Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Permanent Rule Amendments - "Own Motion, Board Review, Miscellaneous" Rules - Effective April 1, 2013

At its January 31, 2013 meeting, after considering comments received at its January 11, 2013 rulemaking hearing, the Board adopted permanent amendments to its administrative rules. Those amended rules become effective April 1, 2013. Electronic copies of the rules, along with the Board's Order of Adoption, will soon be available on WCB's website at: http://www.wcb.oregon.gov/wcbrule/rules.htm. Copies will also be distributed to parties and practitioners on WCB's mailing list.

The rule amendments pertain to: Adoption of Attorney General's Model Rules (OAR 438-005-0015); Settlement Stipulations (OAR 438-009-0005); Claim Disposition Agreements; Forms (OAR 438-009-0020); Applicability (OAR 438-011-0010); Third Party Orders (OAR 438-011-0045); Definitions (OAR 438-012-0001); Insurer to Process Own Motion Claim: Notice and Contents of Claim; Worsened Condition Claim; "Post-aggravation Rights" New Medical Condition or Omitted Medical Condition Claim; Pre-1966 Injury Claim (OAR 438-012-0020); Notification of Pending Proceedings (OAR 438-012-0031); Temporary Disability Compensation (OAR 438-012-0035); Permanent Disability Compensation (OAR 438-012-0036); Board Will Act Unless Claimant Has Not Exhausted Other Available Remedies (OAR 438-012-0050); Board Review of Insurer Closure (OAR 438-012-0060); Referral of Request for Enforcement of Board's Own Motion Order and Request for Suspension of Temporary Disability Compensation to Hearings Division (OAR 438-012-0062); Request for Board Review (OAR 438-016-0005); Mediator Qualifications (OAR 438-019-0010); Notice of Need for and Appointment of Interpreter (OAR 438-020-0010); Adoption of Attorney General's Model Rules (OAR 438-022-0005).

Permanent Rule Amendments - Division 015 - "Attorney Fee" Rules - Effective January 1, 2013

At its November 13, 2012 meeting, after considering comments received at its November 2, 2013 rulemaking hearing, the Board adopted permanent amendments to some of its Division 015 administrative rules. Those amended rules became effective January 1, 2013. Electronic copies of the rules, along with the Board's Order of Adoption, are available on WCB's website at: http://www.wcb.oregon.gov/wcbrule/rules.htm. Copies have also been distributed to parties and practitioners on WCB's mailing list.

The rule amendments are summarized as follows: (1) amending OAR 438-015-0005(7) to clarify the definition of "denied claim" to include claims under ORS 656.386(1)(b)(B), (C), or (D); (2) amending OAR 438-015-0015 by adding ORS 656.262(11)(a) and 656.308(2)(d) to the list of statutes that authorize attorney fees; (3) amending OAR 438-015-0019(5) to clarify when payment of costs are due; (4) amending OAR 438-015-0025 by adding reference to OAR 438-015-0055(2) and (3) to complete the list of out-of-compensation attorney fee rules; (5) amending OAR 438-015-0029(2)(c) and (3)(b) by providing that copies of requests and "responses" for assessed attorney fees on Board review are served on "attorneys"; (6) amending OAR 438-015-0035 to provide that this rule "applies to denials under OAR 438-015-0005(7)"; (7) amending OAR 438-015-0038, OAR 438-015-0055(5), and OAR 438-015-0110 to provide the manner of calculation and notification of the maximum fee awardable under ORS 656.308(2)(d) and ORS 656.262(11)(a); (8) amending OAR 439-015-0050(1) to delete typographical error ("Administrative Law Judge"); (9) amending OAR 438-015-0055(5) to refer to section (2) of ORS 656.308; and (10) amending OAR 438-015-0095 to include reference to entire range of third party law ("ORS 656.576 through 656.596").

Enhancements to WCB's Portal

WCB has added a "Request for Board Review" tab to the Portal. This tab allows for the electronic filing of requests/cross-requests for review of ALJ orders.

If you are already signed up to use the Portal you will only need to update your notifications on the Contacts tab. You will then receive email receipt of your request with an electronic acknowledgment to follow. If you are not signed up for the WCB Portal you may sign up today at: https://portal.wcb.oregon.gov

You can ask for assistance in setting up an account either by phone or making other arrangements. If you have questions or request assistance, please contact Terry Bello at 503-934-0126 or terry.t.bello@state.or.us

Some interesting facts about the portal:

- Customers using WCB Portal:
  - 96 attorney firms
  - 16 insurers
  - 5 third party administrators
- 21 of those signed up have requested hearings via the portal
- 2,808 email notifications have saved $1,021 in postal costs

CDAs: Changes in "Approval Notification" Process - No Postcards Required For "Represented Claimant" CDAs

Represented parties and practitioners are not required to include self-addressed stamped postcards with their proposed agreement. Instead, notice of Board (or ALJ-Mediator) approval will occur either by means of WCB's "portal" (if

If parties/attorneys wish to receive "postcard" notice, they can include self-addressed stamped postcards.

the attorney(s) and carrier are "registered users") and/or through the posting of the CDA's approval on WCB's website. OAR 438-009-0028(1)(a), (b). CDAs involving unrepresented claimants must continue to include a postcard for the claimant. OAR 438-009-0028(2). If any party/practitioner also wishes to include one or more postcards, they may do so. OAR 438-009-0028(3).

CDAs: No Copy Required - Signatures Need Not Be Original

A copy of the CDA is no longer required to be filed. OAR 438-009-0025(1). In addition, signatures of the parties and attorneys may be provided in writing, by FAX, or other electronic means. OAR 438-005-0046(4).

A CDA may include signatures that have been faxed or scanned. That CDA must be filed with the Board by physical delivery to a permanently staffed office or to an ALJ-Mediator, or by means of U.S. Mail.

The "signature" rule mentions the "website portal." However, because CDAs cannot be filed by means of the "portal," this portion of the "signature" rule has no application to CDAs.

Briefing Schedule: Extension Requests - May Be "Filed" Via "E-Mail" - Specific Address Requirement

A briefing extension request (as well as a request for waiver of the Board's Division 011 rules) may be filed by means of e-mail. OAR 438-005-0046(1)(e), (D), (E); OAR 438-005-0046(1)(f). To be considered, such a request must be e-mailed to the following address: request.wcb@state.or.us. The request must also include the information required by OAR 438-011-0020 (for extensions of the briefing schedule) or OAR 438-011-0030 (for waiver of the Board's Division 011 rules).

File "e-mail" briefing extension requests early in the business day.

Consistent with current practice, most requests will be processed the next business day following the filing of the request. However, if a request is e-mailed to the Board on or after the end of a business day, it may not be processed the next business day. Therefore, parties/practitioners are encouraged to file such requests early in the business day.

Notify WCB if Interpreter Required For WCD Defer And Transfer Orders

WCB has instances when hearings have to be cancelled due to a lack of awareness that an interpreter is required. These instances stem from cases that are forwarded to the Hearings Division from WCD by way of a Transfer Order or a Defer and Transfer Order. Currently, there is no mechanism in place

to notify WCB that an interpreter is required in these situations. Accordingly, in cases transferred to WCB from WCD by way of a Transfer Order or a Defer and Transfer Order, please notify the Hearings Division if an interpreter is needed.

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. Those remaining Fridays are as follows:

- Friday, April 19, 2013
- Friday, May 24, 2013

CASE NOTES

Administrative Notice: "Recon Record" - "283(6)" Evidentiary Prohibition - "Post-Recon" WCD "Vocational Assistance Eligibility" Decision - No "Notice" for Review of "Claim Closure" Under "268(10)"

Premature Closure: "ATP" Termination - "268(10)" - "Post-Recon" "Vocational Assistance Eligibility" WCD Decision - No Effect on Claim Closure

Christian R. Lundblad, 65 Van Natta 28 (January 3, 2013). On review of an Order on Reconsideration that affirmed a Notice of Closure (that had closed claimant's injury claim under ORS 656.268(10) following the termination of his authorized training program (ATP) because it found him ineligible for further vocational assistance), the Board held that it was prohibited by ORS 656.283(6) from taking administrative notice of a "post-closure" Workers' Compensation Division's (WCD's) order which had reversed a carrier's "vocational ineligibility" decision. After finding claimant ineligible for vocational assistance and terminating his ATP, the carrier issued a Notice of Closure (NOC), which was subsequently affirmed by an Order on Reconsideration. After claimant requested a hearing contending that the claim was prematurely closed because the carrier's vocational ineligibility decision was erroneous, an ALJ affirmed the reconsideration order. While claimant's request for Board review was pending, he sought administrative notice of WCD's "post-reconsideration order" decision which had set aside the carrier's "vocational ineligibility" decision. Relying on WCD's decision, claimant asserted that his claim had been prematurely closed.

The Board declined to take administrative notice of WCD's decision and affirmed the claim closure. Citing ORS 656.283(6), the Board stated that evidence on an issue regarding a NOC that was not submitted at the reconsideration proceeding is not admissible at hearing. Based on that explicit statutory prohibition, the Board noted that it had not taken administrative notice of "post-reconsideration order" matters that would, in effect, constitute consideration of additional evidence. *See Willie L. Frison*, 63 Van Natta 1331 (2011); *Tony D. Houck*, 51 Van Natta 1301 (1999).

Turning to the case at hand, the Board acknowledged that the carrier had closed the claim based on its termination of claimant's vocational program. The Board further recognized that the carrier's "vocational ineligibility" decision had apparently been overturned by WCD. Nonetheless, reasoning that claimant would again be evaluated for vocational training, including the reopening of his claim for another "ATP," the Board concluded that that, once such training was completed, his claim would again be closed and his condition rated for work disability benefits. *See* ORS 656.340; ORS 656.268(10).

Based on "283(6)" prohibition, Board declined to take administrative notice of "post-reconsideration" matter (WCD's vocational eligibility decision).

Under such circumstances, particularly considering the unqualified language of ORS 656.283(6) prohibiting "post-reconsideration" evidence, the Board declined to take administrative notice of the "post-reconsideration" WCD "vocational eligibility" decision. In reaching its conclusion, the Board analogized the situation to cases such as *Jonathan E. Ayers*, 56 Van Natta 1470, 1471 (2004), where it had declined to take administrative notice of a "post-reconsideration" compensability decision regarding a combined condition denial in a case involving a "reconsideration record" on a claim closure concerning the accepted portion of the claim at closure. Similar to the present case, the Board noted that, in *Ayers*, it had reasoned that, as a result of the compensability decision, the carrier would subsequently be required to reopen, process, and close the claim under ORS 656.262(7)(c) and ORS 656.268.

Claim Preclusion: Alleged Violation of WCD "Recon Record" Rule - Not Raised During "Recon Record" Hearing - "Violation" Claim Precluded

Yelena Puzur, 65 Van Natta 106 (January 10, 2013). The Board held that claimant's request for a penalty-related attorney fee (attributable to a carrier's alleged failure to submit all claim-related documents to the Appellate Review Unit (ARU) during the reconsideration proceeding) was precluded because she had not raised the issue during a prior hearing involving the Order on Reconsideration resulting from the reconsideration proceeding. In a previous hearing and on review of the ALJ's order regarding that hearing, claimant sought admission of several documents that had not been submitted by the carrier during the reconsideration proceeding. However, at that time, she did not seek a penalty or associated attorney fee for the carrier's alleged violation of OAR 436-030-0135(1). Instead, claimant filed another hearing request, claiming that she was entitled to a penalty and attorney fee for the carrier's rule violation.

The Board held that claimant's request was precluded. Citing *Rennie v. Freeway Transportation*, 294 Or 319, 323 (1982), the Board stated that a party is barred from prosecuting an action that is "based on the same factual transaction that was at issue in the first [action], seeks a remedy additional to or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action." Relying on *Drews v. EBI Cos.*, 310 Or 134, 140 (1990), the Board noted that claim preclusion does not require actual litigation of an issue of fact or law, or that the determination of the issue be essential to the final result of the action.

Because claimant could have raised an alleged discovery violation during prior proceeding, its attempt to do so in subsequent proceeding was precluded.

Turning to the case at hand, the Board observed that, in the prior proceeding, claimant had sought admission of the documents that were not submitted during the reconsideration proceeding. The Board further noted that claimant's request had been declined in that previous proceeding. *See* ORS 656.283(6). Reasoning that claimant could have raised an attorney fee for the carrier's alleged violation of WCD's rule during that prior proceeding, the Board concluded that her current request was barred by the doctrine of claim preclusion.

Combined Condition: "Ceases" Denial - "262(6)(c)" - Accepted Combined Lumbar Strain/"Spondylolisthesis" Condition - "Radiculopathy" Not a Separate Accepted Condition, Rather Symptom of "Preexisting Condition" Component of Accepted Combined Condition

Felix V. Roble, 65 Van Natta 206 (January 31, 2013). Applying ORS 656.262(6)(c), in upholding a carrier's "ceases" denial of a combined spondylolisthesis condition (because an accepted lumbar strain had ceased to be the major contributing cause of the combined condition), the Board rejected claimant's contention that his radiculopathy and radiculitis (which had been accepted in conjunction with the "preexisting condition" component of the combined condition) constituted separate accepted conditions. Following claimant's work injury, the carrier initially accepted a lumbar strain. Subsequently, the carrier modified its acceptance to include a combined condition (lumbar strain combined with preexisting spondylolisthesis causing L5-S1 radiculopathy and L5-S1 radiculitis effective the date of claimant's injury). Shortly thereafter, the carrier issued a "ceases" denial of the combined condition, contending that the accepted lumbar strain had ceased to be the major contributing cause of his combined condition. Claimant requested a hearing, asserting that the "otherwise compensable injury" had not ceased to be the major contributing cause of his combined condition because his radiculopathy and radiculitis had not resolved.

The Board upheld the carrier's denial. Citing ORS 656.262(6)(c), and *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410 (2008), the Board stated that the word "ceases" presumes a change in the worker's condition or circumstances such that the otherwise compensable injury is no longer the major contributing cause of the combined condition. Relying on *Reid v. SAIF*, 241 Or App 496, 503 (2011), the Board noted that, in determining whether cessation has occurred, it examined only the specific combined condition that is accepted and denied. Finally, referring to *Gaylen J. Kiltow*, 64 Van Natta 1136, 1143 (2012), the Board remarked that a "combined condition" consists of two components: (1) an otherwise compensable injury; and (2) a "preexisting condition" under ORS 656.005(24).

Turning to the case at hand, the Board acknowledged that the carrier's acceptance of a combined condition had referred to claimant's L5-S1 radiculopathy and radiculitis. Nonetheless, the Board noted that the carrier had accepted the radiculopathy and radiculitis as symptoms of the "preexisting component" of the "combined condition" (spondylolisthesis), rather than as separate conditions.

Because radicular complaints had been accepted as symptoms of "preexisting condition" component of "combined condition," those symptoms were not considered "otherwise compensable injury" for purposes of "ceases" denial under "262(6)(c)."

Therefore, regardless of whether the L5-S1 radiculopathy/radiculitis might be compensable independently of the lumbar strain, the Board reasoned that the accepted combined condition was limited to the "otherwise compensable injury" (the lumbar strain) combined with the "preexisting condition" (spondylolisthesis, including the radiculopathy/radiculitis symptoms). Because it was undisputed that the lumbar strain had resolved, the Board concluded that the "otherwise compensable injury" had ceased to be the major contributing cause of the combined condition and, as such, the carrier's "ceases" denial was upheld.

Course & Scope: "Arising Out Of" Employment - "Idiopathic Fall" - Not "Truly Unexplained" - All "Personal" Causes for Fall Not Eliminated

Horace Brown, 65 Van Natta 159 (January 22, 2013). The Board held that claimant's head injury, which allegedly occurred as a result of a fall while he was working as a truck driver, did not arise out of his employment because other personal reasons for his fall had not been eliminated and, as such, was not "truly unexplained." Claimant, who had a history of post-concussion syndrome, alleged that, while he was attempting to retrieve a dropped windshield cleaner can, he had apparently fallen and struck his head. He explained that this action was the last event he remembered before he realized he was driving his truck on the highway. Examining physicians identified several possible explanations for claimant's bump on his head: a history of post-concussion syndrome; syncope; metabolic encephalopathy related to chronic opioids and muscle relaxers; and chronic headaches versus migraines. Determining that it was unknown whether claimant's loss of consciousness occurred before or after striking his head (and that both causes were possible), an examining physician considered it "most

consistent" with claimant's version of events that he had hit his head and probably passed out. The carrier denied claimant's injury claim, contending that it did not arise out of his employment.

The Board upheld the carrier's denial. Citing *Blank v. U.S. Bank of Oregon*, 252 Or App 553, 557 (2012), the Board stated that a truly unexplained fall that occurs in the course of employment arises out of the employment, as a matter of law. Relying on *Phil A. Livesley Co. v. Russ*, 296 Or 25, 30 (1983), the Board noted that whether a fall is truly unexplained is a question of fact, and a fall will be deemed "truly unexplained" only if the claimant "persuasively eliminates all idiopathic factors of causation." Finally, referring to *Russ*, the Board clarified that the term "idiopathic" means "peculiar to the individual" and not as "arising from an unknown cause."

Turning to the case at hand, the Board found that the medical opinions had identified multiple potential idiopathic causes of claimant's injury, most prominently a "probable syncope" which had resulted in his fall. In addition, although a medical expert had opined that *some* of claimant's idiopathic causes were "unlikely," the Board noted that the expert had ultimately concluded that the syncopal (fainting) episode could not be "ruled out" and that both scenarios (hitting his head and passing out/hitting his head) "were possible."

Because "idiopathic" reasons for claimant's fall had not been eliminated, fall was not "truly unexplained" and, as such, was not considered to have arisen out of employment.

Under such circumstances, the Board reasoned that, at most, claimant had established that it was "equally possible" that "idiopathic" factors or work-related factors caused his fall. Concluding that claimant had not persuasively eliminated all idiopathic factors of causation, the Board determined that the claim was not compensable.

Course & Scope: "005(7)(b)(A)" - "Assault/Combat" Exclusion - "Compensability" Exclusion Not Applicable - Confrontation Connected to "Job Assignment," "Course Of " Employment - Alleged Work Rule (No "Injury Activity") Violation - Concerned "Method" of Accomplishing "Ultimate Work"

Lora McDonald, 65 Van Natta 123 (January 15, 2013). Applying ORS 656.005(7)(b)(A), the Board held that claimant's right wrist and chest injury was not excluded from compensation because even if it resulted from an assault in which she was an active participant, the assault was connected to her job assignment. While working on a "clean-up" crew for a "flood-rescue" organization, claimant joined in a disagreement between other crew members regarding the pace of a member's work activities. During that disagreement, claimant put her hand on or near the worker's face, which prompted him to grab her wrist and pulled it down. Thereafter, claimant sought medical treatment and

filed an injury claim. The carrier denied the claim, asserting that: (1) she was an active participant in an assault that was not connected to her job assignment and amounted from a deviation from her customary duties; and (2) her injury constituted a violation of her employer's work rule, which prohibited "any activity that could result in injury."

The Board disagreed with the carrier's contentions. Citing ORS 656.005(7)(b)(A), and *Redman Industries, Inc. v. Lang*, 326 Or 32, 38 (1997), the Board stated that injuries are excluded from compensation that result from assaults (1) to an active participant in the assault and (2) when the assault is not connected to the job assignment and amounts to a deviation from customary duties. Relying on *Frederick C. Moreland*, 59 Van Natta 2991, 2992-93 (2007), and *Donald Converse*, 50 Van Natta 1830, 1833 (1998), ***aff'd without opinion***, 160 Or App 700 (1999), the Board noted that "not connected to the job assignment" requires that the assault be "separate from, and not linked or joined with, the claimant's assigned duties.

Because subject matter of dispute with coworker concerned a work-related activity, alleged assault was connected to a job assignment and, as such, "005(7)(b)(A)" exclusion did not apply.

Turning to the case at hand, the Board determined that it was unnecessary to resolve whether claimant was an active participant in an assault or combat because the purported assault was connected to her job assignment. In doing so, the Board found that the subject matter of the dispute between the workers (frustration by coworkers over a team member's pace of work during the group assignment) that led to the physical confrontation was directly related to her work and connected to her job assignment. Consequently, the Board concluded that claimant's injury fell outside the purview of ORS 656.005(7)(b)(A).

The Board also disagreed with the carrier's argument that claimant's injury was not "in the course of" her employment because of her purported violation of a "work rule." Citing *Andrews v. Tektronix, Inc.*, 323 Or 154, 159 (1996), and *Sisco v. Quicker Recovery*, 218 Or App 376, 383 (2008), the Board observed that the court has distinguished between work rules "defining the ultimate work to be done by the claimant" and rules "relating to the method of accomplishing that ultimate work." Quoting *Andrews* and *Sisco*, the Board stated that "[t]he violation of an employer rule relating to the method of accomplishing the ultimate work is not outside the course of employment."

Addressing the record, the Board questioned whether the employer's "blanket prohibition" constituted a valid "work rule" for workers' compensation purposes. In doing so, the Board reasoned that, by its terms, the so-called work rule would displace the "unitary work connection" test, as any work injury would necessarily be the result of engaging an "activity that could result in injury." Furthermore, the Board noted that the court has cautioned against "scheme[s] whereby employers could insulate themselves from workers' compensation liability simply by providing the narrowest possible job descriptions to their employees, and instructing them to avoid any work that is not in either scope or manner precisely within the tasks thus assigned." *See Andrews*, 323 Or at 166.

"Work rule" prohibiting any activity that could result in a worker's injury (even assuming that such a "blanket prohibition" was valid) concerned the "method" of accomplishing "ultimate work" and, as such, an alleged violation of such a rule did not remove claimant from the course of employment.

In any event, the Board determined that the "work rule" prohibiting an employee from engaging in any activity that could result in injury related to the "method" in which claimant accomplished her ultimate work of cleaning, rather than defining the "ultimate work" to be performed. Accordingly, the Board concluded that claimant's alleged "violation" of the employer's "work rule" did not remove her from the course of her employment.

Finally, the Board held that claimant's injury "arose out of" her employment. Citing *Lang*, the Board noted that "the risk of an assault by a coworker in the workplace" is a risk to which the work environment exposes an employee. Finding that the dispute between claimant and her coworker arose out of a workplace dispute concerning the accomplishment of a work task, the Board concluded that her injury was the result of an "employment" risk and, as such, her claim was compensable.

Course & Scope: "005(7)(b)(B)" - Not "Primarily for Personal Pleasure" - "Special Errand" For Employer - "Post Office" Trip - "Arose Out Of" Employment

Florence M. Norwood, 65 Van Natta 154 (January 23, 2013). Citing ORS 656.005(7)(b)(B), the Board held that claimant's injury, which occurred while she was walking back to her workplace from the post office after mailing her employer's business mail, was not a social/recreational activity primarily for her personal pleasure and arose out of and in the course of her employment. While at her workplace, claimant's employer gave her a check and requested that she take business mail to the post office. After claimant walked to the post office and deposited the mail, she was struck by a car. The carrier denied her claim, contending that she was injured while engaging in an activity primarily for her own personal pleasure and, as such, her claim was excluded from compensation under ORS 656.005(7)(b)(B).

The Board disagreed with the carrier's contention. Citing ORS 656.005(7)(b)(B), and *Roberts v. SAIF*, 341 Or 48, 56 (2006), the Board stated that only if a worker's personal pleasure is the fundamental or principal reason, in relation to work-related reasons, for engaging in the activity, would the resulting injury be noncompensable.

Turning to the case at hand, the Board found that claimant had just completed a "special errand" for her employer before sustaining her injury. Under such circumstances, the Board was not persuaded that personal pleasure was the principal reason for claimant's activity when she was injured.

The Board also determined that claimant's injury arose out of her employment. Relying on *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 601 (1997), the Board stated that a worker's injury is deemed to "arise out of" employment "if the risk of the injury results from the nature of his or her work or when it originates from some risk to which the work environment exposes the worker."

Risk of being struck by a car while returning to workplace after performing special errand (mailing business letters) was a risk directly associated with employment and, as such, arose out of employment.

After reviewing the record, the Board found that the employer had provided claimant with a signed business check to facilitate the mailing task (an errand that she had previously performed). Reasoning that the risk that she would be struck by a car while returning to the workplace after performing her work-related task was a risk directly associated with her employment, the Board concluded that her injury arose out of her employment.

Hearing Procedure: Untimely Hearing Request - "319(1)(b)" - Denial Not "Upheld," Rather "Stands" As Untimely Appealed - ALJ's Alternative "Credibility/ Compensability" Findings Not Adopted, But Encouraged

Matthew A. Loos, 65 Van Natta 94 (January 9, 2013). Applying ORS 656.319(1)(b), the Board held that, because claimant had not established "good cause" for his untimely filed hearing request from a carrier's claim denial, it was unnecessary to address the merits of the denied claim, but that it was advisable for the ALJ to have included alternative "credibility/compensability" findings for purposes of appeal. Following a hearing regarding a carrier's injury denial for claimant's back condition, an ALJ found that claimant did not have "good cause" for his untimely filed hearing request. In addition, the ALJ made alternative findings regarding claimant's credibility and the compensability of the denied claim. On review, claimant challenged all of the ALJ's conclusions.

The Board adopted and affirmed the ALJ's determination that claimant had not established "good cause" for his untimely filed hearing request. In light of that conclusion, the Board reasoned that it was unnecessary to address the ALJ's alternative findings and analysis regarding the merits of the compensability dispute. *See Joe Ann Aguilar*, 43 Van Natta 246 (1990).

Because compensability findings (particularly demeanor of witnesses) can be pivotal to Board's analysis of merits of denied claim (if Board reverses ALJ's ruling that claimant lacked "good cause' for untimely hearing request) ALJs are encouraged to include such alternative findings.

In reaching its conclusion, the Board emphasized that because compensability findings (particularly the assessment of a witness' demeanor and credibility) can be pivotal to its analysis of the merits of a denied claim (should it ultimately disagree with an ALJ's determination that a claimant lacked "good cause" for an untimely filed hearing request), the inclusion of such alternative findings could avoid further extending the litigation by remanding to the ALJ for such credibility assessments. *See Rickey A. Stevens*, 49 Van Natta 2051 (1997).

Finally, the Board vacated the portion of the ALJ's order that had "upheld" the carrier's denial. Because claimant's hearing request had been dismissed as untimely filed, the Board concluded that the carrier's denial should "stand" as untimely appealed. *See Alfred L. Hillard*, 65 Van Natta 22 (2013); *Lisa M. Kasel*, 64 Van Natta 743, 750 (2012).

New/Omitted Medical Condition: Work Injury Must Be Material Cause of Need for Treatment/Disability

Misty D. Kopperman, 65 Van Natta 109 (January 15, 2013). Applying ORS 656.005(7)(a), the Board held that claimant's new/omitted medical condition claim for a L4-5 disc bulge was compensable because she had

established that her work injury was a material contributing cause of her need for treatment/disability for her claimed condition. In doing so, the Board rejected a carrier's contention that claimant was required to prove that her work injury was a material contributing cause of the condition itself, rather than just her "need for treatment."

Following her work injury, the carrier accepted a lumbar strain. Thereafter, she filed a new/omitted medical condition claim for a L4-5 disc. After the carrier denied the claim, claimant requested a hearing. On appeal of the ALJ's decision setting aside its denial, the carrier contended that, in order to establish the compensability of a new/omitted medical condition under ORS 656.267, claimant must prove that her work injury was a material contributing cause of the condition itself, not just her need for medical treatment.

"Disability/need for treatment" analysis under "005(7)(a)" applies to "new/omitted medical condition" claim for purposes of claimant proving compensable injury.

The Board disagreed with the carrier's contention. First, noting that the carrier had acknowledged the longstanding "need for treatment" standard at the hearing level, the Board commented that it was not inclined to address the carrier's argument. Nonetheless, citing *Donna J. Lowe*, 59 Van Natta 3106 (2007), *on recon*, 60 Van Natta 214 (2008), the Board noted that it had previously rejected such an assertion. Furthermore, relying on *Staffing Services, Inc. v. Kalaveras*, 241 Or App 130, 131 (2011), the Board observed that the court has likewise applied the "need for treatment" standard to new/omitted medical condition claims.

Finally, the Board stated that the application of the carrier's proposed standard would introduce a different compensability standard for initial injury claims from that of new/omitted medical condition claims. The Board also commented that such an analysis would provide an incentive for carriers to "omit" conditions, knowing that a claimant would have to prove that a work injury was a material cause of the claimed condition itself, rather than the claimant's need for treatment. Furthermore, the Board noted that the "need for treatment" standard would still apply when a "combined condition" issue was raised. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a). Finding no statutory or policy support for the carrier's proposed analytical framework for new/omitted medical conditions, the Board rejected the carrier's proposal.

Standards: Work Disability - "Adaptability" Value - Prior Claim/Offset - "436-035-0015" - Prior Disability Not "Fully Dissipated"

Franz R. Anderson, 65 Van Natta 43 (January 4, 2013). Applying OAR 436-035-0015(5), the Board held that, in rating claimant's work disability award for a right shoulder condition, it was appropriate to offset his current adaptability value by his adaptability value from the earlier left shoulder claim because his left shoulder disability had not fully dissipated as of the date of his right shoulder injury. Before his compensable right shoulder injury, claimant had sustained a compensable left shoulder injury, which had resulted in work disability award based on an adaptability value of 4 (a Base Functional Capacity of "Heavy"

reduced to "Medium"). After closure of the left shoulder claim, the carrier closed claimant's right shoulder claim, which eventually resulted in an Order on Reconsideration that offset the "left shoulder" adaptability value for a "right shoulder" adaptability value of 1. *See* OAR 436-035-0015. Multiplying that value (1) by the sum of claimant's age, education, and SVP values (4), and adding his impairment value (1), the reconsideration order awarded 5 percent work disability. Claimant requested a hearing, challenging his work disability award (specifically, the "adaptability" calculation).

The Board affirmed the Order on Reconsideration. Citing OAR 436-035-0015(1), the Board stated that a prior permanent disability award can be used to offset a permanent disability award for a subsequent claim when: (a) the prior claim is closed under Oregon workers' compensation law; (b) the prior claim had a permanent disability award; (c) the prior disability had not fully dissipated under section (2) of the rule; and (d) both claims have similar disabilities under Section (3) and (4) of the rule. Relying on section (2), the Board noted that a prior claim is considered to have fully dissipated if there is not a preponderance of medical evidence or opinion establishing that disability from the prior injury or occupational disease was still present on the date of injury or disease being determined. Finally, referring to sections (4), (5)(c), and (d), the Board observed that disability findings can be offset from a prior claim, and after considering and comparing the claims a compensation award is granted for any loss of earning capacity caused by the current injury/disease which did not exist at the time of his current injury/disease and for which he was not previously compensated.

Turning to the case at hand, the Board found that claimant's prior left shoulder claim and his current right shoulder claim had "similar disabilities"; *i.e.*, reduced functional capacity. Specifically, the Board noted that claimant's residual functional capacity was reduced from "heavy" to "medium light" for his left shoulder claim and reduced from "heavy" to "medium" for his right shoulder claim.

Because disability from prior left shoulder claim had not fully dissipated on date of current right shoulder injury, claimant's prior adaptability value was offset against current adaptability value.

Under such circumstances, the Board concluded that disability from claimant's prior left shoulder claim had not fully dissipated on the date of his right shoulder injury. Consequently, the Board determined that the prior adaptability value for his left shoulder claim should be offset against his current adaptability value for his right shoulder claim. Finally, considering the combined effect of claimant's prior and current injuries, the Board found no error in the reconsideration order's assignment of a neutral adaptability value (1) for claimant's right shoulder injury after offsetting the prior adaptability value for his earlier left shoulder claim.

In reaching its conclusion, the Board noted that a strict "offset" of the prior adaptability value (4) from the current adaptability value (4) would result in a "zero" value. However, the Board reasoned that a "zero" adaptability value would be inconsistent with the Director's disability standards. *See e.g.*, *Frank E. Weigele*, 50 Van Natta 294, 295 (1998). Therefore, the Board held that a neutral adaptability value (1) was appropriate.

Member Lanning dissented. Asserting that claimant's current disability was at least partially attributable to his compensable right shoulder injury, Lanning contended that reducing his adaptability value to 1 (from its otherwise

calculated value of 4) did not fully account for his permanent limitations and restrictions resulting from his compensable right shoulder injury. Consequently, Member Lanning considered an adaptability value of 2 was more appropriate.

TTD: "325(5)(b)" - "TPD" Conversion Not Applicable - Record Did Not Establish "Termination" For Work-Rule Violation

Roger D. Curtis, 65 Van Natta 171 (January 23, 2013). Applying ORS 656.325(5)(b), the Board held that a carrier was not authorized to convert claimant's temporary total disability (TTD) benefits into temporary partial disability (TPD) benefits because the record did not establish that he had been terminated from his employment for a violation of his employer's work rules (a "positive" drug test). Following his compensable injury, claimant was administered a urine test, which reported positive for illegal drugs. After his attending physician approved a modified job description, the carrier notified claimant that it was converting his TTD benefits into TPD benefits because a modified job would have been available to him, but that he had been terminated for violating a work rule. Claimant requested a hearing, contending that he remained entitled to TTD benefits because he had not been notified that his employment had been terminated. In response, the carrier asserted that the employer's work policy provided for immediate termination upon a positive drug test.

The Board found the record insufficient to establish that claimant had, in fact, been terminated. Citing ORS 656.325(5)(b), the Board stated that a carrier is authorized to convert TTD benefits into TPD benefits if an attending physician approves a modified job that would have been offered to a claimant had he not been terminated for the violation of an employer's work rule. Relying on *Ronald L. Jewell*, 57 Van Natta 2339, 2340 (2005), and *Kevin H. Fisher*, 56 Van Natta 3173, 3174 (2004), the Board noted that, although it was not authorized to resolve the *propriety* of a claimant's termination for a work rule violation, it was allowed to examine the *factual* issue of whether a "termination" for a violation had occurred.

Because employer's dismissal authority for a work rule violation ("positive" drug test) was discretionary and record did not establish that claimant had, in fact, been terminated, Board held that "325(5)(b)" requirements for converting TTD benefits into TPD benefits had been satisfied.

Turning to the case at hand, the Board found that the record supported a conclusion that claimant had violated a work rule by testing "positive." The Board further acknowledged that the employer's work policy stated that a positive drug test would result in immediate termination. However, the Board also noted that another provision indicated that the failure to adhere to the work policy "may" result in discipline "up to and including" dismissal. Considering these provisions, the Board reasoned that the employer's "dismissal" authority was discretionary, rather than automatic.

Consequently, the Board reviewed the record to determine whether claimant had, in fact, been "terminated" from his employment. Regarding that question, the Board made the following findings: (1) it was undisputed that claimant had not received written notice of a termination from his employer; (2) claimant had been told by the employer's recruiter that he was "laid off"; (3) although the employer's safety director wrote a memo to the file indicating

that claimant had been terminated for violating a workplace rule, he clarified that he was "under the impression" that claimant "was considered terminated"; and (4) the employer's safety director did not state that he had talked to claimant's recruiter or any other employee about whether claimant was actually terminated.

Based on its review of the record, the Board was not persuaded that claimant's employment was "terminated." Under such circumstances, the Board concluded that ORS 656.325(5)(b) was not applicable. Consequently, the Board reinstated claimant's TTD benefits.

APPELLATE DECISIONS UPDATE

Penalty: "268(5)(d)" - Refusal To Close Claim - "Legitimate Doubt" Not Provided By WCD "Suspension" Order

Walker v. Providence Health System Oregon, __ Or App __ (January 30, 2013). Applying ORS 656.268(5)(d), and ORS 656.382(1), the court reversed that portion of the Board's order in *Joy M. Walker*, 63 Van Natta 564 (2011), previously noted 30 NCN 3, that had found that a carrier's *de facto* refusal to close a new/omitted medical condition claim was not unreasonable and, therefore, penalties and attorney fees were not justified. In reaching its conclusion, the Board had found that the carrier had a legitimate doubt regarding its obligation to close the claim because claimant had not attended an insurer-arranged medical examination (IME) (which had resulted in a Director's order suspending her compensation) and, in any event, because a subsequent Notice of Closure had not awarded compensation, there were no "amounts then due" on which to base a penalty.

Addressing the "then due" issue first, the court held that the Board had erred. Citing ORS 656.268(5)(d), the court stated that a carrier shall be assessed a penalty in an amount equal to "25 percent of all compensation determined to be then due the claimant." After considering the text and context of the statutory provision, the court determined that the relevant point in time is when the unreasonable Notice of Closure or refusal to close the claim was issued. Applying that rationale, the court reasoned that the relevant date for the carrier's allegedly unreasonable activity (*i.e.*, its failure to close the claim or issue a refusal to do so within 10 days of claimant's request as required by ORS 656.268(5)(b)) occurred 10 days from claimant's "claim closure" request.

Amount "then due" under "268(5)(d)" for unreasonable refusal to close a claim is the amount claimant was entitled to at the time of the unreasonable activity as eventually determined by an Order on Reconsideration (rather than by the Notice of Closure).

Turning to the question of the amount of compensation "then due" at that time, the court disagreed with the Board's decision that the pertinent date was the date of the eventual Notice of Closure. Relying on *Johnson v. SAIF*, 219 Or App 82 (2008), the court reiterated that "the amount 'due'" under ORS 656.268(5)(d) "is the amount that [the] claimant was entitled to be paid, and not * * * the amount 'awarded.'" Consequently, the court reasoned that the amount "due" claimant was the amount that she was *entitled* to be paid at the time of the carrier's allegedly unreasonable activity (which was not the Notice of Closure that awarded no permanent disability, but rather the eventual Order on

Reconsideration that awarded 35 percent permanent disability). Accordingly, the court held that the Board had erred in determining that no penalty could be assessed because no compensation was initially awarded to claimant.

Next addressing the Board's finding that the carrier had "legitimate doubt" concerning its duty to close the claim, the court concluded that such a finding lacked substantial reasoning. After considering OAR 436-060-0095(11), and the Director's "suspension" order, the court acknowledged that substantial evidence might support a "legitimate doubt" determination regarding a carrier's obligation to close the claim within 60 days of the "suspension" order. Nevertheless, identifying ORS 656.268(5)(d) as the more directly applicable law, the court found nothing in the statute's 10-day deadline for a Notice of Closure or refusal to close a claim that would not apply if a carrier's duty to pay compensation had been suspended because of a worker's refusal to submit to an IME.

Court found nothing in "268(5)(d)" 10-day deadline for a Notice of Closure or refusal to close a claim that would not apply if a carrier's duty to pay compensation had been suspended because of a worker's refusal to submit to an IME.

Referring to the unambiguous mandate in ORS 656.268(5)(b), the court noted that the Board order had not explained why the carrier could have a legitimate doubt about its obligation to close the claim within 10 days of claimant's request. The court acknowledged the Board's conclusion that there was no existing case precedent involving both a suspension order and a claim closure request. Nonetheless, the court reasoned that controlling case law is needed only where some *other* aspect of the pertinent law creates uncertainty, such as where applicable statutes are reasonably susceptible to competing interpretations. *See Providence Health Systems v. Walker*, 252 Or App 489, 506-07 (2012). Were it otherwise, the court remarked that a carrier could defeat an unreasonable claim processing challenge simply by noting a lack of case law directly on point, regardless of its refusal to fulfill clearly mandated statutory obligations.

In light of such circumstances, the court concluded that substantial reason did not support the Board's determination that the Director's suspension order gave the carrier legitimate doubt concerning its obligation to close the claim. However, noting that the Board had declined to address the carrier's additional argument that it had lacked sufficient information to close the claim, the court remanded for consideration of that aspect of the carrier's contention that its *de facto* refusal to timely close the claim was reasonable.

APPELLATE DECISIONS
COURT OF APPEALS

Attorney Fee: "382(2)" - Carrier Hearing Request On Recon Order PPD Award - Ultimately Unsuccessful On Appeal - Carrier-Paid Fee Awarded

SAIF v. Preston, 254 Or App 507 (January 9, 2013). On remand from the Supreme Court, 352 Or 564 (2012), the court affirmed the Board's order in *Terri L. Preston*, 62 Van Natta 87 (2010), that awarded claimant a carrier-paid attorney fee under ORS 656.382(2), when she ultimately prevailed against the

carrier's hearing request challenging an Order on Reconsideration permanent disability award. Relying on *SAIF v. DeLeon*, 352 Or 130 (2012), the court noted that the Supreme Court has held that a claimant is entitled to a carrier-paid attorney fee under such circumstances, because she *ultimately* prevailed after the carrier had challenged her award at an *earlier* stage. Consistent with its decision in *SAIF v. Haley*, 254 Or App 410 (2012), the court reinstated the Board's order and its insurer-paid attorney fee award.

(And),

SAIF v. Strohm, __ Or App __ (January 30, 2013). On remand from the Supreme Court, 352 Or 564 (2012), the court affirmed the Board's order in *Mary J. Strohm*, 62 Van Natta 27, *recon*, 62 Van Natta 97, *recon*, 62 Van 312, *recon* 62 Van Natta 340 (2010), that awarded claimant a carrier-paid attorney fee under ORS 656.382(2), when she ultimately prevailed against the carrier's hearing request challenging an Order on Reconsideration permanent disability award. The court cited *SAIF v. DeLeon*, 352 Or 130 (2012), and *SAIF v. Haley*, 254 Or App 410 (2012).