Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Board Meeting on June 30 to Discuss Adoption of Rule Changes and Biennial Attorney fee Review

The Workers' Compensation Board (WCB) members have scheduled a public meeting for June 30, 2022, at 10 a.m. The agenda includes discussion of the adoption of administrative rule amendments to OAR 438, to update the Board's email address and the name of the "Ombuds" Office. The Members will also discuss timeframes and processes for the Biennial Attorney Fee Review under ORS 656.388(4).

Participation will be by telephone only. The phone conference link can be found here.

Barbara Woodford - Retirement

After four years of service as a Member, and five years as a staff attorney, Barbara Woodford has retired from the Board. Barbara started her career in 1981 with the plaintiff's firm of Haugh and Foote. She then spent 25 years with Liberty Northwest Insurance Corp.'s legal department. Barbara's last day was May 31, 2022. WCB congratulates Barbara for her years of public service and wishes her well in her retirement.

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.

Managing Attorney: Recruitment

The Workers' Compensation Board is recruiting candidates for the Managing Attorney position in the Board Review Division. This is an Executive Service position, which serves at the pleasure of the Board Chair. The position is located in Salem. The salary range is $8,009.00 - $12,389.00 per month. 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. This position manages the Board Review Division, including its staff attorneys and

administrative staff, as well as assists the Board Chair and Members, providing analysis and consultation regarding workers' compensation and administrative law issues. The Managing Attorney also coordinates the drafting of orders/memos by the legal staff, which are prepared in accordance with the Members' instructions concerning the disposition of appealed ALJ orders, procedural motions, petitions for third party relief, crime victim cases, court remands, petitions for Own Motion relief, requests for reconsideration of Board decisions, and the processing of proposed agreements submitted for Member approval. The deadline for applications is July 5, 2022. Further details about the position and information on how to apply is available online here WCB is an equal opportunity employer.

CASE NOTES

Attorney Fees: Assessed Fee under ORS 656.382(2) Not Reduced on Reconsideration, All Factors Considered

Michelle L. Showalter (May 13, 2022). On reconsideration of its initial order (Michelle L. Showalter, 74 Van Natta 153 (2022)), applying ORS 656.382(2) and OAR 438-015-0010(4), the Board adhered to its prior determination that $6,250 was a reasonable attorney fee award for claimant's counsel's services on review for defending against the carrier's request for review seeking to reduce the permanent disability compensation awarded in the Appellate Review Unit's (ARU's) Order on Reconsideration to zero.

Citing OAR 438-015-0010(4), the Board observed that the determination of a reasonable attorney fee involves the consideration of the "rule-based" factors. Referring to Weyerhaeuser Co. v. Fillmore, 98 Or App 567 (1989), the Board stated that it was not required to make findings for each rule-based factor. It also reiterated that no one factor is dispositive.

Board concluded that $6,250 was a reasonable attorney fee award for claimant's counsel's services on review.

In this case, the Board considered the issue of claimant's entitlement to permanent impairment benefits to be of average to above-average complexity in light of the medical arbiter panel's initial references to an unaccepted condition and claimant's "work injury" as causes of her impairment findings, as well as claimant's ongoing treatment and request for acceptance of the unaccepted condition prior to the arbiter examination. The Board further found that the benefit secured for claimant was the ARU's 17 percent whole person permanent impairment award, and that the risk that claimant's counsel's efforts may go uncompensated was significant because any reduction in the permanent disability award would have also resulted in a reversal of the ALJ's attorney fee award. The Board also observed that the value of the interest involved included the potential for other workers' compensation benefits in the future, and considered the necessity of awarding a fee that helps assure the greatest and broadest access to representation by injured workers to navigate the complexities of the workers' compensation system. Thus, the Board concluded that $6,250 was a reasonable attorney fee award for claimant's counsel's services on review.

Attorney Fees: No Assessed Fee Awardable Under ORS 656.383(1) Because No Temporary Disability Benefits Resulted from Premature Closure Decision

Claimant had not obtained temporary disability benefits as a result of the Order on Reconsideration's premature closure decision, so assessed attorney fee not awardable under ORS 656.383(1).

Robert L. Stanley, 74 Van Natta 359 (May 6, 2022). Analyzing ORS 656.383(1), on remand, the Board held that claimant's counsel was not entitled to a carrier-paid attorney fee for services rendered during the reconsideration proceeding that resulted in an Order on Reconsideration's premature closure finding. Citing *Dancingbear v. SAIF*, 314 Or App 538, 541 (2021), the Board stated that an assessed attorney fee is awardable under ORS 656.383(1) when a claimant's attorney is instrumental in obtaining temporary disability benefits during the reconsideration proceeding. However, relying on *Bledsoe v. City of Lincoln City*, 301 Or App 11 (2019) and *Guadalupe Gonzalez Morales*, 72 Van Natta 141 (2020), the Board reiterated that the issue of premature closure does not necessarily encompass the issue of entitlement to temporary disability.

Turning to the case at hand, the Board noted that the Order on Reconsideration set aside the Notice of Closure as premature but did not award temporary disability benefits. The Board further noted that the parties agreed, and the record supported a conclusion, that claimant had not obtained temporary disability benefits as a result of the Order on Reconsideration's premature closure decision. Under such circumstances, the Board considered *Dancingbear* to be distinguishable and concluded that claimant had not obtained temporary disability benefits as a result of the reconsideration proceeding. Consequently, the Board determined that an assessed attorney fee was not awardable under ORS 656.383(1).

Claim Processing: Carriers Have Obligation to Modify Acceptances Even in the Absence of a Claim Under ORS 656.262(6)(b)(F). Penalties Potentially Assessable

Carriers have an obligation to modify a Notice of Acceptance "from time to time" even in the absence of a claim.

Luis F. Nava, 74 Van Natta 372 (May 17, 2022). Interpreting ORS 656.262(6)(b)(F), the majority opinion of the Board concluded that carriers have an obligation to modify a Notice of Acceptance "from time to time" in the absence of a claim. In reaching this conclusion, the Board distinguished ORS 656.262(6)(a), (7)(a), and ORS 656.262.267(1), explaining that those statutes address a carrier's obligations when a worker has filed a "claim," rather than when "medical" or "other information" changes a previously issued notice of acceptance. Moreover, the Board distinguished the Lyons case (which had found ORS 656.262(6)(b)(F) to lack an enforcement mechanism) on the basis that, unlike the Lyons matter, a Notice of Acceptance had previously issued. See Ernest R. Lyons, 69 Van Natta 688 (2017).

Applying ORS 656.262(11)(a), the Board ultimately concluded that a penalty was not warranted in this case because the carrier had a legitimate doubt; i.e., the statute was subject to more than one interpretation (as "from time to time" is not expressly defined), and the Board had not previously reached a conclusion that the statute imposed an affirmative duty on carriers to periodically revise their notices in the absence of a "claim." However, the Board cautioned that, moving forward, a penalty would likely be available under similar facts. Moreover, the

Board explained that, in the future, the ORS 656.262(6)(b)(F) "reasonableness" analysis would be on a case-by-case basis, resembling that of ORS 656.268(5)(f). Finally, the Board noted that, because the Director has exclusive jurisdiction over cases when the sole issue is penalties and attorney fees, the Hearings Division would generally not have jurisdiction in these matters.

Members Curey and Woodford offered a concurring opinion, in which they agreed that no penalty was due, but ultimately applied a different analysis. In particular, the concurring opinion stated that ORS 656.262(6)(b)(F) neither provides an independent means for the resolution of claim processing issues arising from a carrier's acceptance nor transcends the statutory process mandated by ORS 656.262(6)(d) and ORS 656.267(1) for a claimant to object to a Notice of Acceptance. Moreover, it noted that neither the statute nor any rule provided further guidance as to what would constitute "from time to time." In addition, it disagreed that the Lyons reasoning was limited to matters in which a written request was submitted before the initial acceptance, but rather included an analysis of the claims processing statutory scheme in general. Finally, it noted that a penalty for ORS 656.262(11)(a) is available for a delay in "acceptance," but only when it is for a "claim." Because claimant's argument was premised on the notion that no "claim" was necessary, the concurring opinion offered that no penalty under the statute was awardable for any "delay in acceptance" of a non-claim.

Compensability: Examining Physician Well Reasoned, Considered Claimant's Circumstances and Weighed Alternative Causes; Occupational Disease Established

Rosemary Creswell, 74 Van Natta 337 (May 2, 2022). Applying ORS 656.802(2)(a) and ORS 656.266(1), the Board held that the record persuasively established that the claimant's occupational disease claim was compensable. In reaching that conclusion, the Board found an examining physician's opinion more persuasive than contrary medical opinions. The Board reasoned that the examining physician's well-explained opinion considered the claimant's particular circumstances, sufficiently weighed possible alternate causes of the claimant's condition, and persuasively rebutted contrary medical opinions. *See Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995); *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Rebecca Larsen*, 66 Van Natta 1123, 1127 (2014). Moreover, citing *Moe v. Ceiling Sys., Inc.* , 44 Or App 429, 433 (1980), the Board discounted the contrary opinions of the claimant's treating physicians and an examining physician because they were not sufficiently explained and lacked logical force. Accordingly, the Board found the claimant's occupational disease claim compensable.

Compensability: Examining Physician Had Materially Accurate History; Occupational Disease Not Established

Anthony D. Gibson, 74 Van Natta 360 (May 10, 2022). Applying ORS 656.802(2)(a) and ORS 656.266(1), the Board held that the record did not persuasively establish that the claimant's occupational disease claim was compensable. In reaching that conclusion, the Board found an examining

physician's opinion more persuasive than the opinion of the claimant's treating chiropractor. The Board disagreed with the claimant's contention that the examining physician's opinion was based on an inaccurate history. *See Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003). Accordingly, the Board upheld the carrier's denial of the claimant's occupational disease claim.

Dismissal: Board Remands to ALJ to Consider Claimant's Post-Hearing Motion for Postponement

Jacob Orand, 74 Van Natta 369 (May 13, 2022). Citing OAR 438-006-0071(2), the Board remanded the case to the Hearings Division for the ALJ to rule on a motion for postponement that was filed after the ALJ issued a "combined" "good cause/dismissal" order. Claimant, who was *pro se*, had failed to appear at the telephonic hearing. Citing OAR 438-006-0071(2) and noting that the record did not establish "extraordinary circumstances" that would justify claimant's failure to appear by telephone, the ALJ dismissed the case as abandoned. The ALJ's order, however, advised claimant that he had the right to request reconsideration of the order within 15 days to establish "extraordinary circumstances" for his failure to appear at the hearing. Within the 15-day "reconsideration" period, claimant filed a response to the ALJ's order that was processed as a request for Board review.

ALJ must consider a motion for postponement, even if submitted after an order of dismissal.

The Board noted that an ALJ must consider a motion for postponement, even if submitted after an order of dismissal. *See Brian P. Howell*, 73 Van Natta 657, 659 (2021). In those cases where the ALJ has not ruled on the motion to postpone, the Board stated that it has remanded to the ALJ for consideration of the motion. The Board noted that the exception is when the motion to postpone contains no explanation concerning the claimant's failure to appear. *See Harold J. Howard*, 55 Van Natta 290, 295 (2003).

Finding that claimant had provided an explanation concerning his failure to appear at the hearing, and because his explanation was filed within the 15-day "reconsideration" period provided in the ALJ's "combined dismissal" order, the Board concluded that remand to the ALJ for consideration of claimant's response was warranted.

Medical Opinion: Physician Relied on Incomplete Medical History and Failed to Address Gap in Onset of Symptoms, Compensability Not Established

Angie M. Aguirre, 74 Van Natta 388 (May 18, 2022). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the medical record did not persuasively establish the compensability of the claimant's new/omitted medical condition claims for back, clavicular, and SI joint conditions.

The Board explained that the record did not establish that the physician on whom the claimant relied had the opportunity to review the totality of the claimant's medical records concerning the denied condition. Therefore, the Board found her opinion unpersuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (physician's opinion based on an incomplete or inaccurate history was not persuasive); *Roberto C. Ruiz-Gongora*, 74 Van Natta 324, 332

(2022) (discounting medical opinion that was based on a review of a limited portion of the medical records).

Physician's opinion did not rely on complete information and failed to address the onset of the claimant's symptoms

Moreover, the Board found the physician's opinion unpersuasive because that physician did not adequately address the two month gap between the claimant's work event and the onset of her symptoms. *See Joy Bildeau*, 73 Van Natta 24, 28 (2021). Accordingly, the Board concluded that the record did not persuasively establish the compensability of claimant's new/omitted medical condition claims for back, clavicular, and SI joint conditions.

Own Motion: Additional Unscheduled and Scheduled Permanent Disability Awarded for Post-Aggravation Rights Back and Foot Conditions; Limitation in ORS 656.278(2)(d) Applied to Claimant's Unscheduled PPD Award Only

Donna J. Anderson-Bowman, 74 Van Natta 343 (May 4, 2022): Analyzing ORS 656.278(2)(d), and relying on the medical arbiter's findings, the Board awarded additional unscheduled and scheduled permanent partial disability (PPD) benefits for claimant's "post-aggravation rights" new/omitted lumbosacral spine conditions.

In calculating the impairment for the newly accepted conditions, the Board found that the limitation set forth in ORS 656.278(2)(d) applied to claimant's unscheduled PPD award for her low back because the "post-aggravation rights" new/omitted medical conditions involved the same "injured body part" (lumbosacral spine) that was the basis of her previous unscheduled PPD award. *Cory L. Nielsen,* 55 Van Natta 3199 (2003). Based on the arbiter's impairment findings and a reevaluation of claimant's "social-vocational" factor values, and after applying the limitation set forth in ORS 656.278(2)(d), the Board awarded additional unscheduled PPD for the lumbosacral spine.

Board awarded additional unscheduled and scheduled permanent partial disability (PPD) benefits for claimant's "post-aggravation rights" new/omitted lumbosacral spine conditions.

On the other hand, the Board determined that the ORS 656.278(2)(d) limitation did not apply to claimant's scheduled PPD award for the right foot because she had not previously been awarded scheduled PPD for right foot. *Terry L. Rasmussen*, 56 Van Natta 1136 (2004). Because the medical arbiter found partial loss of plantar surface sensation in claimant's right foot attributable to the newly accepted low back conditions, the Board awarded scheduled PPD for the loss of use or function of the right foot. *See Foster v. SAIF*, 259 Or 86 (1971); *see also Susan K. Evans*, 61 Van Natta 2082 (2009). In doing so, the Board explained that claimant's current scheduled PPD award for the loss of use or function of the right foot could not be "offset" from her prior scheduled PPD award for the loss of use or function of the left leg under the same claim because the "offset" rules apply only to multiple claims and identical impairments of like body parts or systems. *See* OAR 436-035-0007(4); OAR 436-035-0015(3). Because neither the limitation in ORS 656.278(2)(d) nor the "offset" rules applied, claimant's current scheduled PPD award for the right foot was not reduced.

Own Motion: "NOC" Valid – Satisfied "012-0055" / "Leffler" Requirements ("Med Stat" Conditions, Impairment Findings, Release to Work) – "278(6)", Kephart, Thompson, Tompkins, Leffler Cited

Own Motion Notice of Closure was not invalid because the attending physician's reports had indicated that the worker's accepted conditions had become medically stationary, provided impairment findings, and released the worker to return to work without limitations.

Matthew D. Gorbett, 74 Van Natta 403 (May 27, 2022). Analyzing ORS 656.278(6), and OAR 438-012-0055, the Board held that an Own Motion Notice of Closure was not invalid because the attending physician's reports had indicated that the worker's accepted conditions had become medically stationary, provided impairment findings, and released the worker to return to work without limitations. Although acknowledging the worker's contention that the attending physician's reports did not satisfy the "qualifying statement" or "qualifying closure report" requirements for claim closure under OAR 436-030-0020(2)(a)(D), (2)(b)(B), and (D), the Board determined that the closure of the claim was subject to its Own Motion rules pursuant to OAR Division 438, not the Workers' Compensation Division (WCD) rules under OAR Division 436. In any event, even if the Division 436 rules were applicable, the Board reasoned that the attending physician's impairment findings and release to work had addressed the "reasonable expectation" requirements of the WCD rules. Under such circumstances, the Board concluded that, rather than seeking invalidation of the claim closure, the worker's remedy was to either seek a re-evaluation of the attending physician's impairment findings/opinions and/or a referral of the claim to the Appellate Review Unit for the appointment of a medical arbiter for further impairment findings.

APPELLATE DECISIONS

No "workers' compensation-related" appellate decisions were issued by the courts this month.

Workers' Compensation Board
2601 25th St., Ste. 150
Salem, OR 97302
503.378.3308
www.wcb.oregon.gov