Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Third Party Rule Concepts - April 15 Board Meeting

At their April 15, 2013 meeting, the Board Members discussed the report submitted by the "Third Party Rule Concept" Advisory Committee. Following this discussion and consideration of public comment, the Members asked their staff to draft rules/materials addressing the Advisory Committee's suggestions regarding: (1) a requirement that an informational brochure (provided by Board bulletin) be provided to the worker/beneficiary in a paying agency's "notice of election/assignment" letter under ORS 656.583(2); (2) an informational brochure providing a comprehensive review of the "third party election/assignment" process and the "recovery" implications regarding any third party settlements/judgments; and (3) a bulletin providing the means for publication of the informational brochure.

Once those draft rules/materials are prepared, the Members plan to schedule another public meeting to discuss them. In advance of that meeting, copies of the draft rule/materials will be made available to the public, along with a request to provide any written or oral comments at that meeting.

Finally, the Members requested that staff prepare a letter that would forward the Advisory Committee's legislative concepts concerning the "third party" statutes (*e.g.*, "10-day conflict of interest notice" requirement and the "90-day minimum" "election notice/initiation of third party cause of action" requirements of ORS 656.583(2)) to the Executive Committee of OSB's Workers' Compensation Section, as well as other interested parties.

Hearings Division Rule Concepts - April 30 Board Meeting

At their April 30 meeting, the Board Members discussed portions of the "Hearings" Advisory Committee report and previously discussed "Hearings Division" rule concepts. Following those deliberations, the Members requested that staff prepare draft rules to: (1) repeal OAR 438-006-0105 (Deferred Hearing) as inconsistent with ORS 656.283(3); (2) address suggestions from the Advisory Committee concerning procedures designed to enhance the "pre-hearing" specification of issues/response process, without creating binding admissions, OAR 438-006-0031 (Specification of Issues); OAR 438-006-0036 (Response); (3) authorize filing/serving of "responses" to the specification of issues electronically OAR 438-005-0046 (Filing and Service of Documents; Correspondence); OAR 438-006-0036 (Response); (4) amend OAR 438-006-0062 (Prehearing Conference) in a manner consistent with the

Advisory Committee's recommendations; and (5) amend the following rules to address matters regarding grammar, phone number changes, and a statutory amendment (OAR 438-006-0020; OAR 438-006-0075; OAR 438-007-0005(1); OAR 438-007-0020(6)(b); OAR 438-009-0020(3)).

After those materials are prepared, the Members will schedule another public meeting to be announced at a future date, at which time they will consider those draft rules. In advance of that meeting, copies of the materials will be made available to the public, along with a request to provide any written or oral comments at that meeting.

In the meantime, the Members will schedule another public meeting to discuss the remaining portions of the advisory committee's report.

ALJ Anonymous Survey

Watch for your invitation to participate in WCB's 2012 ALJ Anonymous Survey. The survey will be sent to OSB Workers' Compensation Section members via email for those members who have an email address, and by USPS mail for those members who do not have an email address. Responses will be accepted until June 10, and results will be posted on WCB's website by June 24.

Mediation Feedback Form

WCB is updating its process for soliciting mediation feedback. At the conclusion of a mediation, all participants will be provided a half-page feedback form which they can either complete at that time, access online services, or complete the form at a later time and mail it in. This process replaces the previous three-page form that was mailed to each participant. This method reduces the time necessary for the participants to complete and mail the survey to WCB, reduces staff processing time, saves printing/mailing costs, and gives the parties an opportunity to provide their immediate assessment.

Office Closures - Furlough Days

As part of its strategy to address its own budget cuts, Oregon's state government will close most agencies on various Fridays falling throughout the current two-year budget period. The remaining Friday is as follows:

- Friday, May 24, 2013

CASE NOTES

Appellate Procedure: Motion to Withdraw "Appealed" Order Denied - Consideration of "Post-Hearing" Surgery Report Not Reasonably Likely to Effect Outcome

Donald E. Bell, 65 Van Natta 819 (April 24, 2013). Applying ORS 183.482(6) and ORAP 4.35, the Board denied a motion to withdraw its previous order (which was pending judicial review) because it found that the proposed admission of a "post-hearing" surgery report was not reasonably likely to affect the outcome of a compensability dispute regarding a new/omitted medical condition. The carrier had appealed a Board order, which had set aside the carrier's denial of a new/omitted medical condition claim for a shoulder SLAP tear. In reaching its prior decision, the Board had rejected the carrier's contention that the persuasive medical evidence did not establish that a work incident was a material contributing cause of the need for treatment/disability for the SLAP tear. While the carrier's appeal was pending, claimant underwent shoulder surgery, which revealed that his SLAP tear was a "Type II," rather than a previously diagnosed "Type IX," which claimant had claimed and the carrier had denied. Asserting that the surgeon's report was not obtainable at the hearing, concerned claimant's disability, and was reasonably likely to affect the outcome of the case, the carrier requested that the Board withdraw its appealed order and remand the case to the ALJ for consideration of the report.

Board rarely exercises its authority to withdraw an appealed order.

The Board denied the carrier's motion. Citing ORS 183.482(6), ORAP 4.35, and *Glen D. Roles*, 43 Van Natta 278 (1991), the Board stated that it was authorized to withdraw an appealed order. However, relying on *Carole A. VanLanen*, 45 Van Natta 178 (1993), the Board noted that it rarely exercises such authority. Referring to *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986), and *SAIF v. Avery*, 167 Or App 327, 333 (2000), the Board observed that it is authorized to remand a case for additional evidence when there is a "compelling reason," which means that new evidence: (1) concerns disability; (2) was not obtainable at the time of hearing; and (3) is reasonably likely to affect the outcome of the case.

Turning to the case at hand, the Board acknowledged the carrier's contention that claimant had filed a new/omitted medical condition claim for a "SLAP tear Type IX," which the carrier had denied. The Board further recognized that the existence of a claimed new/omitted medical condition is generally a fact necessary to establish such a claim. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

Both ALJ's order and Board's previous orders described litigated condition as "SLAP tear," rather than a particular type of tear.

Nonetheless, the Board stated that both the ALJ's order and its previous orders had described the litigated condition as a "SLAP tear." Citing *Weyerhaeuser Co. v. Bryant*, 102 Or App 432, 435 (1990), the Board noted that parties may explicitly or implicitly agree to litigate an issue that falls outside the express terms of a denial.

Moreover, the Board observed that the prior orders described the disputed issue as the causal relationship between claimant's work incident and his need for treatment/disability for a "SLAP tear," rather than a dispute concerning any particular "type" of SLAP tear. Reasoning that the "existence" of a new/omitted medical condition had not been contested, the Board concluded that it was unnecessary to address that aspect of the claim. *Colt E. Wright*, 65 Van Natta 656 (2013).

Although "post-hearing" surgery report noted "Type II" SLAP tear (rather than Type IX), report was not reasonably likely to affect outcome of case, because dispute concerned "causation" between work incident and shoulder condition (whatever diagnosis).

Addressing the "post-hearing" surgery report, the Board found that the submission concerned the "existence" question and did not pertain to the "causation" issue. Because the disputed issue had been limited to "causation," the Board concluded that the proffered evidence was not reasonably likely to affect the outcome of the case. Consequently, the Board determined that there was no compelling reason to remand. *See Shawn V. Saunders*, 60 Van Natta 2482 (2008). Accordingly, the Board declined to withdraw its appealed order for reconsideration.

Attorney Fee: "Penalty-Related" - "262(11)(a)" - Discovery Violation - During ARU "Recon" Proceeding - Initially Consolidated With Appeal of Recon Order - Jurisdiction - Hearings Division

Jeffrey A. Shultz, 65 Van Natta 829 (April 30, 2013). Applying ORS 656.262(11)(a), the Board held that the Hearings Division was authorized to consider claimant's hearing request seeking penalties and attorney fees regarding a discovery violation allegedly occurring during the reconsideration proceeding before the Appellate Review Unit (ARU) because the request had initially been consolidated with the carrier's hearing request concerning the Order on Reconsideration before it was subsequently bifurcated. While a carrier's hearing request regarding a reconsideration order was pending before the Hearings Division, claimant filed a hearing request, seeking penalties and attorney fees for the carrier's allegedly unreasonable discovery violation during ARU's reconsideration proceeding. Without objection, the hearing requests were initially consolidated, but, at the parties' request, the two hearing requests were subsequently bifurcated. Thereafter, the carrier moved for dismissal of claimant's hearing request, asserting that it solely involved penalties and attorney fees and, as such, jurisdiction rested with the Director. *See* ORS 656.262(11)(a).

The Board denied the carrier's motion. Citing ORS 656.262(11)(a), the Board stated that the Director has exclusive jurisdiction over proceedings regarding solely penalties and attorney fees. However, relying on ORS 656.268(9), the Board noted that its Hearings Division may address and resolve issues arising out of a reconsideration order. Referring to *Nancy Spaan*, 62 Van Natta 2628, 2631 (2010), the Board further observed that its review of a reconsideration order may include consideration of an evidentiary issue arising from the reconsideration proceeding. Finally, based on *Icenhower v. SAIF*,

180 Or App 297, 305 (2002), the Board remarked that once a dispute was properly before the Hearings Division, the subsequent narrowing of the issues to penalties and attorney fees did not divest it from jurisdiction over the dispute.

Because "ARU discovery-related penalty/attorney fee" hearing request was initially consolidated with hearing request regarding Order on Reconsideration, subsequent bifurcation of "penalty/attorney fee" request did not divest Board's Hearings Division of jurisdiction.

Turning to the case at hand, the Board found that, when claimant's hearing request was initially filed, it was consolidated with the carrier's pending hearing request regarding the reconsideration order. Reasoning that claimant's request raised "discovery-related" penalties and attorney fees in conjunction with the carrier's hearing request concerning the reconsideration order, the Board concluded that the Hearings Division had jurisdiction over the request. Under such circumstances, the Board determined that the subsequent bifurcation of the hearing requests and narrowing of the issues to penalties and attorney fees did not divest the Hearings Division of jurisdiction. *See Icenhower*, 180 Or App at 305.

Record did not support unreasonable delay or refusal to pay compensation as a result of discovery violation; therefore, attorney fee not warranted.

Addressing the merits of the penalty and attorney fee issues, the Board noted that it was undisputed that there were no "amounts then due" on which to base a penalty. Therefore, because the record did not establish that there had been an unreasonable delay or refusal to pay compensation as a result of the carrier's discovery violation, the Board concluded that an attorney fee under ORS 656.262(11)(a) was not justified.

In reaching its conclusion, the Board distinguished *Nancy Ochs*, 59 Van Natta 1785 (2007), where an attorney fee under ORS 656.262(11)(a) had been awarded, despite the absence of amounts then due, because a carrier had unreasonably delayed acceptance or denial of a claim. In contrast to *Ochs*, the Board reasoned that the present case did not involve a delay in acceptance or denial of a claim, but rather concerned whether there had been an unreasonable delay or refusal to pay compensation. *See Steven R. Cowell*, 64 Van Natta 68, 70 (2012); *Donald L. Duquette*, 60 Van Natta 797, 807 (2008). Because the record did not support such a conclusion, the Board held that an attorney fee award was not authorized.

Classification: Concurrent Claims - TTD Paid From One Claim - But TTD "Due & Payable" From Both Claims - Both Found "Disabling"

Shawnah J. Green, 65 Van Natta 755 (April 12, 2013). Applying ORS 656.005(7)(c), the Board held that claimant's bilateral carpal tunnel syndrome (CTS) claim must be classified as disabling because, although the carrier had paid all temporary disability (TTD) benefits under a concurrent elbow claim it was also processing, TTD benefits were considered "due and payable" under both claims. In addition to accepting claimant's CTS claim, the carrier had also accepted a separate elbow claim. When her attending physician authorized time loss (based on both conditions), the carrier began paying TTD benefits. Because claimant's TTD rate was higher under the elbow claim, the carrier paid all of claimant's TTD benefits from that claim. As a result, the carrier classified

claimant's CTS claim as nondisabling. Claimant challenged the nondisabling classification, asserting that TTD benefits were also "due and payable" under the CTS claim and, as such, her claim should be reclassified as disabling.

The Board agreed with claimant's contention. Citing ORS 656.005(7)(c), the Board stated that a compensable injury is not disabling if TTD benefits are due and payable or there is a reasonable expectation that permanent disability will result from the injury. Relying on OAR 436-060-0020(8), the Board further noted that when concurrent TTD benefits are due as a result of two or more accepted claims involving the same worker, the same employer/insurer may make a pro rata distribution of TTD benefits without a Workers' Compensation Division order. Finally, also referring to the aforementioned rule, the Board observed that a worker must receive TTD benefits at the higher rate of the concurrent claim.

Turning to the case at hand, the Board acknowledged that the carrier had properly paid claimant's TTD benefits at the higher rate; *i.e.*, the elbow claim. The Board further recognized that the carrier had chosen to pay *all* of claimant's TTD benefits under the elbow claim. Nonetheless, finding that the medical evidence conclusively established that claimant was unable to work due to *both* her CTS condition and elbow condition, the Board determined that TTD benefits were "due and payable" under the CTS claim.

Because claimant unable to work due to both claims, the carrier's decision to pay TTD under only one claim did not equate to a decision that there were no TTD benefits "due and payable" under the other claim; thus, claim was "disabling."

In reaching its conclusion, the Board reasoned that the carrier's unilateral decision to pay all of claimant's TTD benefits due from *both* claims pursuant to the elbow claim (rather than apportioning such benefits between both claims) did not mean that TTD benefits were not "due and payable" under the CTS claim. The Board further noted that to do otherwise would allow the carrier to control the classification of claimant's injury claim based on its unilateral action of paying all of her TTD benefits (which were due to both claims) from only one claim.

Course & Scope: "Going & Coming" Rule - "Lunch Break" Injury - Parking Garage - No Employer "Control"

Christyne Belden, 65 Van Natta 737 (April 10, 2013). The Board held that claimant's shoulder injury, which occurred when she fell in a parking garage of a building where her employer was a tenant, did not arise out of and in the course of her employment because the incident occurred during her unpaid lunch break in an area which her employer did not exercise control. While on her unpaid lunch break, claimant walked to the parking garage where her office was located to pick up her lunch from a vendor. She was injured when she tripped and fell on a curb. When the claim was denied, claimant requested a hearing, contending that there was a sufficient nexus between her employment and her injury.

The Board disagreed with claimant's contention. Citing *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 526 (1996), the Board stated that, under the "going and coming" rule, injuries sustained while an employee is traveling to

"Going and coming" rule applies not only before/after work, but when a worker leaves/returns from lunch or shorter break.

and from work do not occur in the course of employment. Relying on *Enterprise Rent-A-Car Co. v. Frazer*, 252 Or App 726, 731 (2012), the Board noted that the "going and coming" rule applies not only to work before or after work days, but also when a claimant is injured while leaving the workplace for lunch or returning from a lunch break. The Board also referred to *Legacy Health Systems v. Noble*, 232 Or App 93, 95-96 (2009) for the proposition that the "going and coming" rule applies when a claimant is injured while on a shorter break, even a paid break, away from work. Finally, citing *Cope v. West American Ins. Co.*, 309 Or 232, 239 (1990), the Board identified the "parking lot" exception to the "going and coming" rule, if the employer exercises some control over the place where the injury is sustained.

"Going and coming" rule applied to "unpaid lunch break" injury.

Turning to the case at hand, the Board found that claimant was on her unpaid lunch break, performing a personal errand (picking up her lunch) with no directive or encouragement from her employer. Relying on *Frazer*, the Board determined that the "going and coming" rule applied to claimant's unpaid lunch break injury.

Record did not establish that employer exercised control over the parking garage to satisfy "parking lot" exception to "going and coming" rule.

In addition, the Board concluded that the "parking lot" exception was not applicable. Although noting that the employer leased some parking spaces in the garage, the Board reasoned that claimant did not park in the lot nor enter the building from the lot. Under such circumstances, the Board was not persuaded that claimant's employer exercised control over the "parking lot" and, as such, her injury did not occur in the course of her employment.

Evidence: Subpoena - Invalid Service (Via E-Mail) - "007-0020(3)"; ALJ's "Continuance" Denial Upheld - "Unavailable Witness" - No "Extraordinary Circumstances" - Invalid Subpoena

Justin D. Morris, 65 Van Natta 812 (April 23, 2013). Applying OAR 438-007-0020(3), the Board found no abuse of discretion in an ALJ's ruling, which held that claimant's subpoenas of several potential witnesses were invalid because he had attempted to serve them by means of e-mail. At a hearing concerning a denied psychological condition claim, several employees of the insured failed to appear. Claimant contended that these employees had been validly served subpoenas by means of an e-mail from his attorney. The ALJ held that the subpoenas were invalid because they had not been properly served under OAR 438-007-0020(3), (5); *i.e.*, not made in person or by certified mail or other mail that provides for a receipt and were not accompanied by a fee or mileage reimbursement. Because the hearing was continued, the ALJ allowed claimant to resubpoena the witnesses, provided that such service occurred within 10 days of the continued hearing. Thereafter, claimant neglected to timely serve the witnesses, which prompted the employer to challenge the subpoenas. In response, claimant asserted that the employer lacked standing to challenge the subpoenas. In addition, he sought a further continuance of the hearing, arguing that another witness was unavailable to testify due to a family

emergency. The ALJ again held that the subpoenas were invalid and, in addition, declined to continue the hearing because the unavailable witness had not been validly subpoenaed. After the ALJ upheld the carrier's denial, claimant requested Board review, contending (among other issues) that the ALJ's evidentiary rulings were erroneous.

ALJ's "subpoena-related" ruling reviewed for an "abuse of discretion."

The Board disagreed with claimant's contentions. Citing *SAIF v. Kurcin*, 334 Or 399, 405 (2002), and *Diana L. Flanders*, 64 Van Natta 313 (2012), the Board stated that ALJ's evidentiary rulings are reviewed for an abuse of discretion. Relying on OAR 438-007-0020(3), the Board stated that subpoenas may be served by the party or party's representative in person or by certified mail or other mail that provides for a receipt signed by the recipient. The Board further referred to OAR 438-007-0020(5) for the proposition that witness fees and mileage shall be provided at the time the subpoena is served.

Attempt to serve subpoenas by "e-mail" (and lack of witness fees) did not comply with "007-0020(5)."

Turning to the case at hand, the Board noted that claimant had attempted to serve the first subpoenas by means of e-mail and had not included witness fees. Furthermore, concerning claimant's second attempt to serve the subpoenas, the Board observed that he had not complied with the ALJ's directive to serve the subpoenas at least 10 days in advance of the continued hearing. Under such circumstances, the Board found no abuse of discretion in the ALJ's subpoena rulings.

Addressing the ALJ's continuance ruling, the Board noted that a hearing may be postponed/continued if a validly served witness fails to comply with a subpoena. *See* OAR 438-006-0081(1)(b); OAR 438-006-0091. In addition, relying on *Kurcin* and *Scarlet M. Allen*, 58 Van Natta 3049, 3050-51 (2006), the Board reiterated that it reviews continuance rulings for an abuse of discretion.

Because unavailable witness had not been properly served with a subpoena, there was no abuse of discretion in ALJ's denial of a continuance motion.

Applying those points and authorities, the Board acknowledged claimant's contention that the unavailable witness would have provided important testimony regarding a disputed interaction between claimant and another witness. Nonetheless, reasoning that the record did not support a conclusion that the unavailable witness had been properly served with a subpoena before the first hearing or within the time requirements set by the ALJ concerning the second hearing, the Board found no abuse of discretion in the ALJ's denial of claimant's continuance motion.

Extent: Impairment Findings - Arbiter "Clarification" Report - Established That Findings Related to Accepted Depression

Concepcion Zazueta, 65 Van Natta 797 (April 18, 2013). The Board held that claimant was entitled to a permanent impairment award for her accepted depression condition because a medical arbiter had clarified that she had sustained Class 2 impairment for her accepted condition. After the carrier accepted claimant's depression (chronic adjustment disorder with depressed mood), her attending physician deferred to a carrier-arranged medical examiner, who rated her psychological condition as Class I (zero impairment). After a

Notice of Closure did not award permanent impairment, claimant requested reconsideration and a medical arbiter exam. Diagnosing depression and post-traumatic stress disorder (PTSD), an arbiter rated claimant's level of function as "Class 2, at 30%." In response, the Appellate Review Unit (ARU) sought clarification from the arbiter for the newly accepted condition of "depression" (chronic adjustment disorder with depressive mood). After the arbiter rated Class 2 impairment (mild), an Order on Reconsideration awarded permanent impairment based on the arbiter's clarification report. The carrier requested a hearing, contending that the arbiter had not identified impairment solely attributable to the accepted depression, without consideration of the unclaimed, unaccepted PTSD.

The Board disagreed with the carrier's contention. Citing OAR 436-035-0007(1), and *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994), the Board stated that only findings of impairment that are permanent and caused by the accepted compensable condition may be used to rate impairment. Relying on OAR 436-035-0007(5), and *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012), the Board noted that impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. Referring to *Hicks v. SAIF*, 194 Or App 655, *mod on recons*, 196 Or App 146, 152 (2004), the Board observed that when other medical evidence concerning impairment has been expressly rejected and only the medical arbiter's opinion is left that unambiguously attributes the claimant's permanent impairment to the compensable condition, the medical arbiter's report provides the default determination of a claimant's impairment.

Turning to the case at hand, the Board acknowledged that the arbiter had initially reported that claimant's symptoms were characteristic of PTSD (in addition to anxiety, depressive, and phobic symptoms) and rated her current level of function at Class 2, at 30 percent. Nevertheless, the Board noted that ARU had subsequently sought clarification of the arbiter's opinion (which included a copy of the Director's disability standards, an identification of the newly accepted depression (chronic adjustment disorder with depressive mood), and an explanation that 30 percent impairment was not available for any class of impairment). Furthermore, in response to ARU's clarification request, the Board determined that the arbiter had specifically indicated that the diagnosis of depression was "confirmed" and had been unambiguously rated Class 2 impairment (without any apportionment).

In response to ARU's clarification request, the arbiter had specifically "confirmed" a depression diagnosis and rated Class 2 impairment (without any apportionment); therefore, Board found that arbiter related claimant's permanent impairment to accepted depression.

Under such circumstances, the Board was persuaded that the arbiter had related claimant's permanent impairment to her accepted depression condition. Moreover, finding that the other impairment findings (to which the attending physician had deferred) were not more accurate and should be used, the Board concluded that the carrier had not established that ARU had erred in awarding permanent impairment based on the arbiter's clarified report. *See Marvin Woods Product v. Callow*, 171 Or App 175, 183-84 (2000).

Member Langer dissented. Noting the arbiter's references to varying diagnoses (including major depressive disorder and PTSD, in addition to the accepted adjustment disorder), Langer declined to rely on the arbiter's initial

Dissent argued that because arbiter's clarification report addressed class of impairment (rather than relationship to accepted condition), record did not establish that impairment findings were due to accepted condition.

rating of Class 2 impairment. In addition, noting that the ARU's clarification request addressed the *class* of claimant's impairment (rather than whether the impairment was related to the newly accepted condition or apportioned), Member Langer was unable to infer that the arbiter had rated claimant's permanent impairment solely to her accepted depression condition. Reasoning that the arbiter's findings were ambiguous, Langer concluded that the attending physician-ratified" findings should be used in rating claimant's impairment and, as such, she was not entitled to a permanent impairment award.

APPELLATE DECISIONS UPDATE

Course & Scope: Idiopathic Fall - No "Employment-Related" Reason For Fainting - No "Mixed Risk" - Fall While Standing on Brick Floor - "Increased Danger" Rule Not Applicable

Hamilton v. SAIF, ___ Or App ___ (April 17, 2013). The court affirmed the Board's order in *Pamela M. Hamilton*, 63 Van Natta 736 (2011), previously noted 30 NCN 4, which found that claimant's injury, which resulted from an idiopathic fall from a standing position onto a brick floor of her workspace, did not arise out of her employment. In reaching its conclusion, the Board had reasoned that: (1) because claimant fell due to idiopathic (personal) reasons, the "mixed risk" doctrine was not applicable; and (2) claimant's fall from a standing position onto a brick floor was insufficient to find her injury compensable under the "increased danger" rule. On appeal, claimant contended that her work environment (specifically, the need to stand on a hard floor) both contributed to her risk of injury and aggravated her facial and dental injuries (sustained when she fell after fainting while working as a cook/cashier) and, as such, her claim was compensable under the "mixed risk" doctrine.

The court disagreed with claimant's contention. Citing *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 368-69 (1994), the court stated that a claimant must show a causal link between the occurrence of the injury and risk connected with his/her employment. Relying on *Phil A. Livesley Co. v. Russ*, 296 Or 25, 29-30 (1983), the court noted that all risks causing a claimant's injury fall into three categories: (1) risks distinctly associated with employment; (2) risks personal to the claimant; and (3) neutral risks (those having no material employment or personal character). The court also referred to *Redman Industries, Inc. v. Lange*, 326 Or 32, 36 (1997) for the proposition that an injury arises out of employment when it is the product of either: (1) a risk connected with the nature of the work; or (2) a risk to which the work environment exposes the claimant.

No Oregon appellate cases applied "mixed risk" doctrine.

Discussing the "mixed risk" doctrine, the court found no Oregon appellate cases announcing or applying such a doctrine. Nevertheless, the court noted that Professor Larson has stated that a "mixed risk" occurs when "a personal cause and an employment cause combine to produce the harm." 1 *Larson's Workers' Compensation Law*, Section 4.04 at 4-3. The court further

observed *Larson's* explanation that, if an employment risk was a contributing factor in causing the claimant's injury, the concurrence of the personal cause will not defeat compensability.

Turning to the case at hand, the court agreed with the Board's conclusion that idiopathic falls on level ground do not implicate the "mixed risk" doctrine and are not compensable. In doing so, the court found the *Livesley* reasoning controlling.

Truly unexplained fall occurring on work premises, during work hours, while performing required duties is compensable if worker can eliminate idiopaths (personal) causes.

After analyzing the *Livesley* decision, the court stated that a fall due to idiopathic causes is not compensable, but a truly unexplained fall that occurs on the employer's premises, during work hours, while the employee is performing required duties is compensable if the employee can eliminate idiopathic causes. 296 Or at 30. Relying on *McAdam v. SAIF*, 66 Or App 415, 417, *rev den*, 296 Or 638 (1984), the court further observed that a claimant's injury from a fall onto a floor had not been found compensable because the claimant could not explain why he fainted and there was no evidence that work-related conditions had caused him to faint and sustain his injury.

Because record did not establish that work-related conditions caused or contributed to worker's fall, fall was idiopathic and, as such, "mixed risk" doctrine did not apply.

Applying the *Livesley* and *McAdams* reasoning, the court explained that the dispositive fact was the idiopathic nature of claimant's loss of consciousness. Finding no evidence that work-related conditions caused or contributed to her fall and noting her concession that her fall was idiopathic, the court held that the "mixed risk" doctrine did not apply.

Under the "increased danger" rule, even if fainting episode is solely idiopathic, injury was compensable if the danger of serious injury as greatly increased by some employment-related factors (e.g., fainting while driving a log truck).

Finally, the court rejected claimant's contention that her injury (caused by falling from a standing position onto a brick floor) was compensable under the "increased danger" rule. Citing *Marshall v. Bob Kimmel Trucking*, 109 Or App 101, 104 (1991), the court repeated that the "increased danger" rule has been applied when an employer places a worker in a position where "the consequences of blacking out were markedly more dangerous than if they had not been so employed." In other words, the court clarified that, even if a fainting episode is solely idiopathic, an injury may be compensable if the danger of serious injury was *greatly increased* by some employment-related factors.

As a matter of law, the hardness of the floor and a fall from a standing position were not employment-related factors that greatly increased the danger or seriousness of the injury.

Based on *Marshall* (which had distinguished *McAdams* and *Livesley* because the claimant's injury was caused solely by his impact with the floor, whereas the claimant in *Marshall* was injured when he fainted while driving a log truck and hit the side of the mountain), the court concluded that, as a matter of law, claimant's two asserted employment-related factors (the hardness of the floor and the height of the fall) did not *greatly increase* the danger or seriousness of the injury.