Workers' Compensation Board

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News & Case Notes

BOARD NEWS

WCB'S 2022 ALJ Anonymous Survey

Consistent with ORS 656.724(3)(b), attorneys regularly participating in workers' compensation cases will be sent a link, via email, to participate in the annual anonymous survey. So, please watch for your invitation to participate in this important survey tool. Please take a few minutes to complete the survey, which can be completed from your computer, smart phone, or tablet.

Responses will be accepted until February 13, 2023, and results will be posted on WCB's website by March 6, 2023. Your participation is greatly appreciated.

Attorney Fee Statistical Report Published

The Workers' Compensation Board (WCB) published its annual update of statistical information regarding attorney fees on January 19, 2023. The report includes attorney fee data through year-end 2021, and can be found on the WCB statistical reports webpage using this link: https://www.oregon.gov/wcb/Documents/statisticalrpts/011923-atty-fee-stats.pdf

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 25th St. SE, Ste. 150, Salem, OR 97302, 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.

CASE NOTES

Compensability: Claimant's Work as a Bus Driver Was a Material Cause of Influenza Condition. Persuasive Opinion Need Not Weigh Other Causes on Material Standard

Diane M. Rogers, 74 Van Natta 762 (December 21, 2022). On remand, applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's injury claim for an influenza A condition was compensable. In reaching that conclusion, the Board found that a treating physician's opinion persuasively established that the claimant's work as a bus driver was a material contributing cause of her disability or need for treatment. Citing *Rogers v. Corvel Enter. Comp, Inc.*, 317 Or App 116 (2022), and *Nicole M. Brought*, 73 Van Natta 986 (2021), the Board stated that although the treating physician did not specifically address a possible cause identified by another physician, a persuasive expert opinion need not weigh the relative contribution of each potential cause to satisfy the "material contributing cause" standard. In addition, the Board noted that the record lacked a contrary expert opinion challenging the treating physician's opinion in support of compensability. Accordingly, the Board reversed the ALJ's order that upheld the carrier's denial.

Course and Scope: ORS 656.005(7)(b)(A): Standard for "Active Participant" Defense Not Met; Injury to Off-Work Bar Manager Involved in Assault While Removing Bar Patron Compensable

The "assault" must be not connected to the job assignment and amount to a deviation from customary duties.

Claimant was off-duty, but on-duty manager asked him to remove the patron.

Charles E. Davis, 74 Van Natta 726 (December 2, 2022). Analyzing the "mutual combat" affirmative defense of ORS 656.005(7)(b)(A), the Board held that the carrier had not established that a pool hall manager's injury (which resulted from an assault by a patron he was removing from the premises) was excluded from compensation, because the assault was connected to his job assignment and did not amount to a deviation from his customary duties. Finding that the removal of a patron from the pool hall was part of his job as a manager and reasoning that he had removed the patron at the request of the on-duty manager at the time, the Board concluded that the manager was acting for the benefit of his employer. Thus, the Board determined that, even if the manager was an active participant in the assault with the patron, the assault had been connected to his job assignment and, as such, an element for establishing the statutory exclusion from compensability of the worker's injury had not been met.

Jurisdiction/Dismissal: Noncomplying Employer Not a "Party" to the DCS After the Claim Has Been Referred to an Assigned Claims Agent, Could Not Appeal the DCS

ORS 656.289(4)(c) excludes an NCE as a party after referral to an assigned claims agent.

Gary A. Woodruff, 74 Van Natta 760 (December 16, 2022). Applying ORS 656.289(4), the Board held that a noncomplying employer (NCE) was not entitled to request review of an ALJ's approval of a Disputed Claim Settlement (DCS) between a worker and the assigned statutory claim processing agent under ORS 656.054(1). The Board acknowledged that, pursuant to ORS 656.005(21), "party" generally includes an "employer" and, as such, is authorized to request review of an ALJ's order under ORS 656.295(2). Nonetheless, referring to ORS 656.289(4)(c), the Board determined that an NCE (an employer who has not obtained workers' compensation coverage for its employees) does not constitute a "party" concerning a DCS between a worker and statutory claim processing agent assigned to process a worker's claim on behalf of the NCE. Under such circumstances, the Board concluded that it was not authorized to consider the NCE's request for review of the ALJ-approved DCS.

Medical Causation; Standard of Compensability – Direct Injury (Material Cause Applied); Claimant Was Reliable Historian, Opinions Therefore Based on Sufficiently Accurate History

Claimant's conditions were directly caused by the injury event.

Kelly Parkhill, 74 Van Natta 735 (December 7, 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 claims for convergence insufficiency, exophoria, paresis of accommodation, deficiencies of pursuit eye movements, vertical heterophoria, and saccadic eye movement dysfunction. In doing so, the Board determined that the claimant's conditions were directly caused by the injury event, and were therefore appropriately evaluated under an injury theory rather than as consequential conditions. *See Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992); *Christopher Houser*, 71 Van Natta 731, 734 n 1 (2019).

Additionally, the Board determined that the opinions of the claimant's treating physicians persuasively established that the convergence insufficiency, exophoria, paresis of accommodation, deficiencies of pursuit eye movements, vertical heterophoria, and saccadic eye movement dysfunction were compensable. In reaching that conclusion, the Board determined that the claimant was a reliable historian, and, therefore, the opinions of her treating physicians were based on a sufficiently accurate history. *See Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003); *Jose Ahumada*, 74 Van Natta 551, 553 (2022); *Maxwell R. Putnam*, 61 Van Natta 1606, 1608 (2009). Accordingly, the Board set aside the employer's denials of the claimant's new/omitted medical condition claims.

Penalty: Carrier's Delay in Issuing a Notice of Acceptance Following a Prior ALJ's Order Setting Aside a Denial Was Unreasonable

Board found an obligation to process the condition held compensable pending appeal.

Randy G. Simi, 74 Van Natta 740 (December 8, 2022). Analyzing ORS 656.262(7)(c), the Board held that, pending a carrier's request for review of an ALJ's order that had found an omitted medical condition claim compensable, the carrier was required to process the ordered-accepted claim, pending appeal. Because the carrier had not done this within the 30-day appeal period (but rather some 53 days after the ALJ's order and only after the worker had requested another hearing challenging the carrier's failure to process the claim), the Board found its claim processing was unreasonable. The Board relied on *Providence Health Sys. Or. v. Walker*, 252 Or App 489, 502 (2012), *rev den*, 353 Or 867 (2013), in which the court held that ORS 656.262(7)(c), requires carriers to reopen and process omitted medical condition claims that have been found compensable after claim closure, even while an appeal of that finding is pending. The Board found also that the carrier's unreasonable delay justified an award of penalties and attorney fees under ORS 656.262(11)(a).

Premature Closure: No Qualifying Statement of No Impairment or Qualifying Closing Report; Penalty: No Legitimate Doubt as to Carrier's Obligations Given Unambiguous Language of the Rule

Randy G. Simi, 74 Van Natta 747 (December 8, 2022). Analyzing ORS 656.268(1)(a), (5)(f), and OAR 436-030-0020(2), the Board held that a carrier had prematurely and unreasonably closed a worker's shoulder claim, because an attending physician's concurrence with another physician who had opined that there was no permanent disability *beyond* that awarded for a previously accepted condition did not constitute a "qualifying statement" of "no" permanent disability. The Board also found the carrier had not obtained a "qualifying closing report" of the worker's newly accepted shoulder conditions before closing the claim. Relying on the aforementioned administrative rule, the Board reiterated that "sufficient information" to close a claim requires either a "qualifying statement of no permanent disability" or a "qualifying closing report" and that the "qualifying statement" must clearly indicate that there is no reasonable expectation of permanent impairment or permanent work restrictions due to the accepted condition.

No "strict compliance" with the administrative rule on closure.

Because the carrier had not obtained a "qualifying closing report," the Board concluded that the claim had been prematurely closed. In addition, finding that the carrier had not strictly complied with the "claim closure" requirements prescribed in OAR 436-030-0020(2), the Board awarded penalties under ORS 656.262(11)(a) and attorney fees pursuant to ORS 656.382(1).

APPELLATE DECISIONS

Claim Preclusion: Prior "New/Omitted Medical Condition" Litigation Order (Expressly Reserved "O.D." Claim) – Exception to "Claim Preclusion"

Board's prior order had reserved claimant's right to maintain an occupational disease claim.

Martinez-Munoz v. Kendal Merchandizing, 323 Or App 11 (December 7, 2022). The court held that a prior Board order (which had upheld a carrier's denial of a worker's new/omitted medical condition claim for a thumb condition) did not preclude her from subsequently initiating an occupational disease claim for the same condition. The court acknowledged the carrier's contention. However, the court noted that the prior Board order concerning the new/omitted medical condition claim had expressly reserved the worker's right to maintain an occupational disease claim for her thumb condition. Therefore, the court concluded that the doctrine of claim preclusion was not applicable to the worker's current occupational disease claim.

New/Omitted Medical Condition Claim – "Compensability" Standard – Record Did Not Establish "Work Injury" Was Material Contributing Cause of Disability/Need for Treatment of Claimed Hematuria Condition

Board properly understood that compensability could be established by proof of "material cause" of disability or the need for treatment.

Canchola-Morgan v. SAIF, 323 Or App 482 (December 29, 2022). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court held that a Board order did not err in analyzing the compensability of a worker's new/omitted medical condition claim when it determined that physicians' opinions had not persuasively established that a work injury was a material contributing cause of a worker's disability/need for medical treatment of his hematuria (blood in urine) condition.

The court disagreed with the worker's contention that the Board's shorthand "disability/need for treatment" phrase mistakenly merged two possible ways to establish the compensability of an injury claim (*i.e.*, disability or need for treatment) into a single standard. The court instead concluded that the Board had understood that compensability could be established by showing *either* that the work injury was a material contributing cause of disability or that the work injury was a material contributing cause of the need for treatment. Reasoning that the Board had correctly focused on the adequacy of the evidence connecting the worker's hematuria to his work injury, which proof was essential to proving whether either any disability, or any need for treatment, was compensable, the court determined that the Board's analysis was correct.

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