Workers' Compensation Board

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BOARD NEWS

May 27 Rulemaking Hearing to Consider Change in Board's Email Address

The Workers' Compensation Board will hold a public hearing on Friday, May 27, 2022 at 10:00 a.m. by teleconference to receive comments on a proposed amendment of the mandatory language in the Notice of Claim Denial and Hearing Rights. Written comments may also be submitted in advance of the hearing. (*See Notice*, linked below).

The proposed amendments update the Board's email address for filing requests for hearing and Board review and the "email request" address included in the mandatory language for notices of acceptance and denial. Additionally, the office of the Ombudsman for Injured Workers has changed its name to the Ombuds Office for Oregon Workers. In response, the Board proposes amending its permanent rules to replace references to the Ombudsman for Injured Workers with the Ombuds Office for Oregon Workers. These proposed amendments will also affect the mandatory language for notices of acceptance and denial, as well as the mandatory language for subpoenas for individually identifiable health information, Disputed Claim Settlements, and Claim Disposition Agreements.

Further information regarding the proposed amendments and the public hearing are found here. Copies of the rulemaking materials and the proposed amendments will also be distributed to all those on the Board's "interested parties" list for rule-related activities.

Board Amends Rules to Use Gender-Neutral Language

At its March 15, 2022, public meeting, the Board Members adopted administrative rule changes to replace pronouns with gender-neutral and nonbinary language. The proposed amendments are consistent with Governor Brown's Executive Order 19-08.

These "housekeeping" amendments were filed with the Oregon Secretary of State Archives Division on March 15, 2022. The rule amendments can be found here: 1-2022 Housekeeping.

Administrative Law Judge Recruitment

The Workers' Compensation Board intends to fill two Administrative Law Judge positions in the Salem Hearings Division. The positions involve conducting workers' compensation and OR-OSHA contested case hearings, making evidentiary and other procedural rulings, conducting mediations, analyzing complex medical, legal, and factual issues, and issuing written decisions which include findings of fact and conclusions of law.

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Applicants must be members in good standing of the Oregon State Bar or the Bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia. The position requires periodic travel, including but not limited to Eugene, Roseburg, and Coos Bay, and working irregular hours. The successful candidate will have a valid driver's license and a satisfactory driving record. Employment will be contingent upon the passing of a fingerprint-based criminal background check.

The announcement is posted on the Department of Consumer and Business Services (DCBS) website at https://www.oregon.gov/dcbs/jobs/Pages/jobs.aspx and contains additional information about compensation and benefits of the position and how to apply.

Questions regarding the position should be directed to Ms. Kerry Anderson at (503) 934-0104. The closing date for receipt of application materials is April 28, 2022. DCBS is an Equal Opportunity, Affirmative Action employer committed to workforce diversity.

Mediation Evaluation Project

The Workers' Compensation Board will begin conducting a mediation evaluation project from April 1, 2022, through June 30, 2022. WCB will be sending evaluations to attendees of all held mediations. The purpose of the project is to increase feedback to WCB from mediation participants about their mediation experience. Evaluations will be mailed out and will include a postage-paid return envelope for your convenience. We would appreciate your participation in providing us with feedback during the three-month project period.

CASE NOTES

Attorney Fee: No Fee Awarded for Time Spent Litigating Amount of Fee – *Hoffnagle* Distinguished – Claimant's Cross-Petition Challenged Fee Award, But Did Not Relate to a Compensability Dispute

Julie Hooks, 73 Van Natta 605 (August 3, 2021), *recons*, 74 Van Natta 196 (March 4, 2022). On reconsideration of its Order on Remand, the Board did not award claimant's appellate counsel an attorney fee award for time spent litigating the amount of a reasonable attorney fee before the court and on remand.

Claimant contended that, pursuant to *Shearer's Foods v. Hoffnagle*, 363 Or 147, 156 (2018), her attorney was entitled to a fee for those services. The Board disagreed, explaining that claimant's counsel in *Hoffnagle* was entitled to an ORS 656.386(1)(a) attorney fee award for services related to the carrier's denied petition for Supreme Court review of the Court of Appeals compensability decision because claimant had "finally prevailed" over the compensability dispute when the Supreme Court denied the carrier's petition for judicial review.

No basis for an attorney fee where cross-petition did not relate to a compensability dispute.

Yet, unlike *Hoffnagle*, the case at hand involved a cross-petition for judicial review challenging only the Board's attorney fee award for her counsel's services on Board review. Under such circumstances, the Board found that there was no statutory basis for an attorney fee award when the claimant's cross-petition did not relate to an underlying compensability dispute. However, the Board awarded a fee of $9,122.50 for services on Board Review regarding the compensability determination.

Combined Condition: Ceases Denial Set Aside – Opinion Based on Incomplete History and Was Inconsistent

Consequential Condition: Caused by Accepted Condition and its Treatment

Nayef Salem, 74 Van Natta 187 (March 3, 2022). Applying ORS 656.262(6)(c) and ORS 656.266(2)(a), the Board set aside the employer's "ceases" denial of the claimant's combined L4-5 disc herniation condition. The Board determined that the physician's opinion on which the employer relied did not persuasively establish a change in condition such that the "otherwise compensable injury" (*i.e.*, the accepted L4-5 disc herniation condition) had ceased to be the major contributing cause of the claimant's need for treatment and disability for the combined condition before the effective date of the employer's denial.

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 the claimant's new/omitted medical condition claim for a recurrent disc protrusion at L4-5 was a compensable consequential condition based on persuasive medical opinions that the condition existed and was caused in major part by a combination of claimant's compensable injury and the related medical treatment. Thus, the Board concluded that the claimant persuasively established the compensability of his new/omitted medical condition claim. 656.005(7)(a); ORS 656.266(1).

Consequential Condition: Discitis Caused by Manipulation Treatment – Treating Surgeon Ruled Out Infectious Process

Steven Johnson, 74 Van Natta 248 (March 30, 2022). 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 the claimant's new/omitted medical condition claim for a traumatic discitis at T6-7 was a compensable consequential condition, caused in major part by medical treatment for claimant's accepted condition. The Board was persuaded by the

Blood tests and biopsy ruled out an alternate cause of the claimed condition.

opinion of claimant's treating neurosurgeon, who attributed the discitis condition to manipulation treatment for claimant's accepted thoracic strain. The treating neurosurgeon acknowledged that discitis is usually an infectious process, but noted that blood tests and a biopsy ruled out an infection.

Moreover, citing *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980), and *Nancy C. Prater*, 60 Van Natta 1552, 1556 (2008), the Board discounted the contrary opinion of an examining physician because it was not sufficiently explained and did not persuasively respond to the treating physician's opinion. Accordingly, the Board found the traumatic discitis at T6-7 condition compensable.

Extent: Medical Arbiter Did Not Attribute Any Impairment to Accepted Condition or Sequela – *Magana-Marquez* Applied – No Impairment Awarded

Jason Walker, 74 Van Natta 194 (March 3, 2022): Applying 656.283(6), the Board affirmed an Order on Reconsideration that awarded temporary disability benefits but no permanent impairment award. Citing *Marvin Wood Prods. v. Callow,* 171 Or App 175, 183 (2000), the Board held that, as the party challenging the Order on Reconsideration, claimant had to establish error in the reconsideration process.

Applying OAR 436-035-0007(5) and *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012), the Board agreed with the parties that the medical arbiter's findings should be used to rate claimant's impairment. Here, the medical arbiter did not attribute *any* portion of claimant's impairment to an accepted condition or direct medical sequela. Applying *Magana-Marquez*, 276 Or App 32, 36 (2016) and ORS 656.214, the Board held that claimant was not entitled to a permanent impairment award because he had not shown that *any* of his impairment was causally related to his accepted lumbar strain or direct medical sequela. Under such circumstances, the Board held that claimant had not shown error in the reconsideration process. Accordingly, the Board affirmed the ALJ's order that affirmed the Order on Reconsideration.

Claimant failed to establish error in the reconsideration process.

Medical Services: Caused in Material Part by Injury – First Sentence of "245(1)" Applied – Attending Physician Persuasive – Longitudinal History of Treatment

Carmen Cruz-Ruiz, 74 Van Natta 231 (March 23, 2022). Analyzing the first sentence of ORS 656.245(1)(a), the Board held that disputed medical services were for conditions caused in material part by the injury and causally related to claimant's accepted conditions.

The carrier contested the compensability of chiropractic services and attending physician examinations, contending that those medical services were not for the accepted conditions because those conditions had resolved and no longer required treatment.

The Board determined that the disputed medical services were compensable based on the persuasive opinions of the claimant's attending physician and treating chiropractor. Citing *Weiland v. SAIF*, 64 Or App 810 (1983) the Board reasoned that because the attending physician evaluated the claimant on multiple occasions during the time period of the disputed medical services, it was appropriate to defer to his opinion as the attending physician. Further, citing *Kevin G. Gagnon*, 64 Van Natta 1498, 1500 (2012), the Board considered the opinion of the treating chiropractor to be persuasive based on a substantial longitudinal history of treating claimant before and during the period of the disputed medical services.

APPELLATE DECISIONS UPDATE

Course & Scope: "Rest Break" Injury While Walking on Public Sidewalk – Did Not "Arise Out Of" Employment – No "Employment-Related" Risk

Court reiterated its reasoning in Watt v. SAIF *that similar injury did not "arise out of" employment.*

Mandes v. Liberty Mutual Holdings, 318 Or App 207 (March 9, 2022). The court, *per curiam*, affirmed the Board's order in *Katherine Mandes*, 71 Van Natta 240 (2019), previously noted 38 NCN 3:4, which held that, although claimant was engaged in a "personal comfort" activity when she was injured while returning to the employer's premises after taking her "walking break" (which established that her injury occurred "in the course of" her employment), her injury (which occurred when she tripped on an uneven public sidewalk) did not "arise out of" her employment because her risk of falling was not created by her employment and her work environment had not exposed her to such a risk. Noting that it had recently considered this same issue (which concerned almost identical circumstances) in *Watt v. SAIF*, 317 Or App 105, 114 (2022), the court reiterated its reasoning in *Watt* that, notwithstanding the employer's encouragement of activity, there was nothing about claimant's employment that exposed her to the risk of being injured by a cracked sidewalk during an off-premises walk. Accordingly, the court concluded that its analysis in *Watt* compelled the same result in the present case.

Third Party Dispute: "DCS'd" Claim Involving Alleged "NCE" – Sedgwick Not "Paying Agency" Concerning Claimant's Subsequent Civil Settlement – No "Compensable Injury" – No Entitlement to Share of Settlement Proceeds

Sedgwick CMS, Inc. v. Dover, 318 Or App 38 (March 2, 2022). Analyzing ORS 656.576, the court affirmed the Board's order in *Toni M. Dover*, 72 Van Natta 623 (2020), previously noted 39 NCN 7:13, which held that Sedgwick Claim Management Services (who had processed claimant's injury claim with a noncomplying employer (NCE) on behalf of the Director under ORS 656.054) was not entitled to a share of claimant's settlement proceeds resulting from her civil action against a tortfeasor that arose from her injury that had prompted her workers' compensation claim, because when her civil settlement was reached

her claim had already been resolved pursuant to a Disputed Claim Settlement (DCS) which had resolved the compensability of her claim. Noting that it had initially accepted claimant's injury claim before entering into the DCS, Sedgwick contended that it was a "paying agency" under ORS 656.576 because it had paid benefits concerning the claim.

Assigned claims agent was not a "paying agency" at the time of the third-party settlement.

The court disagreed with Sedgwick's contention. Citing ORS 656.576, the court stated that a "paying agency" is defined as "the self-insured employer or insurer paying benefits to the worker or beneficiaries." Relying on ORS 656.005(14), the court added that a "paying agency" also includes an assigned claim agent regarding a claimant's injury claim against a NCE. Referring to *SAIF v. Wright*, 113 Or App 267, 272 (1992), the court noted that it had held that a carrier (who had denied the claimant's workers' compensation claim from the outset) was not a "paying agency" for purposes of the claimant's civil settlement because it was not "paying benefits at the time of the settlement or distribution."

Turning to the case at hand, the court acknowledged that, unlike the carrier in *Wright*, Sedgwick had previously paid benefits on claimant's initially accepted claim before the DCS subsequently determined that the claim was not compensable. Nonetheless, after reviewing the text and context of ORS 656.576 to ORS 656.595, the court concluded that the "third party" law applies to *compensable* claims. Furthermore, after reviewing its reasoning in *Wright*, the court adhered to its holding that, in order to be a "paying agency," a carrier must be responsible for paying benefits concerning a compensable claim at the time of a claimant's civil settlement.

Claim denial through DCS freed the claims agent from its responsibility to pay benefits.

Applying its reasoning to the present record, the court stated that Sedgwick would have been a "paying agency" had the claim not been denied and Sedgwick remained responsible for paying benefits concerning claimant's compensable claim. However, the court reasoned that, once Sedgwick's denial of the claim was resolved through the DCS and it was freed from its responsibility to pay workers' compensation benefits, Sedgwick lost its right as a "paying agency" under the "third party" law to seek reimbursement from claimant's civil settlement.

In reaching its conclusion, the court recognized that the parties' DCS had included a provision stating that Sedgwick reserved its "third party" rights. Nevertheless, based on its explanation of its *Wright* holding, the court considered the DCS provision to be essentially ineffectual because a carrier that has denied a claim at the time of the civil settlement is not a "paying agency" and does not have any statutory right to share in settlement proceeds.

APPELLATE DECISIONS
COURT OF APPEALS

Appellate Review: Substantial Evidence/Reason – Board Order Discounted Physician's Opinion Based On Unreliable History

Dugas v. Liberty Mutual Insurance Company, 318 Or App 68 (March 2, 2022). The court affirmed the Board's order in *Donald J. Dugas II*, 71 Van Natta 512 (2019), which, in upholding a carrier's new/omitted medical condition

denial for claimant's rotator cuff tear, found that the physicians' opinions supporting a causal relationship between his accepted hip condition and his rotator cuff tear were unpersuasive because they had relied on claimant's unreliable history of falling. On appeal, claimant argued that: (1) the Board had erroneously focused on his alleged unreliable history of multiple falls, rather than a single unique fall; and (2) the Board's decision to discount the physicians' opinion supporting his claim lacked substantial evidence and reason.

Court reviewed Board order to determine whether a rational explanation of its factual findings would lead to the legal conclusion on which the order was based.

The court rejected claimant's arguments. Citing ORS 183.482(8)(c), the court stated that it reviewed the Board's compensability determination concerning claimant's rotator cuff tear was for substantial evidence. Relying on *Garcia v. Boise Cascade Corp.*, 309 Or 292, 294, n 1 (1990), the court reiterated that "substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make the finding." Referring to *Arms v. SAIF*, 268 Or App 761, 767 (2015), the court added that it also reviews a Board order to determine whether a rational explanation of its factual findings led to the legal conclusions on which the order was based.

Because it considered the question of medical causation concerning whether claimant's compensable hip injury was the major contributing cause of his rotator cuff tear was complex, the court reviewed the Board's explanation of its view and treatment of the expert medical opinions guided by the following principles: (1) to be persuasive, a medical opinion identifying the major contributing cause of a condition must evaluate how other potential causes might have contributed to the condition (*SAIF v. Willcutt*, 160 Or App 568, 574 (1999); (2) if there are conflicting medical opinions, the Board will "place more emphasis on opinions that are well reasoned and based on the most complete relevant information" (*Jackson County v. Wehren*, 186 Or App 555, 559-60 (2003)); (3) the court reviews the Board's findings concerning expert opinions for substantial evidence (ORS 183.482(8)(c)); and (4) if there are competing expert opinions on a medical issue, the court will reverse the Board's decision to rely on one opinion over the other "only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the Board finds the other without giving a persuasive explanation" (*Id.*). Consistent with those principles, and mindful that its role was not to second-guess the Board, the court reiterated that it assesses the Board's evaluation of the competing medical opinions to determine the reasonableness of the Board's evaluation. *See SAIF v. Pepperling*, 237 Or App 79, 85 (2010).

Although record contained evidence from which the Board might reach a different finding, the Board's finding was supported by substantial evidence in the record.

Applying those principles to the present record, the court acknowledged that the record contained evidence from the Board might have reached a different finding about whether claimant had fallen as he claimed. Nonetheless, the court determined that the Board's finding that he had not fallen was supported by substantial evidence in the record. Under such circumstances, the court held that the Board's reasoning that the medical opinions supporting the compensability of the claimed rotator cuff tear (which had been based on claimant's unreliable history of falling) were unpersuasive reasonably supported its conclusion that claimant had not established that his rotator cuff tear was caused, in major part, by his compensable hip injury. Consequently, the court affirmed the Board's decision to uphold the carrier's claim denial.

Compensability: Injury Claim – "Material Contributing Cause" Standard – "Substantial" Cause – "More Than A Minimal" Cause

Rogers v. Corvel Enterprise Comp. Inc., 318 Or App 641 (March 30, 2022). On reconsideration, the court adhered to its earlier opinion, 317 Or App 116 (2022), which, in reversing the Board's order in *Diane M. Rogers*, 72 Van Natta 919 (2020), concluded that the Board's decision (that had upheld a carrier's denial of claimant's injury claim for Influenza A infection) was not supported by substantial evidence/reasoning. The court allowed reconsideration to address the carrier's contention that it had incorrectly relied on *Mize v. Comcast Corp-AT&T Broadband*, 208 Or App 563 (2006) (which concerns "medical service" claims under ORS 656.245(1)) for the proposition that, under the material contributing cause standard of proof, an injury claim is compensable if the work exposure is a "fact of consequence" in the causation of a claimant's condition, whereas the applicable "material" standard for an injury claim is if it is a "substantial" cause that is more than minimal. *See Knaggs v. Allegheny Techs.*, 223 Or App 91 (2008).

Court modified its opinion to address "material cause" standard for an injury claim, compared to a medical services claim.

The court agreed with the carrier's assertion that it held in *Knaggs* that, for purposes of determining the initial compensability of an injury claim, a "material contributing cause is a substantial cause, but not necessarily the sole cause or even the most significant cause." Consequently, the court modified its opinion to state that, for purposes of analyzing the compensability of an initial injury claim, a material contributing cause is a substantial cause that is more than a minimal cause. The court further commented that the Board, on remand, would have an opportunity to reconsider whether claimant's medical evidence met that standard.

APPELLATE DECISIONS
SUPREME COURT

Subject Worker: "Non-Subject Worker" Exemption – "027(15)" – "Furnish"/"Leasehold Interest" Requirements Not Satisfied – Trucker Leased Equipment From Carrier that Prohibited Use to Any Other Carrier

SAIF v. Ward, 369 Or 384 (March 24, 2022). Analyzing ORS 656.027(15), the Supreme Court affirmed the Court of Appeals decision (307 Or App 337 (2020)), which had affirmed the Board's order in *Carl S. Ward*, 71 Van Natta 484 (2019) that had determined that claimant was a "subject worker" for a trucking company because he did not qualify for an exemption from "subject worker" status because the truck he had "furnished" to the trucking company had been leased from the company with a prohibition against driving the truck for any other company. In reaching its conclusion, the Court of Appeals had reasoned that ORS 656.027(15) "requires a leasehold interest that exceeds the right to furnish the equipment to the carrier such that the driver has a right to possess, use, and control the equipment *for purposes other than providing it to the*

Court addressed whether claimant was a subject worker for a trucking company.

carrier." (Emphasis added). *Ward*, 307 Or App at 343. Because the trucker's lease with the trucking company "did not confer any interest in the leased vehicle beyond the authority to use it in [the trucking company's] service and under [the trucking company's] direction," the Court of Appeals held that the trucker did not have a sufficient leasehold interest in the truck to qualify for the "subject worker" exemption under ORS 656.027(15).

On appeal to the Supreme Court, SAIF contended that the plain text of the statute and the legislative history supported its argument that claimant was exempted from "subject worker" status. Specifically, SAIF contended that the Court of Appeals had incorrectly inferred a more restrictive meaning to the statutory terms "leasehold interest" and "furnish" by requiring that the "leasehold interest" be transferable or provide proprietary rights that extend beyond mere possession and use. The Supreme Court disagreed with SAIF's contention.

The Supreme Court identified the determinative question to be the legislature's intention in enacting the statutory exemption and how to best give meaning to the entire provision. Consulting the dictionary definition of "furnish," the Court stated that the definition implies that a driver can "furnish" a truck by producing it to haul loads for a carrier. Reviewing the legal term "leasehold interest" as used in the Oregon Uniform Commercial Code and Oregon Department of Transportation regulations, the Court found that, at a minimum, the regulations require that a "leasehold interest" requires "possession and use."

"Leasehold interest" requires "possession and use."

Inserting the plain meaning of those terms within the statutory exemption, the Supreme Court acknowledged that, if it stopped its inquiry at this point, the ordinary usage of the statutory terms "furnish" and "leasehold interest" might support SAIF's assertion that claimant fit the requirements for a "nonsubject worker." Nonetheless, persuaded by claimant's argument that such an interpretation of the statutory exemption would render the two requirements as essentially duplicitous, the Court agreed with his reasoning that a lease that grants a lessee a right to supply the equipment for exclusive use by the lessor does not actually grant a sufficient interest in the equipment for the lessee to "furnish."

Lease that grants only exclusive use by the lessor does not grant a sufficient interest for the lessee to "furnish" the equipment.

When considered together, the Supreme Court determined that the text and context of ORS 656.027(15), as well as the legislative history of the "subject worker" exemption, indicated that the legislature did not intend that the exemption cover a situation in which a lessor leases equipment to an individual and then maintains exclusive control of the use of that vehicle. Consequently, to give effect to every word in the exemption in ORS 656.027(15), the Court found that a "leasehold interest" under the exemption must allow for more rights than simply driving the equipment for the sole benefit of the lessor in order for the driver to "furnish" that equipment as the statute requires.

Applying its reasoning to the case at hand, the Supreme Court noted that the terms of claimant's lease agreement were so restrictive that he was prohibited from using the truck for any business purpose other than those purposes requested by the trucking company. In other words, the Court interpreted the lease agreement to have placed claimant in nearly the same position as if he was an employee of the trucking company and not, as the "subject worker" exemption contemplated (as an owner (or lessee)-operator with decision-making ability about who to haul for). Accordingly, because the

Claimant was nearly in the same position as if he was an employee.

lease agreement did not grant claimant sufficient authority over the equipment to possess, use, and furnish the equipment as he chose, the Supreme Court held that he did not qualify for the "subject worker" exemption in ORS 656.027(15).

Justice Garrett, joined by Justice Balmer, dissented. Observing that the legislative history confirmed that the legislators were aware that the terms "leasehold interest" and "furnishes" could encompass the arrangement that occurred in the present case and declined to make further changes to the statute, the dissent asserted that it was the legislature's responsibility, not the court's, to rewrite the statute if the present result was considered undesirable. Citing *State v. Walker*, 356 Or 4, 22 (2014), Justice Garrett reiterated that, where the legislative history demonstrates that the legislature was aware of the expansive nature of an enactment's text, yet chose not to narrow it, the Supreme Court is constrained to interpret the statute in a way that is consistent with that text, which is, in the end, the best indication of the legislature's intent.

Dissent asserted that legislature was aware of the expansive nature of the statute, yet chose not to narrow it.