Workers' Compensation Board

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News & Case Notes

BOARD NEWS

New Board Member – Jenny Ogawa

WCB is pleased to announce that, having been nominated by Governor Brown and confirmed by the Senate, Jenny Ogawa has been appointed to the Workers' Compensation Board. Ms. Ogawa was sworn-in on October 3, 2022, and began her duties on that date, as a board member with a background and understanding of employer concerns.

Jenny Ogawa attended University of Wyoming, earning a Bachelor of Science degree, with Honors. She then received her Juris Doctorate from Lewis and Clark Law School. Thereafter, she became a member of the Oregon State Bar in 1987. She has been an ALJ in WCB's Hearings Division since 2005, also working as an ALJ mediator during that time. Prior to becoming an ALJ, she clerked for SAIF Corporation, worked as a staff attorney for the WCB, was the legal issues coordinator for the WCD, and represented insurers and employers at both hearing and appellate levels. Since 2014, she has been a member of the Executive Committee of the Oregon State Bar Workers' Compensation Section, serving as the secretary in 2015 and as the chair in 2017. Judge Ogawa is currently on the OSB Legal Publications Department's editorial review board for Workers' Compensation.

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

Attorney Fee: No Assessed Fee Awardable to Suspended Attorney

Per statute, must be an active member of the Oregon State Bar to practice law.

Daniel Garcia-Sandoval, 74 Van Natta 622 (September 6, 2022). Applying ORS 9.160, the Board denied a request for a determination of a reasonable attorney fee award under OAR 438-015-0125(3) because the record unequivocally established that the petition for the determination was submitted by an individual that was not qualified to practice law. In reaching this conclusion, the Board noted that, except for the right reserved to litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar. ORS 9.160; *see Parquit Corp. v. Ross*, 273 Or 900, 901 (1975); *see also* 31 Op Atty Gen 52 (1962); OSB Ethics Opinion 2005-24 (2005). Alternatively, the Board concluded that claimant's former counsel was not entitled to an attorney fee for any legal services performed on claimant's behalf during the appeal process because it was uncontested that claimant's former counsel was suspended from practicing law at the time of filing of SAIF's request for Board review, during the briefing schedule, while the case was pending review, and following the issuance of the Board's order.

Compensability/Medical Opinion: Causation of Right Shoulder Condition Not Established; "Rotator Cuff Impingement" was a Mechanism of Injury, Not a "Medical Condition"

Shanda Pedroza, 74 Van Natta 631 (September 13, 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 right rotator cuff impingement and right shoulder adhesive capsulitis. In doing so, the Board determined that the record did not persuasively establish that "right shoulder adhesive capsulitis" was caused in major part by the compensable injury, or by medical treatment directed to the compensable injury. *See Kevin L. McCarley*, 74 Van Natta 447, 455 (2022).

Medical evidence characterized "rotator cuff impingement" as a mechanism of injury rather than a "condition".

Additionally, the Board determined that the opinion of claimant's treating physician established that, in the claimant's particular case, "right rotator cuff impingement" constituted a mechanism of injury, rather than a medical condition. *See Armenta v. PCC Structural, Inc.*, 253 Or App 682, 692 n 7 (2012); *Young v. Hermiston Good Samaritan*, 223 Or App 99, 105 (2008); *Manu R. Kamanda*, 65 Van Natta 1571, 1572 (2013); *Royal S. Buell*, 50 Van Natta 702, ***aff'd without opinion***, 157 Or App 723 (1998). Moreover, the Board concluded that the record did not otherwise persuasively establish the existence of "right rotator cuff impingement." Therefore, the Board upheld the employer's denials of claimant's new/omitted medical condition claims.

Permanent Disability: No Chronic Condition Awardable for Left Shoulder Condition, Member Ousey Specially Concurs

John Velkinburg, 74 Van Natta 624 (September 7, 2022). The Board adopted and affirmed an Administrative Law Judge's (ALJ's) order that found claimant was not entitled to a "chronic condition" impairment value for his left shoulder condition under OAR 436-035-0019(1).

Member Ousey specially concurred to clarify that he disagreed that *Godinez v. SAIF*, 269 Or App 578 (2015), stood for the absolute proposition that a repetitive use limitation of only one motion in a body part can *never* support entitlement to a "chronic condition" award under OAR 436-035-0019(1). Referring to *Spurger v. SAIF*, 292 Or App 227 (2018) (*Spurger II*), *Brit L. Broeke*, 73 Van Natta 338 (2021) (on remand), and *Michael R. Greco, Sr.,* 71 Van Natta 1405 (2019), Member Ousey noted that *Godinez* is most often cited for the proposition that the Appellate Review Unit's (ARU's) interpretation of its own rules through its necessary application of the rule to a particular case is entitled to *deference* if that interpretation is plausible. Member Ousey stated that the "post-*Spurger II*" cases cite *Godinez* in the context of determining whether a medical opinion establishes a "significant limitation" in the repetitive use of a body part in which the limitation is "meaningful" or "important." *See, e.g., Carl C. Stiefbold*, 73 Van Natta 923, 928-29 (2021); *Alton R. Granville*, 71 Van Natta 837, 840 (2019).

APPELLATE DECISIONS UPDATE

Hearing Request: "Rebuttable Presumption" of Untimely Filing ("005-0046(1)(c)") – Attorney's Unsworn Statements in Letter – Admitted As "Exhibit," Must Be Considered as "Evidence"

Court issued a "nonprecedential memorandum opinion."

Kopf v. SAIF, 321 Or App 764 (September 14, 2022). In a nonprecedential memorandum opinion under ORAP 10.30, the court reversed the Board's order in *Eric C. Kopf*, 72 Van Natta 647 (2020), previously noted 39 NCN 7:9, which dismissed claimant's hearing request from a carrier's claim denial as untimely filed because his counsel's unsworn statements in a letter did not rebut the presumption under OAR 438-005-0046(1)(c) that his request (which had not been mailed by registered/certified mail and had been received by the Hearings Division more than 60 days after the carrier's denial) was untimely. In reaching its decision, referring to *SAIF v. Cruz*, 120 Or App 65 (1993), the Board had reasoned that claimant's counsel's letter (which had been admitted as an exhibit without objection) could not be considered evidence. On appeal, claimant argued that the Board had erred in concluding that claimant's attorney's letter did not constitute evidence.

The court agreed with claimant's contention. To begin, the court stated that the Board had ignored the fact that claimant's counsel's letter (which contained

Claimant's counsel's letter had already been admitted into evidence.

the attorney's statements concerning the mailing of the hearing request) had already been admitted into evidence without objection. *See Fisters v. South Hills Health Care*, 149 Or App 214, 219 (1997), rev den, 326 Or 389 (1998); see also *Camacho v. SAIF*, 263 Or App 647, 656 (2014). Furthermore, the court found no support for the Board's blanket conclusion that an attorney's statements in a letter must be sworn to be considered as evidence. *See Zurita v. Canby Nursery*, 115 Or App 330, 334 (1992), rev den, 315 Or 443 (1993).

Finally, the court concluded that its holding in *Cruz* did not support the proposition that a letter containing an attorney's unsworn statement may never be admitted as evidence. Instead, the court clarified that it had held in *Cruz* that an attorney's statement had provided only a legal rationale for a carrier's withholding of certain evidence until after its cross-examination of the claimant and that the Board had not evaluated whether the carrier had reasonably believed that the withheld evidence was relevant only for impeachment purposes.

Because the Board had not considered claimant's counsel's admitted letter in determining whether he had persuasively established that his hearing request had been timely filed, the court remanded for that determination.

Judge Pagan dissented. Pagan found it debatable that claimant's counsel's letter (which had been created well after the filing in question and was not corroborative of any fact) should have been considered "evidence" beyond the fact that it had not been objected to when it was proffered into evidence. In any event, Judge Pagan interpreted the Board's opinion to have deemed the letter insufficient to establish that the hearing request had been timely filed.