



# News & Case Notes

## BOARD NEWS

Biennial Review/Attorney Fees/"388(4)"	1
Claim Disposition Agreement Informational Enclosure Notice Updated	1
Portal Housekeeping	1

## CASE NOTES

Aggravation – Actual Worsening of Compensable Condition Must be Established	2
Attorney Fee – "383(1)" – Not Awardable for "Premature Closure" Decision – No Award of Additional TTD Benefits	2
Compensability/Medical Opinion – Rotator Cuff Tear Established Based on Opinions Focusing on Mechanism of Injury, Claimant's History, Imaging Studies and Temporal Relationship	3
Standard of Compensability – Claimant's Claim for Rotator Cuff Tear Evaluated as "Injury" (Arose Suddenly in Relation to a Specific Event)	4

## APPELLATE DECISIONS

### Update

New/Omitted Medical Condition Claim: Claimed Condition Not "In Existence" / Not Compensable	4
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## BOARD NEWS

### Biennial Review/Attorney Fees/"388(4)"

As the Board begins its biennial review of its schedule of attorney fees under ORS 656.388(4), it is seeking written comments from parties, practitioners, and the general public. Those written comments should be directed to Katy Gunville, WCB's Executive Assistant at 2601 25<sup>th</sup> St. SE, Ste. 150, Salem, OR 97302, [katy.e.gunville@wcb.oregon.gov](mailto:katy.e.gunville@wcb.oregon.gov), or via fax at (503)373-1684.

These written comments will then be posted on WCB's website. The comments will be compiled and presented for discussion at Board meetings, where the Members will also consider public testimony. In establishing its attorney fee schedules, the Members shall also consult with the Board of Governors of the Oregon State Bar, as well as consider the contingent nature of the practice of workers' compensation law, the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees earned by attorneys for insurers and self-insured employers. See ORS 656.388(4), (5).

Announcements regarding Board meetings will be electronically distributed to anyone who has registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>.

### Claim Disposition Agreement Informational Enclosure Notice Updated

The Board's "Claim Disposition Agreement Informational Enclosure" notice has been revised, solely to reflect the changed name of the "Ombuds" office. The new, revised document, can be found on the Board's external website at: <https://www.oregon.gov/wcb/Documents/wcbbulletin/cdanotice2022.pdf>.

On November 16, 2022, the Board published CDA Bulletin No. 4, which reflects the changed name of the "Ombuds" office in the revised informational enclosure for Claim Disposition Agreements (CDAs). The Bulletin can be found on the Board's website at: <https://www.oregon.gov/wcb/Documents/wcbbulletin/cdabulletin4.pdf>

### Portal Housekeeping

Recently the Board has received numerous undeliverable Portal email notifications. One of the great things about the WCB Portal is that it allows users to manage their own Portal accounts. As support staff changes occur in your

firm, please take the time to have your account administrator(s) update your WCB Portal user and contact lists. If you have any questions or need any assistance, please email, [portal.wcb@wcb.oregon.gov](mailto:portal.wcb@wcb.oregon.gov).

#### Removing a User:

- Have your Administrator log into your portal account and click the “Users” tab.
- Select the user you want to remove.
- Click “Remove User.”
- Click “Remove User” again at the bottom of the page.

#### Removing a Contact:

- Log into the Portal.
- Click the “Contacts” tab.
- Select the contact you want to remove.
- Click “Remove Contact.”
- Click “Clear Contact” at the bottom of the page.

## CASE NOTES

### Aggravation – Actual Worsening of Compensable Condition Must be Established

*Aggravation claim must be based on worsening of an accepted condition.*

**Joanne Janicki**, 74 Van Natta 705 (November 15, 2022). Applying ORS 656.273(1), the Board reversed an ALJ’s order that had set aside an aggravation denial. The Board noted that an aggravation claim must be based on the worsening of an accepted condition, citing *Nacoste v. Halton Co.*, 275 Or App 600 (2015). In this instance, the only medical opinions potentially meeting claimant’s burden of proof on this standard had stated that an unaccepted “PVD” condition had worsened, but that the PVD condition did not represent a pathological worsening of any of claimant’s accepted left eye conditions.

### Attorney Fee – “383(1)” – Not Awardable for “Premature Closure” Decision – No Award of Additional TTD Benefits

*Record did not establish that finding of premature closure entitled claimant to additional TTD.*

**John C. Cole**, 74 Van Natta 692 (November 2, 2022). Applying ORS 656.383(1), on remand, the Board held that claimant’s counsel was not entitled to an attorney fee award under that statute when an Order on Reconsideration set aside a Notice of Closure as premature, but the record did not establish that the premature closure decision entitled claimant to additional temporary disability benefits. Citing *Dancingbear v. SAIF*, 314 Or App 538 (2021), the Board noted that an ORS 656.383(1) attorney fee is awardable for a claimant’s counsel’s services in a reconsideration proceeding if the reconsideration proceeding establishes entitlement to temporary disability benefits prior to a decision by an

ALJ. Relying on *Bledsoe v. City of Lincoln*, 301 Or App 11 (2019), and other cases, the Board stated that a premature closure determination does not necessarily establish entitlement to temporary disability benefits. The Board noted that the reconsideration proceeding set aside the Notice of Closure as premature but did not award additional temporary disability benefits. Under such circumstances, the Board concluded that claimant's counsel was not entitled to an ORS 656.383(1) attorney fee for services during the reconsideration proceeding.

Finally, citing ORS 656.268(8)(h), ORS 656.283(6), and *Travis E. Clowers*, 60 Van Natta 1444 (2013), the Board rejected claimant's request for remand for additional evidence taking regarding claimant's entitlement to temporary disability because the record was statutorily limited to that developed during the reconsideration proceeding.

### Compensability/Medical Opinion – Rotator Cuff Tear Established Based on Opinions Focusing on Mechanism of Injury, Claimant's History, Imaging Studies and Temporal Relationship

*Shea A. Sitton*, 74 Van Natta 708 (November 15, 2022). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board reversed the ALJ's order and found claimant's new/omitted medical condition claim for her right shoulder rotator cuff tear condition to be compensable.

Based on the persuasive opinions of claimant's attending physician and a consulting surgeon, which focused on claimant's mechanism of injury, her history, imaging studies, and the temporal relationship between her work injury and the onset of symptoms, the Board found that claimant established the compensability of the claimed right shoulder rotator cuff tear. See *Gregory P. Hamilton*, 73 Van Natta 672, 632 (2021) (physician's opinion not based on the exact age of the claimant's shoulder tear, but on surgical observations of acute trauma, the mechanism of injury, and the temporal relationship between the injury and onset of symptoms, was not discounted).

*Opinion that was inconsistent and did not adequately address temporal relationship or claimant's circumstances was unpersuasive.*

In contrast, the Board found that an examining physician's opinion (on which the ALJ and the employer relied), contained inconsistencies, did not persuasively address the temporal relationship of claimant's work injury and the onset of her right shoulder tear symptoms, and did not apply to claimant's specific circumstances. Accordingly, the Board reasoned that, without additional explanation, the examining physician's causation opinion was conclusory and unpersuasive. See *Moe v. Ceiling Sys. Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained and conclusory opinion); *SAIF v. Harrison*, 229 Or App 104, 113-14 (2019) (a physician's opinion that contains inconsistencies may be accepted only if the inconsistencies are acknowledged, reconciled, and an explanation is provided as to why the opinion is persuasive).

## Standard of Compensability – Claimant’s Claim for Rotator Cuff Tear Evaluated as “Injury” (Arose Suddenly in Relation to a Specific Event)

*Condition arose suddenly in relation to a specific event, thus evaluated as injury.*

**Spencer Barker**, 74 Van Natta 698 (November 9, 2022). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the medical record persuasively established the compensability of the claimant’s new/omitted medical condition claim for a left shoulder rotator cuff tear. In doing so, the Board determined that claimant’s condition arose suddenly in relation to a specific event, and was therefore appropriately evaluated as an injury rather than as an occupational disease. See *Smirnoff v. SAIF*, 188 Or App 438, 443 (2003); *Christopher Houser*, 71 Van Natta 731, 734 n 1 (2019).

Additionally, the Board determined that a treating physician’s opinion persuasively established that the left shoulder rotator cuff tear was compensable. In reaching that conclusion, the Board reasoned that the physician’s well-explained opinion was based on a sufficiently accurate history, considered the claimant’s particular circumstances, including the temporal relationship between the injury and his onset of symptoms, and persuasively rebutted the contrary medical opinion of an examining physician. See *Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003); *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Rebecca Larsen*, 66 Van Natta 1123, 1127 (2014). Accordingly, the Board set aside the employer’s denial of the claimant’s new/omitted medical condition claim.

## APPELLATE DECISIONS UPDATE

### New/Omitted Medical Condition Claim: Claimed Condition Not “In Existence” / Not Compensable

*Board’s order affirming without supplementation was sufficient, supported by substantial evidence.*

**Rochette v. Carehere**, 322 Or App 766 (November 23, 2022). In a nonprecedential memorandum opinion under ORAP 10.30, the court affirmed the Board’s order in *Robert Rochette*, 73 Van Natta 875 (2021), which had affirmed an ALJ’s order upholding a carrier’s denials of claimant’s new/omitted medical condition claims for a rotator cuff tear and biceps tendon rupture. Noting that the Board had simply affirmed (without supplementing) the ALJ’s order upholding the rotator cuff tear denial, the court disagreed with claimant’s contention that the Board had failed to decide his challenge to that denial. Furthermore, the court concluded that substantial evidence supported the Board’s determination that both claims were not compensable, including the Board’s finding that claimant had not established the existence of the claimed biceps tendon rupture.