

In the Matter of the Compensation of  
**FRANK P. COURTELL, Claimant**  
WCB Case No. 15-04173  
ORDER ON REVIEW  
Jodie Phillips Polich, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Bethlahmy's order that: (1) granted the SAIF Corporation's motion for a continuance of the hearing; (2) upheld SAIF's denials of claimant's injury and occupational disease claims for a low back condition; and (3) declined to award a penalty-related attorney fee under ORS 656.262(11)(a) for a discovery violation. On review, the issues are continuance, compensability, discovery, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation concerning the continuance, discovery, and attorney fee issues.

Continuance

There were three 801 forms submitted for this claim. (Exs. 1, 6, 9). The initial form (which was unsigned and undated, but indicated that the employer knew of the claim on May 7, 2015) identified a February 19, 2015 date of injury as "repetitive stress from normal, high stress phlebotomy rounds," which began as mild pain that increased in severity and duration "over weeks of extra shifts[.]" (Ex. 1). The second 801 form was signed by claimant on May 7, 2015 and identified "repetitive stress" as the "date of injury." (Ex. 6). The last 801 form has the same description of the "injury" as the initial form, but was signed by claimant on May 7, 2015. (Ex. 9).

In July 2015, SAIF denied the "claim for an occupational disease described as low back condition, which occurred on or about February 19, 2015[.]" (Ex. 43). In doing so, SAIF indicated that claimant's "work [was] not the major contributing cause of [his] disease." (*Id.*)

In September 2015, claimant submitted a Request for Hearing and Specification of Issues form regarding a July 2015 complete claim denial concerning a February 19, 2015 "date of injury." In a "Response to Issues" form, SAIF denied that claimant sustained a "work-related accidental injury or occupational disease."

At the November 2015 hearing, following “preliminary discussions” which were conducted off the record, SAIF moved for a continuance of the hearing because claimant alleged, for the first time, that he was asserting an “injury” theory, in addition to an “occupational disease” theory, related to the July 2015 claim denial (which had described a low back occupational disease).<sup>1</sup> (Tr. I: 1-3; Ex. 43). In doing so, SAIF asserted “surprise” based on information in the record that supported an “occupational disease” theory rather than an “injury” theory. (Tr. I: 2-3; Ex. 9). Claimant responded that there was no “surprise” to support the basis for a continuance because an 801 form indicated that he sustained a discrete injury “over weeks of extra shifts.” (Tr. I: 2-3; Ex. 1). In addition, he argued that there were no “new issues” because the issue concerning the initial compensability of the low back claim remained the same, regardless of the theory of compensability.

The ALJ granted SAIF’s motion, reasoning that SAIF had been “surprised” by the “injury” theory. (Tr. I: 15, 18). In reaching that conclusion, the ALJ noted that the 801 form indicated a February date of injury, which was not filed until May, the denial described an occupational disease, and that some of the medical records and forms referenced an “onset over time.” (Tr. I: 4-5). Following the hearing and the closure of the record, in her eventual order, the ALJ adhered to her previous ruling. *See* OAR 438-005-0035(4), (5);<sup>2</sup> OAR 438-006-0031(2); OAR 438-006-0036(2).<sup>3</sup>

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<sup>1</sup> The parties and the ALJ periodically use the term “postponement” when discussing SAIF’s motion. Because the ALJ convened the hearing, admitted exhibits into evidence, and kept the record open for subsequent depositions, we interpret SAIF’s motion and the ALJ’s ruling to concern a continuance of the hearing.

<sup>2</sup> OAR 438-005-0035(4) and (5) provide:

“(4) 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.

“(5) The Board recognizes the complexity of disputed claims and the time limitations concerning the scheduling and litigation process for such claims. Consistent with this recognition, as factual, medical, and legal aspects of disputed issues evolve, the amendment of issues, relief requested, theories, and defenses may be allowed as prescribed in OAR 438-006-0031(2) and 438-006-0036(2).”

<sup>3</sup> OAR 438-006-0031(2) and OAR 438-006-0036(2), provide:

On review, claimant challenges the ALJ's ruling. We review the ruling for an abuse of discretion. *See SAIF v. Kurcin*, 334 Or 399, 406 (2002). For the following reasons, we find no abuse of discretion.

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). Under the authority granted in ORS 656.726(5), we have promulgated administrative rules that govern hearing procedures, including the granting or denying of motions for continuances. *See* OAR 438-006-0091; *Kurcin*, 334 Or at 403. OAR 438-006-0091 “vests authority to make the discretionary decision regarding a continuance with the legal officer who is responsible for the efficient administration of the evidentiary hearing: the ALJ.” *Kurcin*, 334 Or at 406-07.

Consequently, we review an ALJ's ruling on a request for a continuance for an abuse of discretion. *Kurcin*, 334 Or at 406; *Scarlet M. Allen*, 58 Van Natta 3049, 3050-51 (2006). If the record would support a decision by the ALJ to either grant or deny the motion, then the ALJ's ruling is not an abuse of discretion. *Kurcin*, 334 Or at 406; *Michael P. Zapel*, 57 Van Natta 1995, 1996 (2005) (same).

Here, claimant's hearing request referred to SAIF's denial, which denied an occupational disease claim. (Ex. 43). Specifically, the denial indicated that his “work [was] not the major contributing cause of [his] disease.” (*Id.*) In addition, the 801 forms referred to repetitive stress activities “over weeks of extra shifts.” (Exs. 1, 6, 9). During the four months following the denial and preceding the scheduled hearing, claimant did not clarify that the compensability issue was not confined to an occupational disease theory. Instead, claimant did not specify an injury theory for his denied claim until the parties convened for the hearing.<sup>4</sup> (Tr. I: 1-7).

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“Consistent with the Board's policy described in OAR 438-005-0035, amendments may be allowed, subject to a motion by an adverse party for a postponement under OAR 438-006-0081 or a continuance under OAR 438-006-0091. If, during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing. In such a situation, the Administrative Law Judge may continue the hearing pursuant to OAR 438-006-0091.”

<sup>4</sup> We recognize that SAIF checked the “Response to Issues” box for the denied injury/occupational disease claim. Nevertheless, under the circumstances of this particular case (where the claim indicated repetitive work activities over an extended period and SAIF expressly denied an “occupational disease”), the most reasonable interpretation is that SAIF's “response” indicated that the issue pertained to a claim denial for an “occupational disease.”

At the hearing, claimant presented (for the first time) an injury theory of compensability. In essence, he amended the “compensability” issue from the previously identified occupational disease theory (as reflected in claimant’s hearing request from SAIF’s claim denial) to include an injury theory.

The ALJ was authorized to allow the amendment of “theories” concerning the compensability issue. OAR 438-005-0035(5); OAR 438-006-0031(2). However, that amendment was subject to a request for a postponement or continuance. *Id.* When SAIF sought a continuance of the hearing, the ALJ was also authorized to consider whether “extraordinary circumstances” existed to grant that request. OAR 438-006-0031(2); OAR 438-006-0091(5) (a hearing may be continued for any reason that would justify postponement); *see also* OAR 438-006-0081(1) (a postponement shall not be granted except upon a finding of “extraordinary circumstances”).

After conducting our review, and considering the procedural background that prompted SAIF’s motion, we find no abuse of discretion in the ALJ’s exercise of her authority to grant the motion. As previously detailed, the record supports a conclusion that, until the hearing, the theory for claimant’s low back claim was confined to an occupational disease. Consistent with the Board’s policy, the ALJ was authorized to allow consideration of the new theory and, in light of the hearing date raising of that theory, to grant a continuance of the hearing for further development of the parties’ positions concerning that compensability theory. *See* OAR 438-005-0035(5); OAR 438-006-0031(2); OAR 438-006-0081(1); OAR 438-006-0091(5).

#### Discovery Violation and Penalty-Related Attorney Fee

SAIF provided a copy of Dr. Brown’s November 30, 2015 concurrence letter as part of its February 16, 2016 exhibit packet. At the May 24, 2016 hearing, SAIF conceded that Exhibit 50 was untimely disclosed. (Tr. III: 41). Based on that late discovery, claimant sought a penalty and penalty-related fee under ORS 656.262(11)(a).

After upholding SAIF’s denial of claimant’s low back condition, the ALJ concluded that no penalties or attorney fees were authorized under ORS 656.262(11)(a) because there were “no amounts due.”

On review, claimant argues that the employer committed an unreasonable discovery violation and that *SAIF v. Traner*, 270 Or 67 (2015), supports a penalty-related attorney fee for that violation under ORS 656.262(11)(a), even in the

absence of a delay or refusal to pay compensation. In addition, he contends that OAR 438-007-0015(8) provides for the imposition of a penalty under these circumstances. We disagree with claimant's contentions.

Pursuant to OAR 438-007-0015(8), the failure to comply with discovery responsibilities, if found to be unreasonable or unjustified, may result in the imposition of penalties and attorney fees under ORS 656.262(11).<sup>5</sup> See *MaryRose K. Gangle*, 65 Van Natta 958 (2013).

Here, even if SAIF did not comply with the discovery rules, and that violation was unreasonable, no penalty or penalty-related attorney fee under ORS 656.262(11)(a) is available because the record does not establish that any discovery violation that may have occurred resulted in a delay or refusal to pay compensation. See *Dawn Turner*, 69 Van Natta 444 (2017) (no penalty-related attorney fee under ORS 656.262(11)(a) available for a discovery violation where there was no compensation award; distinguishing *SAIF v. Traner*, 273 Or App 312, 318 (2015), and *SAIF v. Traner*, 270 Or App 67 (2015)).

Accordingly, we agree with the ALJ's conclusion that an award of penalties or attorney fees under ORS 656.262(11)(a) for a discovery violation is not justified. See *Turner*, 69 Van Natta at 449; *James L. Williams*, 65 Van Natta 874, 878 (2013) (no penalty-related attorney fee under ORS 656.262(11)(a) awarded for discovery violation where the case did not involve a delay in acceptance or denial of the claim, and the violation did not result in a delay or refusal to pay compensation); *Jeffrey A. Shultz*, 65 Van Natta 829, 832-33 (2013) (same). Therefore, we affirm.

### ORDER

The ALJ's order dated June 16, 2016 is affirmed.

Entered at Salem, Oregon on May 9, 2017

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<sup>5</sup> OAR 438-007-0015(8) does not automatically authorize a penalty or an attorney fee for a carrier's unreasonable failure to provide discovery. Rather, the rule merely provides that the unreasonable or unjustified failure to comply with the discovery rules "may" result in the imposition of penalties and attorney fees. Administrative rules must be consistent with an agency's statutory authority, and an agency may not, by its rules, alter, amend, enlarge or limit the terms of a statute. *Cook v. Workers' Comp. Dep't*, 306 Or 134, 138 (1988) ("an administrative agency may not, by its rules, amend, alter, enlarge or limit the terms of a statute"); *Julio C. Garcia-Caro*, 50 Van Natta 160, 163 (1998) (if there is a conflict between an administrative rule and a statute, it is the statute rather than the rule that controls). Therefore, OAR 438-007-0015(8) does not provide for an independent basis for a penalty or attorney fee for a carrier's unreasonable failure to provide discovery. *Leo M. Estes*, 69 Van Natta 558, 561 n 2 (2017); *Michael Hinds*, 59 Van Natta 1980 (2007).