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BOARD NEWS

Case Information at Your Fingertips on the WCB Portal - Coming Soon

A client or a medical provider calls. They need a copy of the 2012 settlement documents, plus the old Opinion and Order. Your file is in archives, or in storage in the basement. You will have to take time out of your day to move the boxes around and dig for the document.

An easier solution is coming soon. As part of WCB's data merge project, the WCB Portal will be making available scanned copies of original orders and settlement documents for your cases. These will be found in your portal account on the "Case Status" tab under "Orders and Documents."

WCB's database of scanned orders goes back to approximately August 2011. You will be able to view, save, and print orders generated since that date. Many of you attended the "open house" meetings in the last two weeks to see previews of these upcoming enhancements.

Stay tuned for the launch date of these new screens. They should be available in the next few weeks. For more information, please contact us at portal.wcb@oregon.gov.

Board Review Inquiries - New Phone No. (503-934-0103)

Effective immediately, questions pertaining to "Board Review-related" matters should be directed to 503-934-0103. This centralized method will allow the staff to screen the call, analyze the question (whether it concerns a request for review, a hearing transcript, a procedural motion, a briefing question, or other appellate-related matter), and direct the inquiry to the appropriate staff member, who will promptly return the call.

There are no changes regarding "Own Motion" and "CDA-related" inquiries. Such questions should continue to be directed to 503-934-0113 for Own Motion, and 503-934-0116 for CDAs. The Board Review fax number is 503-373-1684.

CASE NOTES

Costs: “386(2)(d)” - “Extraordinary Circumstances” - “Post-Hearing” Report From New Physician

“Threshold” exceeded due to “post-hearing” new physician’s charges, which was necessary because of another physician’s “post-hearing” change of opinion.

Ken L. Circle, 67 Van Natta 61 (January 7, 2015). Applying ORS 656.386(2)(d), the Board held that a carrier was obligated to reimburse claimant’s counsel for litigation costs exceeding the standard \$1,500 statutory threshold because it was necessary for claimant to obtain a “post-hearing” report from a new physician concerning the compensability of claimant’s denied claim after a previous physician had changed his opinion and, as such, the situation constituted “extraordinary circumstances.” After claimant successfully prevailed over a carrier’s denial and was awarded litigation costs, his counsel submitted a cost bill, which exceeded the \$1,500 statutory threshold. The threshold was exceeded because of the charges from a new physician, who had issued a “post-hearing” report after another physician had changed his opinion regarding the compensability of the claimed condition. The carrier declined to provide reimbursement beyond the \$1,500 threshold, asserting that it was “quite common” for a party to obtain a last-minute rebuttal report because a physician had changed his opinion and, as such, there were no “extraordinary circumstances.”

The Board disagreed with the carrier’s contention. Citing ORS 656.386(2)(d), the Board stated that payment for witness fees, expenses and costs may not exceed \$1,500 unless the claimant demonstrates extraordinary circumstances justifying payment of a greater amount. Referring to *Webster’s Third New Int’l Dictionary 807* (unabridged ed 1993), the Board noted that “extraordinary” is defined as “more than ordinary * * * going beyond what is usual, regular, common or customary.”

Circumstance considered “extraordinary” because not usual, regular, common, or customary in this litigation forum.

Turning to the case at hand, the Board could not say that circumstances similar to what had happened do not occur in contested cases presented to it. Nonetheless, based on its experience, the Board did not consider such circumstances to be usual, regular, common, or customary in this litigation forum. Consequently, the Board found “extraordinary circumstances” justifying reimbursement of claimant’s cost bill greater than the \$1,500 statutory threshold.

Course & Scope: “Going & Coming” Rule - “Break-Related” Injury Returning to Employer’s Office From Walk on Public Sidewalk With Co-Workers - No “Personal Comfort” Exception

Katherine Mandes, 67 Van Natta 38 (January 7, 2015). The Board, *en banc*, held that claimant’s injury, which occurred when she tripped and fell on a sidewalk while returning from her paid break to the building where she worked,

did not arise out of and in the course of her employment because her injury was subject to the “going and coming” rule and no recognized exception applied to make her claim compensable. Contending that she was injured while engaged in a “personal comfort” activity with the knowledge and encouragement of her employer (e.g., her employer had encouraged employees to walk during their breaks and had provided pedometers for that purpose), claimant asserted that her injury was compensable because it was subject to an exception to the “going and coming” rule.

The Board disagreed with claimant’s contention. Citing *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996), the Board stated that, under the “going and coming” rule, an injury generally does not occur “in the course of” employment if it is sustained while the employee is traveling to or from work. Relying on *Enterprise Rent-A-Car Co. of Oregon v. Frazer*, 252 Or App 726, 736 (2012), *rev den*, 353 Or 428 (2013), and *Kevinia L. Frazer*, 66 Van Natta 761 (2014), the Board noted that such an injury is not compensable unless it falls within an exception to the rule.

Turning to the case at hand, the Board found that claimant was returning to work from her break when she fell and sustained her injury. Under such circumstances, the Board determined that the “going and coming” rule applied and, as such, claimant’s injury did not occur in the course of her employment, unless an exception to the rule applied.

Addressing the possible exceptions to the “going and coming” rule, the Board first found no evidence that claimant’s employer had controlled the sidewalk on which she had fallen. Consequently, the Board concluded that the “parking lot” exception was not applicable. See *Frazer*, 66 Van Natta at 761.

The Board also rejected claimant’s assertion that the “personal comfort doctrine” represented an exception to the “going and coming” rule. To begin, the Board found no controlling case precedent which expressly supported such a proposition. Furthermore, to the extent that some prior case precedent (e.g., *Jordan v. Western Elec. Co.*, 1 Or App 441 (1970)) implicitly recognized such an “exception,” the Board reasoned that a prominent factor in the court’s decision was the statutory principle that there should be a liberal construction of the law in favor of the worker, whereas the current statutory mandate is to interpret statutory provisions “in an impartial and balanced manner.” See ORS 656.012(3). Finally, the Board noted that the “personal comfort doctrine” has been limited to a worker’s “on-premises” activities. See *Clark v. U.S. Plywood*, 288 Or 255 (1980).

Concerning the “arising out of” prong of the “work connection” analysis, the Board determined the risk of claimant’s injury did not result from the nature of her work or originate from some risk to which the work environment exposed her. See *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 601 (1997). Although acknowledging that claimant’s employer had encouraged employees to walk during their breaks (and had provided pedometers for that purpose), the Board found that because the employer had no right to control or maintain the area in which she had fallen, there was no work-related risk that contributed to her injury.

Board found no controlling case precedent for “personal comfort doctrine” exception to “going & coming” rule.

Although employer encouraged employees to walk during breaks, the employer had no right to control/ maintain area where claimant had fallen.

Chair Somers specially concurred. Although agreeing with Member Weddell's reasoning that claimant was engaged in a "personal comfort" activity when she was injured, Chair Somers shared the majority's opinion that the injury did not arise out of her employment.

Member Weddell dissented. To begin, Weddell disagreed with the carrier's contention that claimant's injury was excluded from compensation because it had occurred while she was engaged in a social, recreational activity primarily for her personal pleasure. See ORS 656.005(7)(b)(B). Based on claimant's credible testimony that she had engaged in such activities for her health and to be mentally/physically refreshed for her work (as encouraged by her employer), Member Weddell was not persuaded that her walking activity was not primarily for her personal pleasure.

In addition, after analyzing *Jordan* and its progeny (*Halfman v. State Acc. Ins. Fund*, 49 Or App 23 (1980), and *Mellis v. McEwen, Hanna, Gisvold*, 74 Or App 571, *rev den*, 300 Or 249 (1985)), Member Weddell reasoned that the decisions had found the workers' injuries compensable despite their travels to or from work for personal comfort activities because such activities were reasonably related to employment and advanced their employers' interests in having the labor of refreshed employees. Although the decisions had not explicitly found that the workers' injuries would not have been compensable under the "going and coming" rule but for the "personal comfort" doctrine exception, Weddell considered that to be the implication of the court's holdings.

Applying her reasoning to the case at hand, Member Weddell was persuaded that claimant was injured "going to" her work because of a personal comfort activity that was incidental to her employment, which aided her in the efficient performance of her job and did not represent a temporary abandonment of her employment. See *Jordan*, 1 Or App at 446. Consequently, Weddell contended that claimant's injury occurred in the course of her employment under the "personal comfort" doctrine exception to the "going and coming" rule.

Addressing the "arising out of" employment issue, Member Weddell considered claimant's "break-time" walk to constitute an employment-related risk because of her employer's encouragement to maintain a healthy work force. Alternatively, reasoning that the injury had occurred while walking on the "normal ingress" that claimant would take while returning from "break," Weddell asserted that the injury was one to which claimant was exposed by her employment conditions. See *Hearthstone Manor v. Stuart*, 192 Or App 153, 159-60 (2004).

Because walking during break aided claimant in efficient performance of her duties and was incidental to her employment, dissent contended that injury was subject to "personal comfort doctrine" exception to the "going & coming" rule.

Penalty: “268(5)(e)” - Increased PPD Award Granted by Recon Order - Based on Information Carrier Could Reasonably Have Known at Claim Closure - “AP” Chart Notes Referred to “Heavy” Lifting in “At-Injury” Job, Whereas “AP” Release to Regular Work Based on “Job Description” Referring to “Light” Lifting

Anita Ferrer, 67 Van Natta 5 (January 2, 2015). Applying ORS 656.268(5)(e), the Board held that claimant was entitled to a penalty based on the increased permanent disability granted by an Order on Reconsideration (*i.e.*, a “work disability” award) because the award was based on information that the carrier reasonably could have known at claim closure (*i.e.*, that despite claimant’s attending physician’s “regular work” release without restrictions, the carrier had not furnished the physician with the “at-injury” job analysis, which included duties that exceeded claimant’s physical limitations). Following claimant’s compensable injury, her attending physician questioned whether claimant’s surgeon was aware that claimant was required to lift 100 pounds at her “at-injury” job. Nevertheless, the attending physician released claimant to regular work, without restrictions. At the time of this release, there was no indication that claimant’s attending physician had been furnished the “at-injury” job analysis. Thereafter, the carrier issued a Notice of Closure that awarded permanent impairment, but no work disability. Claimant requested reconsideration, including a report from her attending physician, stating that, after reviewing the “at-injury” job analysis, she could “perform some of the job duties described.” An Order on Reconsideration awarded work disability, as well as a penalty under ORS 656.268(5)(e). The carrier requested a hearing. Challenging the penalty assessment, the carrier argued that the attending physician had changed his opinion and, as such, the Order on Reconsideration’s increased permanent disability award had resulted from information that it could not reasonably have known at the time of claim closure.

The Board disagreed with the carrier’s contention. Citing ORS 656.268(5)(e), the Board stated that if an increased permanent disability award is sufficient to satisfy the requirements for a penalty under that statute, such a penalty is not assessable if the carrier demonstrates that the increased permanent disability compensation results from information that it could not reasonably have known at the time of claim closure. See also OAR 436-030-0175(2)(c). Relying on *Walker v. Providence Health Sys. Oregon*, 267 Or App 87 (2014), the Board noted that the “information” referred to in ORS 656.268(5)(e) includes information that the carrier could have obtained through a request for clarification. See also *Kenneth P. Anderson*, 63 Van Natta 1496, 1503 (2011).

For purposes of “268(5)(e)” penalty, “pre-closure” information includes information that carrier could have obtained through a clarification request to a physician.

Because work disability award granted by reconsideration order was based on physician's response to an "at-injury" job analysis (which the carrier had not provided to the physician before claim closure), Board held that increased award was based on information that carrier reasonably could have known at claim closure.

Turning to the case at hand, the Board acknowledged that, before claim closure, the attending physician had twice released claimant to regular work in response to the carrier's inquiries. Nonetheless, the Board noted that there was no indication that the carrier had provided claimant's attending physician with the "at-injury" job analysis. Because the attending physician had subsequently opined that claimant could perform "some of the job duties" described in the "at-injury" job analysis (which claimant had provided to the physician after claim closure), the Board was persuaded that the work disability award granted by the Order on Reconsideration would have been awarded by the Notice of Closure (had the job analysis been furnished to the attending physician before claim closure).

Under such circumstances, the Board was not persuaded that the increased compensation award granted by the Order on Reconsideration (*i.e.*, the work disability award) resulted from information that the carrier "could not reasonably have known at the time of claim closure." See ORS 656.268(5)(e). Consequently, the Board concluded that a penalty was warranted.

Reconsideration Proceeding: Raising "PTD" Via "Recon Request" Form

Darlene L. Sparling, 67 Van Natta 85 (January 13, 2015). Applying ORS 656.206(1) and (3), the Board held that, because the record did not persuasively establish that claimant was entitled to permanent and total disability (PTD) benefits, it was unnecessary to decide whether she had "raised" a PTD issue during the reconsideration proceeding before the Appellate Review Unit (ARU) or to rule on ARU's exclusion of claimant's attending physician's response to a medical arbiter report. After a Notice of Closure awarded 4 percent permanent impairment for claimant's low back condition, both parties requested reconsideration and a medical arbiter examination. Claimant subsequently amended her reconsideration request, checking the box on the reconsideration form, which indicated that she disagreed with the rating of permanent disability. (She did not check the "additional [issue(s)]" box on the form.) Claimant also submitted her affidavit (which described her functional abilities, as well as her desire and efforts to return to work), her attending physician's report affirming those limitations, and a vocational consultant's opinion indicating that she was permanently and totally disabled. After a medical arbiter report measured reduced lumbar range of motion findings (but did not attribute them to claimant's compensable conditions), claimant submitted another report from her attending physician that disagreed with the arbiter report and attributed the major cause of claimant's problems to her accepted low back conditions. Although ARU included the attending physician's report in the reconsideration record, it declined to consider the report during its evaluation. In doing so, ARU did not interpret the attending physician's report to be correcting or clarifying any "pre-closure" impairment findings. Finally, based on the arbiter's findings, ARU issued an Order on Reconsideration, which reduced claimant's permanent impairment award to zero. Claimant requested a hearing. Asserting that she had raised PTD during the reconsideration proceeding, she sought a PTD award. In response, the carrier contended that the PTD issue had not been specifically raised during the reconsideration proceeding and, as such, could not be considered at the hearing. See ORS 656.268(9); ORS 656.283(6).

The Board concluded that, even if the PTD issue and the disputed evidence were considered, claimant was not entitled to a PTD award. Consequently, the Board determined that it was not necessary to decide whether claimant had “raised” a PTD issue during the reconsideration proceeding or whether ARU’s exclusion of the attending physician’s response to the arbiter report was appropriate.

Citing ORS 656.206(1)(d), the Board stated that PTD means “the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation.” Relying on *Welch v. Bannister Pipeline*, 70 Or App 699, 701 (1984), the Board noted that, to receive PTD benefits, a claimant must be either: (1) completely physically disabled and therefore precluded from gainful employment; or (2) because of her physical impairment, combined with social and vocational factors, be effectively precluded from gainful employment under the “odd-lot” doctrine.

Turning to the case at hand, the Board observed that the medical arbiter had identified measurable range of motion impairment, but had not considered it to be due to “unrelated” conditions. Furthermore, noting that several of claimant’s degenerative and other low back conditions had been denied, the Board reasoned that the attending physician had not persuasively clarified whether his opinion regarding claimant’s physical limitations was solely attributable to her compensable conditions. In the absence of a reasonable explanation, the Board found that the record did not persuasively support claimant’s entitlement to PTD benefits.

Chair Somers filed a concurring opinion. Noting that claimant had checked the “issue” box on the “reconsideration request” form indicating her disagreement with the rating of “permanent disability,” Somers considered PTD to have been raised as an issue during the reconsideration proceeding. In reaching this conclusion, Chair Somers further observed that the request form did not distinguish between PPD and PTD issues.

Member Johnson also filed a concurring opinion. Because claimant had not checked the boxes on the “reconsideration request” form referring to “impairment findings” or “additional issue(s),” Johnson did not consider the submission of additional information with claimant’s request for reconsideration sufficient to have raised the PTD issue during the reconsideration proceeding. *See Robert Christensen*, 57 Van Natta 164 (2005).

Member Weddell dissented. Noting that the “reconsideration request” form does not include separate boxes for “PPD” and “PTD,” Weddell reasoned that the single box referring to “rating of permanent disability” was sufficient to designate PTD as an issue during the reconsideration proceeding. Member Weddell further considered claimant’s submission of additional information (which addressed components of a PTD claim) to have clearly communicated that she had been seeking PTD benefits in requesting ARU reconsideration. Finally, Weddell was persuaded that the attending physician’s response to the arbiter report (which was present in the reconsideration record) could be considered (particularly to the extent that it pertained to the PTD issue) and that claimant’s un rebutted affidavit, along with her attending physician’s opinion, and the vocational consultant’s report established that she was incapable of any gainful and suitable employment.

Unpersuaded that physician had clarified whether claimant’s physical limitations were solely attributable to compensable conditions, Board held that she was not entitled to PTD benefits.

Because box on “reconsideration request” form indicating disagreement with “rating of permanent disability” had been marked and “PTD-related” information had been submitted along with the form, dissent considered PTD to have been raised during reconsideration proceeding.

APPELLATE DECISIONS COURT OF APPEALS

Substantial Evidence: “Substantial Reasoning” - Board’s Reliance on Physicians’ Opinions Based on Review of MRI Report (Rather Than Film Itself) Considered Sufficient

Ryan v. Weyerhaeuser, ___ Or App ___ (January 22, 2015). The court, *per curiam*, affirmed the Board’s order in *Shawn C. Ryan*, 64 Van Natta 1631 (2012), which upheld a carrier’s denial of claimant’s injury claim for a L4-5 disc herniation. In reaching its conclusion, the Board determined that the carrier had met its burden under ORS 656.266(2)(a) to prove that claimant’s “otherwise compensable injury” was not the major contributing cause of his disability/need for treatment for a combined condition. In doing so, the Board was persuaded by the opinions from three physicians, all of whom had concluded that preexisting degenerative disease was the major contributing cause of claimant’s L4-5 disc herniation. On appeal, claimant contended that, because the carrier’s physicians had reviewed only an MRI report to evaluate his “pre-injury” condition (rather than review the actual diagnostic films or “pre-injury” chart notes), their opinions did not constitute substantial evidence and, therefore, the Board’s decision lacked substantial reason.

The court disagreed with claimant’s contention. Citing *Cummings v. SAIF*, 197 Or App 312, 318 (2005), the court stated that, in assessing the major contributing cause of a combined condition, ORS 656.005(7)(a)(B) requires “a comparison of the relative contribution of the preexisting disease or condition and the work-related incident.”

Turning to the case at hand, the court acknowledged that, in *Cummings*, it had remanded to the Board to address an “apparent deficiency” in an expert’s opinion who had “assumed” and “suspected” that the claimant had a preexisting condition, but had not reviewed *any* “pre-injury” records before offering an opinion that the preexisting condition was the major contributing cause of the combined condition. In contrast to *Cummings*, the court reasoned that the carrier’s physicians had not simply speculated about claimant’s preexisting condition, but rather had reviewed the “pre-injury” MRI report, which documented the nature of his preexisting low back degenerative changes, including at the level of his eventual disc herniation. Noting that no other physician nor any other evidence had suggested that the MRI films materially differed from the MRI report or that the MRI findings were inaccurate, the court concluded that substantial reasoning supported the Board’s finding.

Physicians had not simply speculated about preexisting condition, but had reviewed “pre-injury” MRI report documenting the nature of the degenerative changes.