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## BOARD NEWS

### Board Meeting On March 15 to Discuss Rule Change Concepts

The Workers' Compensation Board (WCB) members have scheduled a public meeting for March 15, 2022 at 10 a.m. The agenda includes discussion of administrative rule amendments to OAR 438 that would replace pronouns with gender-neutral and nonbinary language. A February 1, 2022 Memorandum describing and listing these proposed changes can be found at <https://www.oregon.gov/wcb/Documents/brdmtgs/2022/020122-rule-change-memo.pdf>

### Attorney Availability Form Can Help Avoid Schedule Conflicts

Balancing your docket and your vacation plans is never easy. However, WCB has a tool that can assist you and our docketing department in minimizing schedule conflicts. You can use the Board's "attorney availability" form to let us know when you will be unavailable:

<https://www.oregon.gov/wcb/hearings/Pages/atty-availability-form.aspx>

By submitting this form with your "unavailable" dates, the Board will make every effort to avoid scheduling hearings while you are away. However, the Hearings Division is required by statute to schedule a hearing not more than 90 days after receipt of the request for hearing. ORS 656.283(3)(a). Because we must get these hearings set timely, it's not possible to accommodate everyone's unavailability dates. However, we will make our best effort to do so.

We are unable to accommodate "unavailable" dates more than one year out, but please think at least 90 days ahead whenever possible, and let us know of your unavailability dates.

### Hearing Notices Available by Email, and Viewable On WCB Portal Website

WCB's web portal can deliver your Hearing Notices electronically by email, and in addition, stores them for easy retrieval on the portal website.

As more firms are moving to remote work, and regular mail delivery slows, the WCB Portal is a reliable and effective way to receive the all-important Notice of Hearing. By electing to receive the Notices electronically, you can have the full Hearing Notice delivered to the email box of any member of your staff, including any general or shared email boxes.

**APPELLATE DECISIONS****Update**

Course & Scope: Injury While Walking During Rest Break – Participation in Employer “Wellness” Program – “Course Of” Employment Prong Satisfied Via “Personal Comfort” Doctrine; Injury Did Not “Arise Out Of” Employment – Employer Neither Mandated “Walk” nor “Route” – Injury Occurred By Tripping on Cracked Pavement on Public Sidewalk

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In addition, should your email system be unavailable, or if a Notice is inadvertently deleted or mis-filed, those Hearing Notices are retained in your portal account in the “Contact History.” From that tab on the portal, you can retrieve and print copies of the notice.

Please note that electronic or “paper” receipt is an all-or-none choice. If any of your staff select to receive the notices by email, the paper deliveries via USPS will stop.

For more information, contact Greig Lowell at (503) 934-0151 or [greig.lowell@wcb.oregon.gov](mailto:greig.lowell@wcb.oregon.gov).

**WCB Office Reopening Postponed**

Plans to reopen State of Oregon offices to the public, previously scheduled for January 3, 2022, have been delayed indefinitely, Board chair Connie Wold announced on December 17, 2021. The Workers’ Compensation Board (WCB) will continue the current method of telephonic and video conference hearings and mediations through June 30, 2022. Here is Chair Wold’s full announcement. <https://www.oregon.gov/wcb/Documents/announcements/121721-conniereopeningltr.pdf>

Parties can request that a proceeding be conducted in person. Please refer to Presiding Administrative Law Judge Joy Dougherty’s September, 29, 2021 instructions on how to make a request. <https://www.oregon.gov/wcb/Documents/announcements/093021-covidhearingupdate.pdf>

**CASE NOTES**

**Jurisdiction: Medical Services Dispute within Board’s Jurisdiction – Carrier Denied that Medical Bills were Related to a Compensable Condition**

**Responsibility: Major Cause of Condition was Previously-Accepted Claim - LIER not Applicable**

*Steven W. Roberts*, 74 Van Natta 101 (January 27, 2022). Analyzing ORS 656.704(3), the Board held that it had jurisdiction to consider the carrier’s denial of the claimant’s medical services claim. In reaching that conclusion, the Board reasoned that the medical services dispute was a matter concerning a claim because the carrier had denied payment for medical bills, asserting that they were unrelated to a compensable condition.

Moreover, applying ORS 656.005(7)(a)(A), the Board concluded that the persuasive medical evidence established that the claimant’s medical services claim was compensable under a “consequential condition” theory relating to a prior compensable injury. The carrier contended that claimant’s condition was an occupational disease and that the Last Injurious Exposure Rule (LIER) applied. Relying on the opinions of the attending physician and an examining physician, the Board reasoned that the prior compensable injury was the major

*Persuasive medical evidence established that the claim was a consequential condition.*

contributing cause of the claimant's shoulder condition and need for treatment. Accordingly, the carrier responsible for the prior compensable injury was responsible for the medical services claim.

### Legal Causation: Record as a Whole Establishes Compensable Injury Despite Lack of Immediate Report – Testimony Supported by an Injury Report and Subsequent Medical Records

*Keith Zimmermann*, 74 Van Natta 35 (January 7, 2022). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's injury claim was compensable, reasoning that the record persuasively established legal and medical causation. The Board stated that despite some alleged inconsistencies, the record as a whole persuasively established that a potentially causative work event occurred.

*Consistent accounts of the work event in the medical records.*

The ALJ did not make an explicit credibility finding. On review, the carrier contended that claimant's testimony was not credible because he did not immediately report the work event and the initial medical records did not reference a work event. However, the Board observed that claimant's testimony was supported by an injury report, and by subsequent medical records with consistent accounts of the work event. In addition, the Board found that the treating physicians' opinions persuasively established that the work event was a material contributing cause of his disability or need for treatment.

*Carrier did not meet burden of proof on combined conditions.*

The Board further determined that the physician's opinion on which the carrier relied did not persuasively establish that the "otherwise compensable injury" was not the major contributing cause of the disability or need for treatment of a combined condition. Specifically, the Board stated that the physician's opinion was conclusory, not well explained, and did not persuasively evaluate the otherwise compensable injury's relative contribution to the claimant's disability or need for treatment of a combined condition. Accordingly, the Board concluded that the carrier did not meet its burden of proof under ORS 656.266(2)(a).

### Medical Opinion: WRME Persuasive on Labral Tear—Entire History Considered – Contrary Opinions Did Not Persuasively Address Temporal Relationship

*Jodi L. Yeomans*, 74 Van Natta 71 (January 21, 2022). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board determined that claimant's new/omitted medical condition claim for a shoulder labral tear condition was compensable. In doing so, the Board found persuasive the opinion of the worker-requested medical examiner, who explained that the claimed condition, as well its need for treatment and disability, was caused in material part by claimant's work injury.

The Board reasoned that the physician's opinion considered claimant's entire historical picture, was based on a sufficiently accurate history, and was well explained. See *Allied Waste Industries Inc. v. Crawford*, 203 Or App 512,

*Medical service was for a condition caused in material part by the work injury.*

518 (2005), *rev den*, 341 Or 80 (2006); *Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003); *Somers v. SAIF*, 77 Or App 259, 263 (1986). Moreover, the Board discounted the contrary opinions of other medical examiners because they were not sufficiently explained and did not persuasively respond to the worker-requested medical examiner's opinion that the temporal relationship between claimant's injury and her onset of symptoms and disability was consistent with an acute labral tear. See *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980); *Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009). Accordingly, the Board found the right shoulder labral tear condition compensable.

Additionally, applying ORS 656.245(1)(a), ORS 656.266(1), and *Garcia-Solis v. Farmer's Ins. Co.*, 365 Or 27, 37 (2019), the Board determined that claimant's proposed right shoulder surgery was a compensable medical service because it was for the right shoulder labral tear, a condition caused in material part by claimant's work injury.

### Medical Opinion: Treating Physician Given Greater Weight – Diagnosis Based on Objective Findings

*Contrary opinion was a review of the medical records, not an examination.*

*Tiffany V. Meksavanh*, 74 Van Natta 52 (January 18, 2022). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's new/omitted medical condition claims for a lumbar sprain/strain and a left shoulder strain were compensable. In reaching that conclusion, the Board found that a treating physician's opinion in support of compensability was more persuasive than the contrary opinion of a physician who had reviewed the claimant's medical records but did not perform an examination.

Specifically, the Board gave the treating physician's opinion greater weight because he had the opportunity to examine the claimant in person, during which he diagnosed the claimed conditions based on objective findings. In contrast, the Board found that the records review physician's opinion was based on an inaccurate history that the diagnoses were not based on objective findings.

### Occupational Disease: Repetitive Work and Changed Body Mechanics from Previously Accepted Conditions Were “Major Cause”; Consequential Condition - Claimed Conditions Were Caused In Major Part By Medical Treatment For Claimant's Accepted Conditions

*David I. Gingold*, 74 Van Natta 17 (January 3, 2022). Applying ORS 656.266(1), ORS 656.802(2)(a), and *McGarrah v. SAIF*, 296 Or 145, 166 (1983), the Board determined that claimant's new/omitted medical condition claim for medial epicondylitis was a compensable occupational disease. In doing so, the Board found persuasive the opinion of the treating physician, who explained that the condition was caused by claimant's repetitive work activities and changed body mechanics resulting from his previously accepted tendinitis and neuritis conditions.

*Greater weight given to the physician with history of treating the claimant.*

Citing *Kevin G. Gagnon*, 64 Van Natta 1498, 1500 (2012), the Board gave greater weight to the physician's opinion due to the significant longitudinal history of treating the claimant. Moreover, the treating physician's opinion considered claimant's particular circumstances, was well reasoned, and persuasively rebutted the contrary medical opinion. See *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008); *Rebecca Larsen*, 66 Van Natta 1123, 1127 (2014).

*Treating physician relied on surgical findings.*

Additionally, applying ORS 656.005(7)(a)(A), ORS 656.266(1), *Barrett Bus. Servs. v. Hames*, 130 Or App 190, 193, rev den, 320 Or 491 (1994), and *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992), the Board determined that claimant's new/omitted medical condition shoulder claims were compensable consequential conditions. The Board found persuasive the opinion of the treating surgeon, who explained in detail that the claimed conditions were caused in major part by medical treatment for claimant's accepted conditions.

Further, the contrary medical opinion was discounted because it did not respond to the treating surgeon's opinion. The Board also determined that the treating physician's opinion, which relied on his surgical findings, persuasively rebutted the contrary medical opinion.

### Temporary Disability: Altered Pay Period Caused Underpayment – Unreasonable Delay – Penalty and Attorney Fee Awarded

*Frank Taylor*, 74 Van Natta 27 (January 3, 2022). Applying ORS 656.262(4)(g), (h) and citing *Lederer v. Viking Freight*, 193 Or App 226, recons, 195 Or App 94 (2004), the Board held that claimant was entitled to an additional day of temporary disability compensation.

*Payment for a 15-day period was paid at the usual 14-day amount.*

The carrier did not dispute claimant's entitlement to temporary disability benefits, but instead contended that claimant's benefits were fully paid for the disputed period. Claimant, who usually received a 14-day temporary disability payment, received a temporary disability payment for a 15-day pay period that was paid at the amount of her usual 14-day temporary disability payment. Claimant subsequently received a temporary disability payment for a 13-day pay period with the amount reduced by one day of temporary disability. The Board determined that, although the 13-day temporary disability payment amount was reduced by one day, the 15-day pay period was not increased in the amount of one day to account for the extra day in that period. Consequently, the Board awarded claimant temporary disability benefits for that additional day.

Additionally, applying ORS 653.268(14)(a) and citing *Jose Segovia-Funes*, 70 Van Natta 1832, 1825 (2018), the Board noted that, separate from the one day underpayment issue, it was undisputed that there had been an overpayment of claimant's temporary disability benefits by the carrier, and the carrier was authorized to recover a portion of that overpayment by withholding 25 percent of the one-day temporary disability benefit.

*Because carrier did not rectify underpayment, penalty and attorney fee awarded.*

Furthermore, relying on *Castle & Cook, Inc. v. Porras*, 103 Or App 65, 69 (1990), the Board found that, because the record did not establish that the carrier attempted to rectify claimant's underpayment for the period in question,

the carrier unreasonably delayed or refused to pay claimant's temporary disability benefits. Therefore, the Board awarded a penalty equal to 25 percent of the additional one-day of temporary disability benefits and awarded a penalty-related attorney fee.

## APPELLATE DECISIONS UPDATE

Course & Scope: Injury While Walking During Rest Break – Participation in Employer “Wellness” Program – “Course Of” Employment Prong Satisfied Via “Personal Comfort” Doctrine; Injury Did Not “Arise Out Of” Employment – Employer Neither Mandated “Walk” nor “Route” – Injury Occurred By Tripping on Cracked Pavement on Public Sidewalk

*Watt v. SAIF*, 317 Or App 105 (January 20, 2022). The court affirmed the Board's order in *Lori C. Watt*, 70 Van Natta 755 (2018), previously noted 37 NCN 6:3, which held that claimant's injury, which occurred when she tripped on a cracked sidewalk while walking on her rest break, was not compensable. Although determining that her injury occurred “in the course of” her employment under the “personal comfort” doctrine because she participated in her employer-sponsored wellness program, the Board concluded that the injury did not “arise out of” her employment because the cracked sidewalk was not an employment-related risk and her employer had neither mandated nor directed her to follow a particular route during her walk. On appeal, claimant contended that because her injury was sustained while engaging in a “personal comfort” activity the “arising out of” prong of the “work connection” test for establishing the compensability of her claim had also been satisfied.

The court disagreed with claimant's contention. Referring to *Halfman v. SAIF*, 49 Or App 23, 29 (1980), and *Jordan v. Western Electric*, 1 Or App 441, 446 (1970), the court acknowledged that these earlier opinions had not separately addressed the “arising out of” prong in finding that an injury was compensable because the claimant was engaging in a “personal comfort” activity. Nonetheless, relying on *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994), the court noted that the Supreme Court had subsequently emphasized that the two prongs of the unitary work-connection inquiry test the injury's work-connection in different manners and that each (“in the course of” and “arising out of” prong) must be evaluated. Likewise, citing *SAIF v. Chavez-Cordova*, 314 Or App 5, 6-8 (2021), the court observed that its recent caselaw has also pursued the “arising out of” prong in the context of injuries sustained during “personal comfort” activities.

Turning to the case at hand, the court did not interpret its caselaw as having eliminated the requirement for proof of the “arising out of” prong when a “personal comfort” activity had been established and it rejected claimant's suggestion that it should so hold. Accordingly, the court held that the Board had not erred in separately analyzing whether the “arising out of” prong had been met.

*Both prongs of the unitary work-connection inquiry must be evaluated.*

*Whether or not the activity was for claimant's personal comfort, the "arising out of" prong must be analyzed.*

Finally, the court rejected claimant's alternative argument that her satisfaction of the "course of" prong by means of the "personal comfort" doctrine also meant that she had met the "arising out of" prong because that established a work-related condition to which her employment had exposed her. Reasoning that claimant's proposed analysis would render the analysis of the "arising out of" prong superfluous, the court concluded that whether a claimant's employment exposed her to a risk of injury will depend on the circumstances of the injury and its causal connection to the employment, whether or not the activity was for the claimant's personal comfort.

Applying the "arising out of" analysis, the court determined that the Board's findings that, notwithstanding the employer's encouragement of claimant's walking activity, the employer had neither mandated claimant's walk nor directed her route were supported by substantial evidence. Likewise, the court concluded that the Board's determination that claimant's off-premises walk itself was not an employment duty or incidental to an employment (*i.e.*, there was nothing about her employment that exposed her to the risk of being injured by a cracked sidewalk during an off-premises walk) was supported by substantial reason.

## APPELLATE DECISIONS COURT OF APPEALS

Combined Condition: Requires Two *Separate* Conditions – Symptoms/Exacerbation/Worsening of Preexisting Condition Not Separate Medical Condition – “005(7)(a)(B)”

*Gibson v. ESIS*, 316 Or App 703 (January 5, 2022). Analyzing ORS 656.005(7)(a)(B), the court reversed the Board's order in *Terry D. Gibson*, 72 Van Natta 793 (2020), which, in upholding a carrier's new/omitted medical condition denial of claimant's knee osteoarthritis, found that the carrier had established that his work injury-related knee pain had combined with his preexisting osteoarthritis and was not the major contributing cause of his need for treatment/disability for his combined knee condition. In reaching its conclusion, the Board had reasoned that the simultaneous existence of these “two medical problems” constituted a “combined condition.” On appeal, asserting that his osteoarthritis was the only cognizable medical condition, claimant contended that the Board's finding that his knee symptoms had combined with his preexisting osteoarthritis to constitute a “combined condition” under ORS 656.005(7)(a)(B) had misapplied the statute.

The court reversed the Board's decision. Citing *Carrillo v. SAIF*, 310 Or App 8, 11, *rev den*, 368 Or 560 (2021), the court reiterated that the term “combined condition” in ORS 656.005(7)(a)(B) suggests two *separate* conditions that combine. Relying on *Carrillo*, the court further clarified that “[a] combined condition occurs when a new injury combined with an old injury or pre-existing condition to cause or prolong either disability or a need for treatment.” *Id.* Likewise, again referring to *Carrillo*, the court repeated its holding that the worsening of a preexisting condition cannot be a separate condition from (and thus cannot combine with) the underlying preexisting condition to establish a cognizable combined condition. *Carrillo*, 310 Or App at 11-12.

*Worsening of a pre-existing condition cannot be a separate condition from the underlying preexisting condition to establish a combined condition.*

*Medical evidence did not allow a conclusion that hyperextension was a distinct condition.*

Turning to the case at hand, the court observed that none of the characterizations of the “condition” which combined with claimant’s preexisting osteoarthritis (e.g., “the onset of symptoms” due to the work injury; hyperextension of the knee, causing rough surfaces of the underlying osteoarthritis to “pop over one another”; “the work-related knee pain”; “the work-related exacerbation”) amounted to a separate medical condition. In arriving at this determination, the court reiterated that the following characterizations did not constitute a separate medical condition: (1) symptoms of a preexisting condition triggered by a workplace incident (see *Interiano v. SAIF*, 315 Or App 588, 594 (2021)); (2) incidents (see *Brown v. SAIF*, 361 Or 241, 255-71 (2017)); (3) exacerbation of a preexisting condition and worsening of a preexisting condition (see *Carrillo*, 310 Or App at 12). In addition, the court noted that the Board had not identified hyperextension as an injury and the medical evidence did not allow for a conclusion that a hyperextension was a distinct medical condition (as distinct from the process that caused claimant’s knee pain).

Given such circumstances, to the extent that the Board had determined that claimant had a legally cognizable combined condition based on the aforementioned characterizations, the court concluded that the Board had applied an incorrect legal standard.

Finally, the court addressed the Board’s finding that claimant’s work-related knee pain (caused by his fall at work) in combination with his osteoarthritis had resulted in a legally cognizable combined condition. To the extent that the Board’s conclusion suggested that claimant’s knee pain could constitute a separate medical condition, the court reasoned that the Board’s order had neither supplied reasoning for the conclusion that knee pain was a separate medical condition as distinct from symptoms of a preexisting condition nor explained how the knee pain had combined with the osteoarthritis. Consequently, to the extent that the Board’s order had determined that the “combined condition” was claimant’s knee pain combined with osteoarthritis, the court found that the order was not supported by substantial reasoning.

**Substantial Reasoning: Board’s Analysis of Physician’s Opinion Lacked Substantial Reasoning – Discounted Opinion Based on Incomplete History of “Off Work” “Flu” Exposures – No Explanation Why Opinion Insufficient to Meet “Material Cause” Standard (When Physician Had Been Aware of Other “Off Work” Exposures & Considered Work Exposure to be the Greater Risk)**

*Rogers v. Corvel Enterprise Comp, Inc.*, 317 Or App 116 (January 20, 2022). The court reversed the Board’s order in *Diane M. Rogers*, 72 Van Natta 919 (2020), which had upheld a carrier’s denial of a bus driver’s injury claim for influenza. In reaching its conclusion, the Board had reasoned that her attending physician’s opinion (which believed that, more likely than not, she had been exposed to influenza at work) was unpersuasive because the physician had not

*Court clarified that compensability depended on whether it was more likely than not that work exposure was a material cause of illness.*

*Board did not sufficiently explain how physician's lack of awareness of off-job activity defeated the "material contributing cause" standard.*

been aware of her trip to a grocery store in the days before she had become ill. On appeal, claimant contended that the Board's order was not supported by substantial evidence or reason.

The court held that the Board's analysis regarding the attending physician's opinion was not supported by reason. Citing *Schleiss v. SAIF*, 354 Or 637, 643 (2013), the court identified the only disputed issue on review was whether claimant had established, by a preponderance of the evidence, that her exposure to flu at work was a material contributing cause of her illness. As such, the court clarified that the compensability of the claim depended on evidence that it was more likely than not that claimant's work exposure was a likely material cause of her illness.

Turning to the case at hand, the court agreed with the Board's determination that, because of the complexity of the medical causation issue concerning claimant's viral infection involving multiple potential causes, claimant was required to establish medical causation by a preponderance of the evidence through expert medical evidence stated in terms of "a reasonable medical probability." See *SAIF v. Gaffke*, 152 Or App 367, 371 (1988); see also *Liberty Mutual Fabricators, Inc. v. SAIF*, 295 Or App 809, 813 (2019), modified on recons, 302 Or App 110, rev den, 366 Or 731 (2020). Furthermore, citing ORS 656.005(7)(a), ORS 656.266(1), and *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992), the court stated that claimant was required to establish only that it was more likely than not that her work place exposure materially contributed to her disability or need for treatment.

Applying those principles to the Board's analysis of the attending physician's opinion, the court acknowledged that the physician had not considered claimant's grocery store trip. Had the claim been subject to "the major contributing cause" standard as an "occupational disease" (which requires a weighing of all causes to determine the major cause), the court recognized that such an omission would certainly been significant. Nonetheless, noting that the claim had been litigated as an "injury," the court reasoned that the Board had not explained how the attending physician's lack of awareness of the grocery store trip had defeated the persuasiveness of the physician's opinion under "a material contributing cause" standard (when the physician had explained that claimant's work had presented a greater risk of exposure to flu than her brief potential exposures in other off-work environments such as a regular trip to the doctor, as well as quick trips to a department store and a pharmacy drive-up window).

Consequently, in light of the aforementioned shortcoming in the Board's analysis, the court concluded that the Board's rejection of the attending physician's opinion was not supported by substantial reasoning. Accordingly, the court held that the Board had erred and, as such, remanded for reconsideration under the correct standard.