Workers' Compensation Board

Volume XXXVI, Issue 8

August 2017

News & Case Notes

BOARD NEWS

Connie Wold - Board Chair

Following Senate confirmation, Connie Wold will join the Workers' Compensation Board as Board Chair in September 2017. She received her JD from Lewis and Clark Law School. She has practiced workers' compensation law since 1985. She represented employers and insurers for 16 years. In 2002, she began representing injured workers, and in 2003, was a founding member of Hooton Wold & Okrent, LLP. Connie has been a presenter and organizer for many legal seminars, including Oregon State Bar, Oregon Women Lawyers, Oregon Trial Lawyers Association, Oregon Law Institute, and the Oregon Law Center/Legal Aid Services of Oregon. She was on the Board of Oregon Women Lawyers, and served as Chair of the Oregon State Bar CLE Committee. She also served on the Workers' Compensation Section's CLE committee. Join us in welcoming Connie to WCB.

CASE NOTES

Costs: Not Payable Until Litigation Order is "Final" - "015-0019(3)"

Jeffery L. Miller, 69 Van Natta 1204 (August 1, 2017). Applying OAR 438-015-0019(3), the Board held that a carrier was not obligated to pay a cost award granted by an appealed Board order because the order had not "become final." In a prior order, the Board had set aside the carrier's denial of claimant's occupational disease claim, but had upheld the carrier's injury denial of the same condition. The Board order had also awarded claimant reasonable costs for prevailing over the occupational disease denial. Claimant requested judicial review of the Board's order, challenging the portion of the order that had upheld the injury denial. Claimant also submitted a cost bill to the carrier, who declined to pay the costs pending the appeal of the Board's order. Claimant requested a hearing, seeking penalties and attorney fees for the carrier's failure to pay the cost award. Noting that he was only challenging that portion of the Board's order that had upheld the injury denial, claimant asserted that the cost award attributable to the occupational disease claim was payable.

The Board disagreed with claimant's contention. Citing *Brian C. Carlson*, 64 Van Natta 2381 (2012), the Board stated that the appropriate procedure for claiming and recovering an award of reasonable expenses and costs under OAR 438-015-0019(3) is for the claimant to submit a cost bill to the carrier if and when the Board's order "becomes final." The Board further noted that, under ORS 656.298, a Board order "becomes final" unless, within 30 days, one of the parties files a petition for judicial review with the Court of Appeals.

Turning to the case at hand, the Board reasoned that because claimant had filed a petition for judicial review of its prior order, the order had not "become final." Consequently, the Board concluded that the carrier was not obligated to pay the Board's cost award and its refusal to do so was not unreasonable.

Course & Scope: Injury Occurred at Claimant's Home/Before Work Began - "Personal Comfort" Doctrine Not Applicable

Joseph J. Turney, 69 Van Natta 1277 (August 28, 2017). The Board held that claimant's inguinal hernia injury, which occurred while he was using his bathroom at home before work, did not arise out of and in the course of his employment because he had not begun to work and, as such, the "personal comfort" doctrine was not applicable. Asserting that his "home-related" hernia injury was subject to the "personal comfort" doctrine, claimant contended that his claim was compensable.

The Board disagreed with claimant's contention. Citing *Halfman v. SAIF*, 49 Or App 23 (1980), the Board explained that the basis of the "personal comfort" doctrine is that certain activities by employees are expected and necessary, and the conduct of those activities is not a departure from the employment relationship. Relying on *U.S. Bank v. Pohrman*, 272 Or App 31 (2015), the Board stated that the application of the "personal comfort" doctrine focuses on a worker's activity to determine whether the worker remained in, or had left, the course and scope of employment. Referring to *Clark v. U.S. Plywood*, 288 Or 255 (1980), and *Jordan v. Western Electric*, 1 Or App 441 (1970), the Board further observed that the cases applying the "personal comfort" doctrine involved situations where a worker had already begun employment and was injured while on a break during the work day.

"Personal comfort" doctrine involves situations where a worker has already begun employment and is injured while on a break.

Turning to the case at hand, the Board noted that claimant's injury claim was based on his use of a bathroom at home *before* going to work. Reasoning that there was no contention that he was already in the course and scope of his employment at any time before his injury such that a "personal comfort" activity remained within the employment relationship, the Board concluded that the "personal comfort" doctrine was not applicable. Consequently, the Board determined that claimant's injury did not arise out of and occur in the course of his employment. *See Fred Meyer, Inc. v. Hayes*, 325 Or 592 (1997).

Because claimant was injured before going to work, "personal comfort" doctrine did not apply.

Course & Scope: "Gym" Injury During "Layover" - "Social/Recreational Activity" Primarily for "Personal Pleasure" - Excluded From Compensability - "005(7)(b)(B)"

Summer Cook, 69 Van Natta 1227 (August 9, 2017). Applying ORS 656.005(7)(b)(B), the Board concluded that a claimant's (a flight attendant's) injury, which occurred while she was exercising at her local gym during a

During a "layover," claimant was injured at a gym where she had a personal membership.

"layover," was excluded from compensability because she was engaged in a social/recreational activity primarily for her personal pleasure. While on a night "layover" between her assigned flights (which occurred near her residence), claimant was injured while participating in an exercise class at her gym club where she had a personal membership. The carrier denied her injury claim, asserting that she was engaged in a "social/recreational activity" primarily for her "personal pleasure." *See* ORS 656.005(7)(b)(B). Relying on *Liberty Northwest Ins. Corp. v. Nichols*, 186 Or App 664 (2003), claimant argued that her injury occurred while she was working because she was a traveling employee and not engaged in a distinct departure on a personal errand.

The Board concluded that the "compensability" exclusion of ORS 656.005(7)(b)(B) applied, regardless of whether claimant was a traveling employee. Citing *Roberts v. SAIF*, 341 Or 48 (2006), the Board noted that the Supreme Court had discussed the legislative history of ORS 656.005(7)(b)(B), which was enacted to reverse *Beneficiaries of McBroom v. Chamber of Commerce*, 77 Or App 700, *rev den*, 301 Or 240 (1986), which had held that the "personal errand" exception to the "traveling employee" rule did not apply to a claim involving a traveling salesman, who became inebriated and drowned in his hotel's hot tub during a business trip.

Turning to the case at hand, the Board analyzed the three questions raised by the *Roberts* court under ORS 656.005(7)(b)(B): (1) whether the worker was engaging in or performing a "recreational or social activity;" (2) whether the worker incurred the injury "while engaging in or performing, or as a result of engaging in or performing," that activity; and (3) whether the worker engaged in or performed the activity "primarily for the worker's personal pleasure."

Relying on *U.S. Bank v. Pohrman*, 272 Or App 31, *rev den*, 538 Or 70 (2015), the Board stated that the "activity" to which ORS 656.005(7)(b)(B) refers is not the particular action that causes the injury, but the activity (working or not working) within which that action occurs. Noting that it was undisputed that claimant was injured while engaging in an exercise class during a layover, the Board concluded that the answer to the second question raised by ORS 656.005(7)(b)(B) was "yes."

Claimant was engaged in "recreational activity" when she sustained injury while participating in exercise class.

Addressing whether claimant was engaged in a "recreational" activity at the time of her injury, the Board applied the dictionary definition of "recreation" adopted by the court in *Legacy Health Sys. v. Noble*, 232 Or App 93 (2009). Noting that claimant's work duties were suspended during the layover and that she was expected to be rested and ready to resume her work duties after the layover, the Board determined that she was engaged in a "recreational activity" (*i.e.*, "refreshment of the strength and spirits after toil") when she sustained her injury while participating in the exercise class.

Finally, analyzing the "primarily for personal pleasure" question in accordance with the *Roberts* rationale, the Board compared the degree to which the recreational activity served the employer's work-related interests and the degree to which claimant engaged in the activity primarily for personal reasons. The Board acknowledged that the employer promoted gym membership for its employees and incidentally benefitted from claimant's participation in the gym class by having a healthier, stronger employee. Nonetheless, noting that claimant joined a gym that did not qualify for the employer's discount and that

Principal reason claimant attended exercise class was for her "personal pleasure."

she considered exercise a "daily activity of life" related to good health, the Board was persuaded that the principal reason she attended the exercise class was personal and unrelated to traveling/working.

Under such circumstances, the Board concluded that claimant was injured while engaging in recreational activity primarily for her personal pleasure. Consequently, the Board held that her injury claim was precluded from compensability under ORS 656.005(7)(b)(B).

Occupational Disease: "DCS'd" Employment With Prior Employer for Currently Claimed Condition Not Considered - "LIER/Rule of Proof" Not Applied - Claimant Must Prove "Post-DCS" "Pathological Worsening" Under "802(2)(b)"

Lloyd R. Fleming, 69 Van Natta 1238 (August 11, 2017). In analyzing the compensability of claimant's occupational disease claim for a shoulder condition under ORS 656.802(2)(b), the Board held that his employment with a previous employer could not be considered because he had entered into a Disputed Claim Settlement (DCS) with that employer which provided that none of his shoulder condition and need for treatment/disability was attributable to his work activities with that employer. Claimant and his previous employer had resolved the compensability of his earlier shoulder claim pursuant to a DCS, which provided that none of his current conditions and need for treatment/ disability were attributable to his work activities while employed with that employer. Shortly thereafter, claimant filed an occupational disease claim against his current employer for his shoulder condition. When the carrier denied the claim, claimant requested a hearing. Citing *Reynolds v. USF Reddaway, Inc.*, 283 Or App 21 (2016), and *Ahlberg v. SAIF*, 199 Or App 271 (2005), he contended that all of his employment exposures (including his work activities with his previous employer concerning his "DCS'd" claim) should be considered to establish the compensability of his occupational disease claim under the last injurious exposure rule (LIER) as a rule of proof for a worsened shoulder condition.

DCS provided that none of claimant's conditions and treatment/disability were attributable to work with previous employer.

The Board disagreed with claimant's contention. Relying on *Gilkey v. SAIF*, 113 Or App 314 (1992), the Board stated that a previous compensable injury could not be considered to have contributed to a claimant's currently claimed condition based on a previous DCS provision that there was no compensable relationship between the previous injury and the condition.

Turning to the case at hand, the Board acknowledged that *Gilkey* concerned the same employer for both the DCS and the claimant's current claim, whereas the DCS in the current case involved a different employer. Nonetheless, reasoning that the court's rationale was based on the express language of the DCS (rather than the presence of the same employer for both the DCS and the currently denied claim), the Board concluded that the *Gilkey* holding was applicable to the present situation.

Based on claimant's express agreement in prior DCS, his claimed condition could not be considered attributable to his earlier employment.

After reviewing the previously approved DCS, the Board determined that claimant had expressly agreed that his then-current shoulder conditions (which included the newly claimed conditions) were not related to his employment exposure with his prior employer, but rather to nonwork-related causes or subsequent injuries or work activities. Under such circumstances, the Board concluded that claimant's "DCS'd" employment exposure could not be considered in establishing the compensability of his current occupational disease claim with his subsequent employer. In reaching its decision, the Board distinguished *Reynolds* and *Ahlberg* on the basis that neither case involved a previous DCS in which the claimant had stipulated that the employment exposure with the employer subject to the DCS had neither caused nor contributed to the disputed conditions.

Claimant required to prove a "pathological worsening/ combined condition" under "802(2)(b)."

Finally, addressing the merits of claimant's occupational disease claim for a worsening of his preexisting shoulder condition, the Board found that the medical evidence did not establish that his "post-DCS" employment exposure was the major contributing cause of his combined right shoulder condition and the pathological worsening of the disease under ORS 656.802(2)(b). *See James M. Steele*, 51 Van Natta 1031 (1999). Consequently, the Board upheld the carrier's denial.

Third Party Dispute: "Out-of-State" Settlement of "Oregon" Claim - Subject to Oregon "Third Party" Statutes - Carrier Did Not Seek to "Void" Unapproved Settlement - Board Determined Carrier's "Just & Proper" Share - "587," "593(3)"

Larry R. Sullins, 69 Van Natta 1233 (August 11, 2017). Analyzing ORS 656.587 and ORS 656.593(3), the Board resolved a dispute regarding a carrier's "just and proper" share of an unapproved "out-of-state" third party settlement because the carrier did not challenge the validity of the settlement, but instead simply sought its statutory portion of the recovery. The Board acknowledged that claimant had initiated and settled his third party cause of action in another state. Nonetheless, citing *Allen v. American Hardwoods*, 102 Or App 562, *rev den*, 310 Or 547 (1990), the Board explained that because claimant had received Oregon workers' compensation benefits, the carrier was entitled to reimbursement of its third party lien under Oregon law.

Because claimant had received Oregon benefits, claimant's "out-of-state" settlement was subject to "third party" statutes.

Because carrier did not object to claimant's unapproved settlement, Board authorized to resolve "just and proper" determination of proceeds.

Relying on ORS 656.587 and *Donna Dean*, 63 Van Natta 558 (2011), the Board acknowledged that any third party settlement is void unless it is made with the written approval of the paying agency or, in the event of a dispute between the parties, by an order of the Board. Nevertheless, emphasizing that the carrier had not objected to the settlement, but rather sought its "just and proper" share of the proceeds, the Board concluded that it was authorized to make such a determination. *See Billy G. King*, 66 Van Natta 1181 (2014).

Addressing a "just and proper" determination, the Board reiterated that, although it is improper to automatically apply the ORS 656.593(1) distribution scheme (which applies to third party judgments) to determine the "just and proper" distribution of third party settlement proceeds under ORS 656.593(3), ORS 656.593(1) may provide general guidance in such cases. *See Urness v. Liberty Northwest Ins. Corp*., 130 Or App 454 (1994); *Ralph A. Hernandez*, 66 Van Natta 1815, 1818 (2014); *Norman H. Perkins*, 47 Van Natta 488 (1995).

Turning to the case at hand, the Board concluded that a distribution of third party settlement proceeds that mirrored ORS 656.593(1) was "just and proper." Consequently, after allotting for claimant's one-third attorney fee (no litigation expenses were asserted) and statutory one-third share, the Board determined that it was "just and proper" for the carrier to recover the remaining balance of settlement proceeds (which did not exceed the carrier's unchallenged third party lien).

APPELLATE DECISIONS UPDATE

Course & Scope: "Social/Recreational" Activity - Primarily for Personal Pleasure" - Jumping to Touch Basketball Court Backboard During "Work Break" - "005(7)(b)(B)"

Greenblatt v. Symantec Corporation, 287 Or App 506 (August 30, 2017). Analyzing ORS 656.005(7)(b)(B), the court affirmed the Board's order in *Adam J. Greenblatt*, 66 Van Natta 1696 (2014), previously noted 33 NCN 10:4, that held that claimant's knee injury, which occurred when he jumped to slap the backboard of a basketball hoop in his employer's courtyard was excluded from compensability because he was engaged in a recreational activity primarily for his personal pleasure. On appeal, claimant challenged the Board's finding that: (1) there was no dispute that claimant's basketball activity was a recreational activity; (2) the injury (which occurred shortly after the basketball game had ended) was ultimately the result of engaging in the recreation; and (3) claimant was engaged in the recreational activity primarily for his personal pleasure.

Claimant did not dispute carrier's assertion that basketball was a recreational activity.

The court rejected claimant's contentions. Concerning the first argument, the court noted that, on Board review, claimant had not disputed the carrier's assertion that he had "not contested the fact that basketball is a recreational activity," but rather had contended that the recreational activity had ended at the time of his injury. Under such circumstances, the court determined that claimant had not presented an objection to the Board's finding that the basketball activity itself was recreational.

Regarding claimant's second argument, the court noted that claimant had not disputed the Board's alternate rationale that, even if the recreational activity had ended, the injury was nonetheless *the result* of engaging in the

recreational activity. Because claimant had not challenged the Board's alternative rationale, the court rejected his challenge to the Board's findings that his jump was recreational and occurred during a recreational activity.

Addressing claimant's third argument (*i.e.*, contesting the Board's finding that he was engaged in the recreational activity primarily for his personal pleasure), the court identified the inquiry as whether there was "any work-related reason for the activity" or "incidental to an employment activity." *See Roberts v. SAIF*, 341 Or 48, 56 (2006); *U.S. Bank v. Pohrman*, 272 Or App 31, 38, *rev den*, 358 Or 70 (2015); *Washington Group International v. Barela*, 218 Or App 541, 546-47 (2008).

Reviewing the Board's finding for substantial evidence, the court acknowledged claimant's contention that a worker's enjoyment when engaging in pleasurable activities does not exclude compensability if the worker's injury was sustained during such activities that are incidental to the worker's primary work activity. *See e.g., Liberty Northwest Ins. Corp. v Nichols*, 186 Or App 664, 667 (2003); *Kaiel v. Cultural Homestay Institute*, 129 Or App 471, 473-74, *rev den*, 320 Or 543 (1994). However, emphasizing that the legal point drawn from *Kaiel* and *Nichols* is that an injury is not excluded from coverage under ORS 656.005(7)(b)(B) if the worker is primarily engaged in work activities at the time of injury, the court concluded that, unlike the claimants in those cases, the present claimant was not actually working during his recreational activity.

Claimant was not working during his recreational activity (slapping backboard after playing basketball).

Finally, the court acknowledged claimant's assertion that case law recognizes the value to employers of on-site facilities for breaks and personal comfort activities (*see e.g.*, *Henderson v. S.D. Deacon Corp.*, 127 Or App 333, 338-39 (1994)), and that such a value must be considered in determining whether claimant's activity was undertaken primarily for his/her personal pleasure. Nonetheless, reasoning that determining the primary motivation for the activity itself is a separate inquiry from an employer's work-related interests in providing break facilities, the court concluded that substantial evidence (including claimant's testimony) as well as inferences that could be drawn from the circumstances of the activity itself, supported the Board's determination that claimant was engaged in the recreational activity primarily for his personal pleasure when he sustained his knee injury.

Despite employer's on-site basketball facility, claimant was engaged in recreational activity primarily for his personal pleasure when injury sustained.

TTD: "Non-MCO" Physician TTD Authorization Valid - Occurred While New/ Omitted Medical Condition Claim Was in "Denied" Status - "245(4)(b)(D)"

Orowheat-Bimbo Bakeries USA-BBU, Inc. v. Vargas, 287 Or App 331 (August 23, 2017). Analyzing ORS 656.005(12)(b), ORS 656.245(4)(a),(b)(D), and ORS 656.262(4)(a), the court affirmed the Board's order in *Francisco Vargas*, 66 Van Natta 1777 (2014), previously noted 33 NCN10:8, that held that claimant was substantively entitled to temporary total disability (TTD) benefits based on a non-managed care organization (non-MCO) physician's authorization, which had been based on a denied new/omitted medical condition

claim that was subsequently found compensable. In reaching its conclusion, the Board had determined that, due to the carrier's denial of the new/omitted medical condition claim, claimant was not subject to the MCO for medical services attributable to the denied condition and, as such, he was entitled to select a non-MCO attending physician who could authorize TTD benefits for those conditions. On appeal, the carrier contended that, because claimant's initial claim had been accepted, his new/omitted medical condition claim was subject to the MCO and, therefore, the non-MCO physician could not authorize TTD benefits.

The court disagreed with the carrier's contention. Citing ORS 656.260(14), the court stated that, notwithstanding ORS 656.005(12) (which defines an "attending physician"), a MCO contract may designate any medical service provider or category of providers as attending physicians. The court observed that the implication from the statute is that, when a worker is subject to a MCO contract, the MCO may designate who may serve as the worker's attending physician.

Court concluded claimant was not "subject to" the MCO contract during period that new/omitted medical condition was denied.

The court identified the question as whether claimant was "subject to" the MCO for purposes of the selection of an attending physician while his new/omitted medical condition claim was in denied status. Based on its review of ORS 656.245(4), the court concluded that the answer to that question was no.

Referring to ORS 656.245(4)(a), the court stated that workers subject to the MCO contract include those who are receiving medical treatment for an *accepted compensable injury or occupational disease* on or after the effective date of the contract. However, when a claim is denied, the court noted that, under subsection (4)(b)(D) of the statute, the worker may receive medical services after the denial from sources other than the MCO until the denial is reversed, which must be paid by the carrier if the services are reasonable and necessary and the claim is finally determined to be compensable. Furthermore, relying on *SAIF v. Reid*, 160 Or App 383, 385 (1999), the court reiterated that a denied claim under ORS 656.245(4)(b)(D) includes a new/omitted medical condition claim.

Turning to the case at hand, the court acknowledged the carrier's contention that ORS 656.245(4)(b)(D) addressed only medical services (not the authorization of TTD benefits) and, as such, the worker must have an attending physician within the MCO for purposes of receiving TTD benefits for a denied new/omitted medical condition claim that is finally determined to be compensable. Nonetheless, emphasizing that subsection (4)(a) provides that workers "subject to" an MCO contract include those seeking medical services for an *accepted compensable injury* and reiterating that subsection (4)(b)(D) permits a worker seeking medical services on a denied claim to receive such services from non-MCO physicians, the court concluded that claimant was not "subject to" the MCO concerning his medical services for the denied new/omitted medical condition claim.

Because statute allowed worker with a denied claim to choose a non-MCO provider for medical treatment, it followed that a non-MCO provider may authorize TTD.

Finally, addressing the TTD authorization question, the court reasoned that because, under subsection (4)(b)(D), a worker may choose a non-MCO physician as an attending physician for medical treatment under ORS 656.245(2)(a), it necessarily followed that a non-MCO physician may also authorize TTD benefits. Emphasizing that it was undisputed that the non-MCO physician was otherwise authorized to serve as an attending physician, the court held that claimant was entitled to the disputed TTD benefits.

APPELLATE DECISIONS
COURT OF APPEALS

Penalty: Carrier's Failure to Award PPD in NOC - "Legitimate Doubt" Based on "AP-Ratified" Findings That Did Not Support Permanent Impairment (Notwithstanding Claimant's Surgery)

Snyder v. SAIF, 287 Or App 361 (August 23, 2017). Analyzing ORS 656.262(11)(a), the court affirmed the Board's order in *Brian Snyder*, 66 Van Natta 1927 (2014), that declined to award penalties/attorney fees for unreasonable claim processing when the carrier closed claimant's central cord syndrome claim without a permanent impairment award. In reaching its conclusion, the Board had reasoned that, although claimant had undergone spinal surgery, the attending physician's ratified impairment findings (which did not support permanent impairment) had provided the carrier with a legitimate doubt concerning his entitlement to a permanent impairment award.

Claimant contended prior "compensability" litigation precluded doubt about later impairment award for surgery.

On appeal, claimant contended that a prior compensability litigation regarding the claimed condition precluded a conclusion that the carrier had a legitimate doubt concerning his entitlement to a permanent impairment award based on his surgery for that condition. In response, the carrier asserted that claimant had not properly preserved the penalty/attorney fee issues because he had not appealed a prior Order on Reconsideration (which had rescinded an earlier Notice of Closure that had not granted permanent impairment for the claimed condition) and, in any event, he had not sought a penalty/attorney fee under the appropriate statute (which it argued was ORS 656.268, rather than ORS 656.262(11)(a)).

Addressing the carrier's "preservation" argument, the court determined that claimant had raised the issue of his entitlement to a penalty/attorney fee under ORS 656.262(11)(a), which provided the carrier with a fair opportunity for the carrier to respond and the ALJ/Board to rule on the issue. Under such circumstances, the court concluded that the penalty/attorney fee issue had been preserved for purposes of appellate review. *See Peeples v. Lampert*, 345 Or 209, 219-21 (2008).

Concerning the carrier's "procedural" challenges to claimant's penalty/attorney fee request (*i.e.*, that ORS 656.268, not ORS 656.262(11)(a), was the only applicable statute from which to seek his remedy), the court assumed, without deciding (as did the Board), that ORS 656.262(11)(a) applied in the context of the carrier's allegedly unreasonable claim closure.

Turning to the merits of the penalty/attorney fee issue, the court identified the question for resolution as whether the carrier had a legitimate doubt about claimant's entitlement to a permanent impairment award for his central cord syndrome when it closed the claim. *See Scott v. Liberty Northwest Ins. Corp.*, 281 Or App 516, 520 (2016); *Brown v. Argonaut Insurance Company*,

93 Or App 588, 591 (1988). The court further noted that it reviewed that question based on whether the Board's determination was supported by substantial evidence; *i.e.*, did the record, when viewed as a whole, permit a reasonable person to make such a finding. ORS 183.482(8)(c); *Scott*, 281 Or App at 520-21.

After conducting its "substantial evidence" review, the court concluded that the Board's "legitimate doubt" decision met the aforementioned "reasonable person" standard. In reaching its determination, the court rejected claimant's various challenges to the Board's decision.

Physician opinion in compensability decision not from, or ratified by, the attending physician could not be considered.

First, the court disagreed with claimant's argument that a physician's opinion in the earlier compensability litigation precluded the carrier from determining that he was not entitled to a permanent impairment award at claim closure. Citing ORS 656.245(2)(b)(C), OAR 436-035-0007(5), (6), and *SAIF v. Owens*, 247 Or App 402,412-15 (2011), *rev den*, 352 Or 170 (2012), the court reasoned that the carrier was required to base its "impairment" decision on findings from, or ratified by, the attending physician. Because the physician's opinion from the "compensability" litigation did not satisfy the aforementioned requirements (and, in any event, was not admitted into the evidentiary record concerning the "penalty/attorney fee" proceeding), the court concluded that the opinion could not be considered.

Prior "compensability" litigation did not adjudicate whether surgery was for accepted condition.

Second, the court rejected claimant's assertion that the "compensability" litigation established the "law of the case" that his surgery was for his accepted cervical cord syndrome. Noting that the prior "compensability" ruling was from an ALJ's decision and not from an *appellate court*, the court found that the "law of the case" doctrine was not applicable. *See Reynolds v. USF Reddaway, Inc.*, 283 Or App 21, 24 (2016). Moreover, although acknowledging that the previous "compensability" litigation addressed the relationship between claimant's cervical cord syndrome and his accepted knee surgery, the court reasoned that the prior ALJ's decision did not adjudicate the question of whether claimant's subsequent cervical surgery was for the central cord syndrome or preexisting cervical conditions.

Under "262(10)," carrier's payment of compensation for surgery did not constitute admission of liability.

Finally, the court disagreed with claimant's contention that the carrier's payment of medical services and temporary disability benefits connected to the cervical cord syndrome and surgery compelled the inference that it had no legitimate doubt that it was liable for a permanent impairment award for the surgery when it closed the claim. Relying on ORS 656.262(10), the court reiterated that merely paying or proving compensation shall not be considered acceptance of a claim or an admission of liability.