Workers' Compensation Board

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News & Case Notes

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 25th St. SE, Ste. 150, Salem, OR 97302, katy.e.gunville@wcb.oregon.gov, or via fax at (503)373-1684. The Board requests that any comments be submitted by Friday, September 16, 2022.

These written comments will 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.

Legible Copies of Exhibits: Possibly Available at WCD

On occasion, WCB has reviewed records that include claim processing documents that are difficult to interpret or entirely illegible. Parties are reminded that, under the Board's administrative rules, parties are obligated to present "legible copies" of proposed exhibits. *See* OAR 438-007-0015(2), (3), OAR 438-007-0018(1), (2), OAR 438-012-0060(3), and OAR 438-012-0061(2).

The submission of illegible documents can result in a delay of WCB proceedings. To comply with the aforementioned administrative rules and to avoid a possible delay in the proceeding, parties seeking a "legible" copy of a claim processing document may wish to contact the Workers' Compensation Division (503-947-7810) to determine whether a more "legible" copy is available.

CASE NOTES

Occupational Disease: Attending Physician's Opinion Was Based on Complete and Accurate History; Contrary Opinion Did Not Adequately Address Claimant's Specific Circumstances

Eric Cooke, 74 Van Natta 467 (July 5, 2022). Analyzing ORS 656.802(2)(a), the Board held that claimant's occupational disease claim for bilateral wrist conditions was compensable.

Citing *Jackson County v.* Wehren, 186 Or App 555, 559 (2003), the Board found the opinion of claimant's attending physician, which was based on a thorough review of claimant's medical records (including claimant's age and BMI) and work activities (including repetitive gripping, grasping, and exposure to vibration), was based on an accurate history that persuasively established claimant's overall work activities as the major contributing cause of her bilateral wrist conditions.

Opinions must address a claimant's particular circumstances

In contrast, the Board found the opinion of the physician relied on by the carrier, which concluded that claimant's condition was caused in major part by idiopathic factors and not his work conditions, was inconsistent with claimant's uncontradicted and corroborated testimony and was thus based on inaccurate information regarding his work activities. *See Somers v. SAIF*, 77 Or App 259, 263 (1986) (more weight is given to those medical opinions that are well reasoned and based on complete information); *David D. Montgomery*, 71 Van Natta 8, 10 (2019) (physician's opinion that did not address the claimant's personal circumstances and was based on his general understanding was unpersuasive).

Moreover, the board declined to discount the opinion of claimant's attending physician on the grounds that it did not explain why claimant's bilateral wrist conditions persisted and worsened after he was no longer experiencing work exposure. Citing *John Pinion*, 55 Van Natta 4135, 4136 (2003), the Board explained that the continuing nature of claimant's bilateral wrist conditions did not undercut the causal connect between claimant's work and his condition. Accordingly, the Board reversed the ALJ's order and found the occupational disease claim compensable. ORS 656.266(1); ORS 656.802(2)(a).

Legal and Medical Causation Established; Claimant Engaged in Potentially Causative Work Activities; Medical Opinion Relied on Accurate History of the Mechanism of Injury; Carrier Had Legitimate Doubt Based on Conflicting Evidence – Penalty Not Appropriate

Lisa L. Vedack, 74 Van Natta 458 (July 5, 2022). Applying *Harris v. Farmer's Co-op Creamery,* 53 Or App 618, *rev den*, 291 Or 893 (1981) and ORS 656.266(1), the Board held that claimant established legal and medical causation

and consequently proved the compensability of her injury claim. However, the Board declined to award claimant a penalty or penalty-related attorney fee, finding that the carrier had a legitimate doubt as to its liability at the time of the denial.

Claimant immediately notified the employer and sought treatment for her injury, legal causation established

Regarding legal causation, the Board found that a preponderance of the evidence supported a finding that claimant engaged in potentially causative work activities. *See Darla Litten*, 55 Van Natta 925, 926 (2003). The Board reasoned that claimant testified that she was injured at work when a coworker ran into her, she notified her manager of the injury directly after it occurred, she notified the restaurant owner the night of the injury, and she immediately sought treatment for her injury at the emergency department. Moreover, the Board acknowledged that the opinions of Drs. Kitchel and Woodrum, on which the carrier relied, were based on video footage that did not capture the work event. Therefore, the Board determined that claimant established legal causation.

Furthermore, the Board found that medical causation was established. The board explained that the opinion of Dr. Pham, on which claimant relied, persuasively accredited claimant's injury/need for treatment, based on reasonable medical probability, to the unguarded movement or trauma of being bumped by a coworker at work.

However, the Board declined to award claimant a penalty or penalty-related attorney fee, finding that the carrier had a legitimate doubt as to its liability at the time of the denial based on the conflicting evidence. *See Robert R. Ritchey, Jr.*, 69 Van Natta 325, 330 (2017) (the carrier was entitled to pursue its denial for the ALJ's determination regarding the persuasiveness of a physician's opinion regarding whether the claimant's condition was related to his employment).

"Ceases" Denial: Preexisting Condition, Combined Condition and "Ceases" Elements Met by Carrier

Timothy Menzies, 74 Van Natta 482 (July 7, 2022). Applying ORS 656.262(6)(c) and ORS 656.266(2)(a), the Board held that an examining neuropsychologist's unrebutted opinion persuasively established that a preexisting depression condition combined with an "otherwise compensable injury" (*i.e.*, a previously accepted concussion condition) and that the "otherwise compensable injury" ceased to be the major contributing cause of the disability or need for treatment of the combined concussion condition.

In reaching that conclusion, the Board disagreed with the claimant's contention that the record did not establish a cognizable preexisting condition because it did not include evidence of a preinjury depression diagnosis. Citing ORS 656.005(24)(a)(A) and *Alicia Carr*, 66 Van Natta 279 (2014), the Board found that the record persuasively established a cognizable preexisting condition because the claimant had obtained preinjury medical services for symptoms of a condition that the examining neuropsychologist later diagnosed as depression. Accordingly, the Board upheld the carrier's "ceases" denial of the combined concussion condition.

Medical services for symptoms of a condition later diagnosed as depression constituted a preexisting condition

"Ceases" Denial Upheld; Consequential Condition From Prior Accepted Condition Found Compensable

Kevin L. McCarley, 74 Van Natta 447 (July 1, 2022). Applying ORS 656.262(6)(c) and ORS 656.266(2)(a), the Board held that an examining physician's uncontroverted opinion persuasively established that a previously accepted 2019 ankle sprain had ceased to be the major contributing cause of the disability or need for treatment of a combined left ankle arthritic condition. Therefore, the Board upheld the carrier's "ceases" denial.

Moreover, applying ORS 656.005(7)(a)(A) and ORS 656.266(1), the Board held that the claimant's new/omitted medical condition claim for ankle posttraumatic arthritis was compensable under a "consequential condition" theory related to a previously accepted 2016 ankle sprain. Specifically, the Board stated that a treating physician's opinion persuasively established that the 2016 ankle sprain was the major contributing cause of the claimant's posttraumatic arthritis condition. Accordingly, the Board set aside the carrier's new/omitted medical condition denial.

"Open-Ended" Authorization for Temporary Disability Related to the Accepted Condition; Penalty Assessable Due to Unreasonable Failure to Pay Temporary Disability

Thomas Lawson, II, 74 Van Natta 501 (July 21, 2022): Applying ORS 656.262(4) and ORS 656.262(11)(a), the Board held that claimant was entitled to additional temporary disability benefits because his attending physician's temporary disability authorization was "open-ended" and pertained to his accepted bilateral carpal tunnel syndrome (CTS) condition, as well as a penalty and penalty-related attorney fee for the carrier's unreasonable claim processing.

Citing *Lederer v. Viking Freight, Inc*., 193 Or App 226, 234, *recons*, 195 Or App 94 (2004), the Board stated that a carrier is obligated to pay temporary disability benefits when an objective reasonable carrier would understand contemporaneous medical reports to excuse the injured worker from work.

Based on the attending physician's chart note instructing claimant to "use hand tools so it does not touch the heel of the hand" and stating that claimant "most likely will not be able to continue doing this line of work" due to the bilateral CTS, the Board found that the attending physician provided an "open-ended" authorization of temporary disability benefits related to the accepted condition. The Board further noted that the chart note was identical to a prior chart note, which the carrier had conceded (at hearing and on review) authorized temporary disability benefits for the bilateral CTS. Thus, the Board concluded that an objectively reasonable carrier would understand the chart note to excuse claimant from work due to the accepted condition, triggering its obligation to pay temporary disability benefits, and awarded additional temporary disability benefits until claimant's subsequent attending physician declared the accepted bilateral CTS condition medically stationary without impairment and released claimant for regular work.

Objectively reasonable carrier would understand the chart note to excuse the claimant from work

Based on the reasoning explained above, particularly in light of the carrier's concession that the time loss authorization in the prior chart note applied to the accepted condition (such that claimant was entitled to temporary disability benefits, and that a penalty and penalty-related attorney fee for its failure to pay during that time period were appropriate), the Board found the carrier's failure to pay ongoing temporary disability benefits based on the later chart note (which was identical to the prior chart note) to be unreasonable. Thus, the Board awarded a penalty based on the temporary disability benefits "then due" as a result of the order, as well as a penalty-related attorney fee, for the carrier's unreasonable claim processing. ORS 656.262(11)(a); *Stanley T. Castle*, 67 Van Natta 2055 (2015).

On Remand: "Parking Lot" Injury "Arose Out Of" and "In the Course Of" Employment

"Parking lot" exception to the Going and Coming rule applied because employer had some control over the area where claimant was injured

Sherrie A. Miles, 74 Van Natta 518 (July 28, 2022). Applying ORS 656.005(7)(a), on remand, the Board held that claimant's injury of falling in the employer's leased parking lot occurred "in the course of" and "arose out of" her employment. Concerning the "course of" employment prong, citing *Miles v. Bi-Mart Corp.*, 316 Or App 481 (2021), the Board stated that the "parking lot" exception to the "going and coming" rule applied because the record demonstrated that the employer had "some control" over the parking lot where the claimant was injured. The Board explained that the court reasoned that "some control" was demonstrated because the employer used the parking lot for shelving and displays, fenced off certain areas of the lot to discourage loiterers and skateboarders, had a right to request repairs and maintenance of the lot, and established a designated employee parking area pursuant to its rights in the lease agreement. Further relying on the court's decision in *Miles*, the Board addressed the "arising out of" employment prong, stating that the risk of falling over cracked and broken pavement was a neutral risk to which the work environment exposed claimant. Specifically, the Board explained the court's reasoning that because claimant was injured walking from the designated employee parking area as part of her normal ingress to work, her injury "arose out of her employment."

Turning to the case at hand, the Board concluded, consistent with the court's analysis and directive, that claimant's injury occurred in the "course and scope" of her employment.

APPELLATE DECISIONS UPDATE

There were no Board-related decisions from the appellate courts this month.

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