, penalty and related attorney fee issues.<sup>2</sup>

#### Postponement

At the hearing, SAIF moved to postpone the hearing on the basis that it was surprised that claimant was alleging a *de facto* denial of an injury claim, or that an injury claim was being pursued, related to its June 2015 claim denial (which had described a left shoulder occupational disease). (Tr. 2-3, 13). In doing so, SAIF asserted that, consistent with the previous hearing postponement ruling (which it argued had been granted to allow it to pursue and process an "injury" theory), it had accepted claimant's injury claim for a left shoulder sprain in December 2015 under a different claim number. (Tr. 2-3). Claimant responded that no new or second written claim for an injury had been filed, and that the hearing had already been postponed for SAIF to evaluate and process his left shoulder claim on an injury or occupational disease theory. (Tr. 5). Claimant also explained that his supplemental hearing request for a *de facto* denial was an alternative theory if it were determined that SAIF's denial denied only an occupational disease claim. The ALJ denied SAIF's motion to postpone/continue the hearing because it was aware that claimant was pursuing an injury theory, which formed the basis for the previous postponement. (Tr. 14).

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<sup>2</sup> SAIF requests that its June 29, 2015 denial, insofar as it expressly denied an "occupational disease," be upheld. Yet, the record does not establish that claimant pursued a denied "occupational disease" claim at hearing nor that SAIF requested that the ALJ uphold its occupational disease denial. *See* (Tr. 6-8, 43-45). Under such circumstances, the compensability of a denied occupational disease claim was effectively waived at the hearing and is not before us on review.

On review, SAIF argues that the hearing should have been postponed because claimant raised new issues at hearing regarding an injury claim, as well as entitlement to temporary disability benefits related to his already-accepted injury claim with a different claim number (rather than under the original claim number for its “occupational disease” denial). For the following reasons, we affirm the ALJ’s procedural ruling.

Under OAR 438-006-0081(1), “[a] scheduled hearing shall not be postponed except \* \* \* upon a finding of extraordinary circumstances beyond the control of the party or parties requesting the postponement.” “Extraordinary circumstances” shall not include incomplete case preparation in the absence of due diligence, as defined in OAR 438-006-0081(2). OAR 438-006-0081(1)(d). We review the ALJ’s postponement ruling *de novo*. See *Grinstead v. Lacamas Laboratories, Inc.*, 212 Or App 408, 413 (2007) (the decision regarding the existence of “extraordinary circumstances” justifying postponement under OAR 438-006-0081 is not discretionary); see also *Guadalupe Arias-Santos*, 66 Van Natta 2094, 2096 (2014) (Board review of an ALJ’s postponement determination is *de novo*).

Consistent with the Board’s policy,<sup>3</sup> a request for hearing shall include a specific listing of all issues to be raised at hearing and all relief requested, and a party defending against a request for hearing shall specify the respondent’s position on the issues raised and relief requested and any additional issues and relief requested by the respondent. OAR 438-006-0031(1); OAR 438-006-0036(1). Amendments to the specification of issues and response may be allowed, subject to a motion by an adverse party for a postponement or continuance. OAR 438-006-0031(2); OAR 438-006-0036(2). A party may file a motion for clarification of the issues raised and relief requested by any party in a specification of issues or a response. OAR 438-006-0045(2).

Here, the hearing regarding SAIF’s “occupational disease” denial was postponed (upon motion by SAIF, and over claimant’s objection) on October 30, 2015, to give SAIF an opportunity to prepare for claimant’s “injury” theory of compensability. (Hearing File; Tr. 4-13). Before claimant filed his January 17,

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<sup>3</sup> OAR 438-005-0035(4) provides:

“It is the policy of the Board to promote the full and complete disclosure of a party’s specific position concerning the issues raised and relief requested in a specification of issues under OAR 438-006-0031 and in a response under 438-006-0036. However, it is not the intent of this policy to create binding admissions on behalf of any party, but to clarify the scope of the matters to be litigated.”

2016 supplemental request for hearing and consolidation referencing the original claim number, SAIF had further investigated claimant's claim and accepted an injury claim for a left shoulder sprain related to a March 23, 2015 date of injury. (Exs. 18, 18A, 18C, 18D, 18F). Yet, SAIF neither sought clarification of the supplemental hearing request (which listed a complete claim denial (*de facto*), procedural temporary disability, and penalties/attorney fees), nor objected to claimant's "consolidation" request.

Based on these particular circumstances, the record does not support a finding of "extraordinary circumstances beyond the control of the party or parties requesting the postponement." OAR 438-006-0081(1). Consequently, we affirm the ALJ's determination that a postponement of the hearing was not justified. *See Felix R. Sanchez*, 59 Van Natta 524 (2007) (finding no justification for postponement where the record did not establish "extraordinary circumstances" under OAR 438-006-0081, or that the adverse party was "surprised" by an issue because the party had notice of and the opportunity to prepare for that issue).<sup>4</sup>

### Attorney Fee

Reasoning that SAIF's August 2015 Response to Issues was an express denial of claimant's injury claim, the ALJ awarded a carrier-paid attorney fee for SAIF's December 22, 2015 acceptance of his left shoulder injury claim as a rescission of that denial. *See* ORS 656.386(1). We affirm the ALJ's attorney fee award, but do so based on the following reasoning.

ORS 656.386(1) provides:

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<sup>4</sup> The ALJ also was not persuaded that SAIF was "surprised" that claimant was seeking temporary disability based on his "injury" claim. (Tr. 8, 14). Considering the ALJ's reference to "surprise," the ALJ's ruling could also be interpreted as pertaining to a motion for continuance, which is a party's remedy for surprise and prejudice created by a late-raised issue. *See* OAR 438-006-0091(4); *see also Michael D. Leming*, 68 Van Natta 298, 301 (2016) (citing OAR 438-006-0031 and OAR 438-006-0036). Nevertheless, a continuance may be granted for any reason that would justify postponement of a scheduled hearing under OAR 438-006-0081. OAR 438-006-0091(5). We review an ALJ's continuance and evidentiary rulings for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002); *Patrick Shippy*, 68 Van Natta 1342, 1345 (2016). If the record would support the ALJ's decision, but would also support a different decision, there is no abuse of discretion. *Kurcin*, 334 Or at 406.

Here, as explained above, we find that a postponement of the hearing was not justified. The record likewise supports the ALJ's finding that there was no surprise. Accordingly, to the extent that SAIF argues that the ALJ should have continued the hearing, we find no abuse of discretion in the ALJ's ruling.

“(a) \* \* \* In such cases involving denied claims where the claimant prevails finally in a hearing before an Administrative Law Judge or in a review by the Workers’ Compensation Board, then the Administrative Law Judge or board shall allow a reasonable attorney fee. In such cases involving denied claims where an attorney is instrumental in obtaining a rescission of the denial prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed.

“(b) For purposes of this section, a ‘denied claim’ is:

“(A) A claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation[.]”

Here, in May 2015, claimant filed 827 and 801 forms for a left shoulder condition, which referred to a March 23, 2015 “date” of injury or illness. (Exs. 5, 6). In his June 2, 2015 statement to SAIF, claimant described his work activities, including pulling pipes in shafts, a progressive and gradual onset of left shoulder pain, as well as “something happening” in his left shoulder when he lifted and pulled a pipe. (Ex. 11-6-7).

On June 29, 2015, SAIF issued a denial, listing a March 23, 2015 date of injury, and specified that claimant “filed a claim for an occupational disease described as a left shoulder condition[.]” (Ex. 14). SAIF denied claimant’s claim on the basis that his work was not the major contributing cause of his disease. (*Id.*) Claimant timely appealed that denial. On October 30, 2015, the initial hearing addressing that denial was postponed for a “new issue/theory raised.” (Hearing File).

Claimant’s description of his claim encompassed *both* “injury” and “occupational disease” theories. Therefore, notwithstanding SAIF’s specification of “a claim for an occupational disease,” its denial either encompassed an “injury” theory of the claim, or constituted a *de facto* denial of claimant’s “injury” claim. In either case, there was a “denied claim” under either ORS 656.386(1)(b)(A) or (D). Accordingly, when it accepted the “injury” claim, SAIF rescinded its claim denial.

The fact that SAIF chose to identify claimant's claim as an occupational disease does not afford it another 60 days to accept or deny the initial claim as a separate "injury." *See* ORS 656.262(6)(a). Moreover, after the postponement of the hearing was granted, SAIF evaluated and processed claimant's left shoulder claim under an "injury theory." Claimant did not file a separate injury claim.

Under these particular circumstances, because SAIF ultimately accepted claimant's single claim for left shoulder sprain injury, its June 29, 2015 denial, insofar as it pertained to an injury claim, was effectively rescinded. Therefore, the ALJ properly awarded a carrier-paid fee pursuant to ORS 656.386(1).<sup>5</sup>

Finally, 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 SAIF. 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 claimant's counsel might go uncompensated.

### ORDER

The ALJ's order dated March 22, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$5,000, payable by SAIF.

Entered at Salem, Oregon on October 24, 2016

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<sup>5</sup> Claimant agrees that there is only one "claim," and that the attorney fee is related to SAIF's rescission of the denial.