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ALJ Recruitment

WCB intends to fill an Administrative Law Judge position in the Salem Hearings Division. The position involves conducting workers' compensation and OSHA contested case hearings, making evidentiary and other procedural rulings, conducting mediations, analyzing complex medical, legal, and factual issues, and issuing written decisions which include findings of fact and conclusions of law. Applicants must be members in good standing of the Oregon State Bar or the Bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia. The position requires periodic travel, including but not limited to Eugene, Roseburg, and Coos Bay, and working irregular hours. The successful candidate will have a valid driver's license and a satisfactory driving record. Employment will be contingent upon the passing of a fingerprint-based criminal background check. The announcement (number DCBS18-0049), found on the Department of Consumer and Business Services (DCBS) website at <http://www.oregon.gov/DCBS/jobs/Pages/jobs.aspx>, contains additional information about compensation and benefits of the position and how to apply. Questions regarding the position should be directed to Ms. Kerry Garrett at (503) 934-0104. The close date for receipt of application materials is April 16, 2018. DCBS is an equal opportunity, affirmative action employer committed to workforce diversity.

CASE NOTES

Attorney Fee: "382(1)" - Interest on Appealed Attorney Fee/Cost Awards "Due Under" Appealed Order - "Refusal" to Pay Interest - "Per Se" Unreasonable

Jorge A. Rodriguez, 70 Van Natta 418 (March 28, 2018). Analyzing ORS 656.382(1), the Board held that claimant was entitled to an attorney fee award because a carrier had refused to pay interest that had accrued on stayed attorney fee and cost awards pending its appeal of a prior ALJ's compensability order. In its initial order on review, 69 Van Natta 1354 (2017), the Board had determined that the carrier was obligated to pay interest on the attorney fee and cost awards it had stayed pending its appeal of a 2015 ALJ's compensability decision because that decision had been affirmed by a 2016 Board order. However, in doing so, the Board declined claimant's request for a carrier-paid attorney fee under ORS 656.382(1), finding that the carrier's claim processing had not been unreasonable.

On reconsideration, claimant contended that a finding of unreasonable conduct was not required for an attorney fee award under the first clause of ORS 656.382(1), but rather that the statute required a carrier's refusal to pay compensation, attorney fees, or costs under an order.

Carrier's "refusal" under first clause of "382(1)" considered per se unreasonable.

The Board agreed with claimant's contention. Reasoning that the legislature had not modified the term "refuses" in the first clause of ORS 656.382(1) with the term "unreasonably" (as it had in related statutes regarding the assessment of a penalty under ORS 656.268(5)(f) or penalty/attorney fee award pursuant to ORS 656.262(11)(a)), the Board concluded that a carrier's refusal under the first clause of ORS 656.382(1) was considered *per se* unreasonable.

In reaching its conclusion, the Board acknowledged that the Supreme Court had stated in *Ellis v. McCall Insulation*, 308 Or 74, 77 (1989), that an attorney fee award under ORS 656.382(1) was "keyed to unreasonably resisting the payment of compensation." Nonetheless, the Board noted that the court was applying the second clause of the statute, which addresses a carrier's *unreasonable* resistance to the payment of compensation. Under such circumstances, the Board determined that the court's statement in *Ellis* was not contrary to its analysis of the first clause of ORS 656.382(1). Furthermore, the Board disavowed its rationale in *Eugene L. Mallory*, 43 Van Natta 1317 (1991), which had held otherwise.

Interest designed to preserve real monetary value of attorney fee/cost awards.

Turning to the question of whether the accrued interest on the prior litigation order's attorney fee and cost awards was "due under" that order, the Board reiterated that interest under ORS 656.313(1)(b) "is treated as part of the award itself." See *James A. Bradley*, 56 Van Natta 3287, 3288 (2004); *Marcus M. Tipler*, 45 Van Natta 216, 217 (1993). Although acknowledging that the *Bradley/Tipler* rationale concerned compensation awards for purposes of ORS 656.382(2), the Board reasoned that, under the *Bradley/Tipler* interpretation of ORS 656.313(1)(b), such interest was also designed to preserve the real monetary value of the attorney fee and cost awards.

Disputed interest on attorney fee award was "due under" previous order.

Finally, the Board noted that the prior ALJ's compensability decision (which had been affirmed by the Board's previous order) had expressly remanded the claim to the carrier for "processing according to law." Under such circumstances, the Board reasoned that the disputed interest (which was payable under ORS 656.313) was "due under" its previous order and, as such, an attorney award under ORS 656.382(1) was warranted.

Member Johnson dissented. To begin, based on the reasoning expressed in her initial dissenting opinion, Johnson reiterated that interest was not due under ORS 656.382(1)(b) on the stayed attorney fee and cost awards and, as such, an attorney fee award pursuant to ORS 656.382(1) was not warranted.

In addition, reasoning that to "refuse" requires "a positive willingness to comply with" something asked, demanded, or expected, Member Johnson interpreted the first clause of ORS 656.382(1) as allowing an attorney fee award only when the carrier affirmatively declined to pay what is plainly required to be paid by an order. Applying that analysis to the present case, Johnson reasoned

Dissent argued that failure to pay interest did not constitute “refusal” to pay attorney fee/ cost award.

Calculation of accrued interest was statutory derivative of attorney fee/ cost award; not “due under” prior order.

Reconsideration order granted additional TPD benefits and became final.

Issue preclusion applies to actually litigated/ determined issue in a final decision.

that, in the absence of prior authority interpreting amended ORS 656.313(1)(b), the carrier’s failure to pay such interest did not constitute a “refusal” to pay costs or attorney fees due under an order for purposes of ORS 656.382(1).

Finally, citing *David E. Mathews, DCD*, 63 Van Natta 358, 359 (2011), Member Johnson noted that the question of interest payable under ORS 656.313 is a claim processing issue that arises from an appealed litigation order once it becomes final. Thus, reasoning that the calculation of accrued interest does not become ripe for resolution unless and until an appealed order becomes final, Johnson contended that the calculation of interest is a statutory derivative of an appealed order, which is contingent on the order becoming final.

Based on such reasoning, Member Johnson concluded that it naturally follows that, because interest was neither awarded nor calculated in an appealed order, it logically follows that this statutorily defined interest was not “due under” the appealed order. Consequently, Johnson asserted that an attorney fee award under ORS 656.382(1) was not justified.

Issue Preclusion: Unappealed Order on Reconsideration TPD Award - Found “AP” Had Not Released Claimant to “At-Injury” Job - Finding Preclusive on Carrier’s Subsequent Claim Processing

Terry E. Mason, 70 Van Natta 362 (March 7, 2018). The Board held that, after an unappealed Order on Reconsideration concerning claimant’s aggravation claim awarded temporary partial disability (TPD) benefits (based on a finding that the attending physician had not released claimant to his “at-injury” job and, therefore, temporary disability benefits could not be terminated under ORS 656.268(4)), the carrier was precluded from subsequently refusing to pay TPD benefits awarded by the reconsideration order based on a contention that the attending physician had released claimant to his work at the time of his aggravation claim. An Order on Reconsideration awarded additional temporary disability benefits beyond the date listed in a Notice of Closure, finding that the attending physician’s release to work did not pertain to his “at-injury” job, but rather to his job at the time of his aggravation claim (which was less physically demanding). After the reconsideration order became final, claimant requested a hearing, asserting that the carrier had not paid the additional TPD benefits.

The Board concluded that the carrier was precluded from arguing that it was not obligated to pay the TPD benefits awarded by the reconsideration order. Citing *Drews v. EBI Cos.*, 310 Or 134 (1990), the Board stated that under the doctrine of issue preclusion, a former adjudication precludes future litigation on a subject issue only if the issue was actually litigated and determined in a setting where its determination was essential to the final decision reached. Referring to *Sharyle J. Burtch*, 59 Van Natta 233 (2007), and *Michele S. Thomas-Finney*, 47 Van Natta 174 (1995), the Board reiterated that issue preclusion applies to uncontested Orders on Reconsideration.

Turning to the case at hand, the Board found that the issue of claimant's entitlement to TPD benefits following the attending physician's release to work (including which employment the release must address for temporary disability benefits to be terminated under ORS 656.268(4)(b)), was actually determined during the reconsideration process and was essential to a final decision on the merits in that proceeding. Under such circumstances, the Board concluded that the carrier was precluded from disputing the TPD issue because, to hold otherwise, would constitute an impermissible collateral attack on a final order. See, e.g., *Jerilyn J. Hendrickson*, 49 Van Natta 1208, 1210 n 5 (1997); *Edmund D. Moore*, 49 Van Natta 1426 (1997); *Mindi M. Miller*, 44 Van Natta 2144 (1992). Accordingly, the Board directed the carrier to pay the TPD benefits awarded by the final reconsideration order.

Carrier's contention that claimant was not entitled to TPD benefits was addressed/resolved in final reconsideration order.

In reaching its conclusion, the Board noted that the carrier was not contending that claimant's TPD benefits should be calculated at zero because he had returned to modified work at his "at-injury" regular wage. See *Mark A. Johnson*, 45 Van Natta 83 (1993). Instead, the Board emphasized that the carrier had asserted that, because claimant had been released to his work at the time of his aggravation claim (which the carrier argued constituted his "regular work"), it was not obligated to pay TPD benefits for the period awarded by the unappealed Order on Reconsideration. Reasoning that the Order on Reconsideration had specifically addressed that issue in reaching its final determination, the Board held that the carrier was precluded from further pursuing that argument.

Penalty: TTD Payment - Not Unreasonable - "AP" Offered Inconsistent Opinions - Reasonable For Carrier to Seek Clarification From "AP"

Attending physician released claimant to regular work, then agreed she could not return to regular work.

Devynne C. Krossman, 70 Van Natta 372 (March 19, 2018). Analyzing ORS 656.262(11)(a), and ORS 656.262(4)(a), the Board held that a penalty for unreasonable claim processing was not warranted when a carrier did not begin paying temporary disability (TTD) benefits until it received clarification from the attending physician concerning claimant's ability to perform her regular work. Following claimant's compensable injury, her attending physician released her to regular work, noting that she had "no restrictions for work." Shortly thereafter, a carrier-arranged medical examiner reported that claimant could *not* return to her regular work. After the attending physician agreed with the other physician's report "in its entirety," the carrier sought clarification of the attending physician's opinion. After the attending physician clarified (about one week later) that claimant was not capable of performing her regular work, the carrier began paying TTD benefits. Claimant then requested a hearing, seeking penalties/ attorney fee awards for the carrier's delay in making the TTD payments.

The Board held that such awards were not justified. Citing *Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991), the Board stated that the standard for determining unreasonableness is whether, from a legal standpoint, a carrier had legitimate doubt as to its liability. Relying on *Brown v. Argonaut Ins.*, 93 Or

Carrier had legitimate doubt regarding claimant's entitlement to TTD benefits; reasonable to seek clarification.

"268(5)(f)" penalty for unreasonable claim closure based on all compensation payable from eventual NOC (or final appellate decision).

Order on Reconsideration (which relied on "inference" rule) did not err in awarding TTD following surgery.

App 588, 591 (1998), the Board noted that "unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available to the carrier. Finally, referring to ORS 656.262(4)(a), (g) and OAR 436-060-0150(4)(b)(A), the Board observed that a carrier is obligated to pay TTD compensation no later than the 14th day after it has notice or knowledge of the claim, if the attending physician has authorized the payment of such benefits.

Turning to the case at hand, the Board determined that the attending physician had offered (within the span of some 7 days) inconsistent opinions regarding claimant's ability to perform her regular work. Considering this inconsistency, the Board reasoned that the carrier had a legitimate doubt for not paying TTD benefits within 14 days of the attending physician's concurrence with the other physician's opinion that claimant was unable to perform her regular work and to await clarification from the attending physician's opinion before beginning claimant's TTD benefits another 7 days later. See *Daniel R. Caldwell*, 60 Van Natta 625, 629 (2008) (ambiguous medical records concerning temporary disability authorization constitutes legitimate doubt as to carrier's liability to pay TTD benefits). Under such circumstances, the Board concluded that the carrier's claim processing had not been unreasonable and, as such, penalties and attorney fee awards under ORS 656.262(11)(a) were not warranted.

Finally, regarding a penalty assessment under ORS 656.268(5)(f) for the carrier's unreasonable closure of the claim, the Board modified an ALJ's determination that the penalty was based on all compensation payable under the Notice of Closure. Citing *Walker v. Providence Health Sys. Oregon*, 267 Or App 87, 105-08 (2014), *adh'd to as modified on recons*, 269 Or App 404 (2015), and *David A. VanSickle*, 69 Van Natta 1642, 1650, *recons*, 69 Van Natta 1758 (2017), the Board based the penalty on the eventual calculation of compensation at the subsequent valid claim closure (or final appellate decision from that closure notice).

Temporary Disability: "AP" Authorization/ "Reasonable Inference" From Surgery/ Hospital Records - "060-0020(4)" - Applies to "Claim Closure/Recon" TTD Benefits

Jorge Rodriguez, 70 Van Natta 379 (March 19, 2018). Applying ORS 656.283(6) and OAR 436-060-0020(4), the Board held that a carrier had not proven that an Order on Reconsideration had erred in awarding temporary disability (TTD) benefits based on the attending physician's restrictions following claimant's surgery for his compensable knee condition. Following claimant's knee surgery, a carrier did not pay TTD benefits. Thereafter, claimant requested a hearing, seeking such benefits. While that hearing was pending, the carrier issued a Notice of Closure, which also did not award TTD benefits. Claimant sought reconsideration of the closure notice, which resulted in an Order on Reconsideration that awarded TTD benefits, relying on the inference of a temporary disability authorization from claimant's surgery under OAR 436-060-0020(4). The carrier requested a hearing from the reconsideration order, which was consolidated with claimant's previous hearing request.

Citing *Lederer v. Viking Freight, Inc.*, 193 Or App 226, modified on recon, 195 Or App 94 (2004), the Board stated that a carrier's obligation to pay temporary disability benefits begins when an objectively reasonable carrier would understand contemporaneous medical reports to signify such approval. Referring to OAR 436-060-0020(4), the Board noted that, at reconsideration of a claim closure, the Appellate Review Unit (ARU) "may infer authorization from such medical records as a surgery report or hospitalization record that reasonably reflects an inability to work because of the compensable claim, or from a medical report or chart note generated at the time of, and indicating, the worker's inability to work. Finally, relying on ORS 656.283(6) and *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000), the Board observed that, because the carrier was challenging the Order on Reconsideration's TTD award, it had the burden of establishing error in the reconsideration process.

Discharge instructions reflected claimant was unable to work following knee surgery.

Turning to the case at hand, the Board found that, following his knee surgery, claimant had been discharged with instructions to "ambulate with assistance as tolerated," and to "weight bear as tolerated" as well as to elevate the leg and apply cold therapy every 20 minutes. Reasoning that such instructions reasonably reflected that claimant was unable to work following his surgery, the Board concluded that such restrictions were consistent with the ARU's inference that claimant was unable to work following his knee surgery.

Director's "inference" rule consistent with Lederer rationale; not invalid rule.

In reaching its conclusion, the Board disagreed with the carrier's contention that OAR 436-060-0020(4) was invalid. The Board observed that, in analyzing ORS 656.262(4)(a), *Lederer* had explained that temporary disability benefits are "authorized" when an objectively reasonable carrier would understand contemporaneous medical reports to signify the attending physician's approval excusing a claimant from work. Reasoning that OAR 436-060-0020(4) was consistent with the standard for the authorization of temporary disability benefits as described in *Lederer*, the Board concluded that the rule merely created an inference of such authorization (consistent with the *Lederer* rationale), which is rebuttable by contrary evidence in a particular record.

Because "inference" of TTD authorization not rebutted by remainder of record, carrier had not established error in reconsideration order.

Because the record in this specific record did not include evidence persuasively rebutting the inference of temporary disability authorization following claimant's surgery, the Board found that the carrier had not established error in the reconsideration process. Accordingly, the Board affirmed the Order on Reconsideration's TTD award.

Finally, the Board addressed claimant's contention that the carrier's refusal to pay "pre-closure" TTD benefits had been unreasonable. Citing *International Paper Co. v. Huntley*, 106 Or App 107 (1991), the Board stated that the standard for determining an unreasonable resistance to the payment of compensation was whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. Relying on *Michael K. Spurgeon*, 69 Van Natta 1612, 1615, on recon, 69 Van Natta 1702 (2017), the Board observed that an employer's knowledge of a claimant's hospitalization did not supplant the requirement that a carrier must receive documentation establishing an attending physician's medical verification of an inability to work.

Absence of contemporaneous TTD authorization created legitimate doubt regarding carrier's obligation to provide "pre-closure" TTD benefits.

TTD "inference" rule not applicable to "pre-closure" claim processing.

Impairment findings due to denied condition not rated under "apportionment" rule.

Applying those principles, the Board found that claimant's attending physician had not contemporaneously authorized temporary disability benefits or otherwise expressly indicated that claimant's work activities were restricted following his surgery. Considering the absence of contemporaneous work restrictions from the attending physician, the Board reasoned that the record supported a reasonable inference that the physician did not intend to authorize claimant to be off-work following the surgery.

The Board acknowledged that the attending physician had subsequently reported that claimant was unable to work following his surgery. Nonetheless, noting that the physician's report had been submitted some two years after the surgery and about one year after claimant had returned to his full duty work, the Board determined that such evidence did not establish his entitlement to "pre-closure" TTD benefits. See *Robert Dubray*, 57 Van Natta 2035, *on recon*, 57 Van Natta 2279, 2281 (2005).

The Board recognized that, as discussed above, OAR 436-060-0020(4) allows a "TTD authorization" inference to be drawn based on a surgery report or other medical records. Nevertheless, reasoning that the rule only applies to claim closure and reconsideration proceedings, the Board concluded that the rule had no application to a carrier's obligations to pay "pre-closure" temporary disability benefits.

APPELLATE DECISIONS UPDATE

Extent: Impairment Findings - "Apportionment" Rule ("035-0013") - Applies to "Denied" Condition

Johnson v. SAIF, 291 Or App 1 (March 28, 2018). The court affirmed the Board's order in *Marisela Johnson*, 67 Van Natta 1458 (2015), previously noted 34 NCN 8:6, that held that, in evaluating claimant's permanent "grip strength" impairment for an accepted hand condition, a portion of these impairment findings that were attributable to her denied shoulder condition were not rated as due to her compensable injury under the "apportionment" rule (OAR 436-035-0013). In reaching its conclusion, the Board determined that, because claimant's shoulder condition claim had been denied, there could be no benefits paid for permanent impairment attributable to a denied claim. In addition, the Board reasoned that a denied claim is a type of "legally cognizable condition" to which apportionment applies under the rationale expressed in *Schleiss v. SAIF*, 354 Or 637, 655 (2013). On appeal, claimant continued to assert that her entire grip strength impairment must be rated because it was caused in material part by her compensable injury and that her denied shoulder condition was not a "legally cognizable condition" for which apportionment of her permanent impairment was appropriate.

The court held that the Board had not erred in apportioning claimant's grip strength impairment between her compensable hand condition and her denied shoulder condition. Citing *McDermott v. SAIF*, 286 Or App 406, 416 (2017), the court reiterated that the text of ORS 656.214(1) shows that the

legislature contemplated apportionment of impairment by providing for permanent impairment “resulting from the compensable industrial injury” and defining “impairment” as the loss of use or function of a body part “due to the compensable industrial injury.” In addition, again referring to *McDermott*, the court stated that *Schleiss* had not invalidated the “apportionment” rule, but had limited apportionment for preexisting conditions to the types of conditions that would be “legally cognizable” as preexisting conditions in a combined condition claim.

Turning to the case at hand, the court determined that the *McDermott* rationale required it to reject most of claimant’s arguments regarding the construction of the pertinent statutes and the effect of *Schleiss*. Addressing claimant’s remaining contention (*i.e.*, that *Schleiss* precludes apportionment because her denied shoulder condition was not a “legally cognizable preexisting condition”), the court agreed that the denied condition did not constitute a “preexisting condition” under ORS 656.005(24).

Nonetheless, noting that *Schleiss* had addressed the apportionment of impairment attributable to a preexisting condition that had neither been claimed or denied, the court concluded that the *Schleiss* rationale did not address whether a claimant is entitled to benefits for impairment due to a denied condition. Citing ORS 656.262(2), ORS 656.268(15), and OAR 436-035-0007(1), the court reasoned that there is no compensation due for a denied condition and, as such, a denied condition is not rated for permanent impairment. Consequently, the court held that, if a portion of a worker’s impairment is attributable to a denied condition, that impairment must be apportioned from the permanent disability award.

Finally, the court acknowledged claimant’s assertion that, because the determination of the compensability of an injury under ORS 656.005(7)(a) involves application of the material contributing cause standard in analyzing whether the injury “arises out of and in the course of employment” (*Schleiss*, 354 Or at 643-44), the same material contributing cause standard should apply in determining whether impairment should be compensated in rating a worker’s permanent disability award. However, relying on its reasoning in *McDermott*, the court reiterated that, because a permanent disability award under ORS 656.214 is based on a loss of use “due to” or “resulting from” the compensable injury, when a portion of a worker’s impairment is caused by a denied condition, that portion of impairment is not “due to” or did not “result from” the compensable injury, even if the work injury is a material cause of the worker’s total impairment.

APPELLATE DECISIONS COURT OF APPEALS

Medical Services: Diagnostic Services Necessary to Determine Extent of Disability Due to Accepted Conditions

SAIF v. Carlos-Macias, 290 Or App 801 (March 21, 2018). On remand from the Supreme Court, 302 Or 38 (2017), the court withdrew its prior conclusion, 262 Or App 629 (2014), and affirmed the Board’s order in

No compensation is due for a denied condition, thus, not rated for permanent impairment.

When a portion of the impairment is caused by a denied condition, that portion is not “due to” the compensable injury.

Under Brown, diagnostic medical services are compensable only if they relate to an already accepted injury or condition.

Diagnostic medical services compensable because services necessary to determine extent of disability for accepted conditions.

Francisco M. Carlos-Macias, 64 Van Natta 307 (2012), that had held that a carrier was responsible for claimant's diagnostic medical services under ORS 656.245(1)(a) because the services were due to his accepted left shoulder and rotator cuff tendinosis conditions.

Citing *Garcia-Solis v. Farmers Ins. Co.*, 288 Or App 1 (2017), the court reiterated that, based on the Supreme Court's analysis in *Brown v. SAIF*, 361 Or 272 (2017), diagnostic medical services are compensable under ORS 656.245 only if they relate to an already accepted injury or condition. Quoting *Brown*, the court stated that "[a]lthough the original definition of 'compensable injury' in ORS 656.005(7)(a) did not explicitly link the term with acceptance, * * * the courts long have supplied that very link." 361 Or at 273. See also *SAIF v. Sprague*, 346 Or 661, 673-75 (2009).

Consistent with the aforementioned points and authorities, the court concluded that, as used in ORS 656.245, the compensable injury is the accepted injury. Consequently, the court withdrew its conclusion in its original opinion, which had rejected the carrier's assertion that the compensability of diagnostic medical services is determined by reference to the "accepted condition."

Nonetheless, the court continued to affirm the Board's determination that the diagnostic medical services were compensable because the services were necessary to determine the extent of claimant's disability for his accepted conditions. See *Garcia-Solis*, 266 Or App at 5; *Roseburg Forest Products v. Langley*, 156 Or App 454, 463 (1998) (diagnostic services are compensable for the purpose of determining the cause or extent of the original compensability injury but not for the purpose of establishing the compensability of a new or consequential condition).