Workers' Compensation Board

Volume XLII, Issue 3

March 2023

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BOARD NEWS

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.

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 Ontario, 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 close date for receipt of application materials has been extended to April 17, 2023. DCBS is an Equal Opportunity, Affirmative Action employer committed to workforce diversity.

Attorney Fee Statistical Report Published

The Workers' Compensation Board (WCB) published its annual update of statistical information regarding attorney fees on January 19, 2023. The report includes attorney fee data through year-end 2021, and can be found on the WCB statistical reports webpage using this link:
https://www.oregon.gov/wcb/Documents/statisticalrpts/011923-atty-fee-stats.pdf

Unrepresented Worker Litigation Report Available

In response to an inquiry from the Oregon State Bar's Workers' Compensation Section's Access to Justice Committee, the Board has prepared a report on litigation by unrepresented workers in our forum. The report can be found here: https://www.oregon.gov/wcb/Documents/statisticalrpts/040723-unrep-worker-rpt.pdf

CASE NOTES

Attorney Fees: ORS 656.386(1) Fee Awardable for Overcoming Subjectivity Denial

Carrier's denial constituted a refusal to pay a claim for compensation on the ground that the claim "otherwise does not give rise to an entitlement to any compensation."

Immer Gutierrez, 75 Van Natta 130 (March 10, 2023). Analyzing ORS 656.386(1), the Board held that the claimant's attorney was entitled to an assessed attorney fee under ORS 656.386(1) because the claimant had finally prevailed over the carrier's subjectivity denial. Citing *SAIF v. Wart*, 192 Or App 505 (2004), the Board stated that ORS 656.386(1) is not limited to compensability denials, but also applies to a refusal to pay a claim for compensation on the ground that the claim "otherwise does not give rise to an entitlement to any compensation." Turning to the case at hand, the Board concluded that the carrier's denial, which was based on the ground that the claimant was not a subject worker (a basis that precludes entitlement to compensation), constituted a refusal to pay a claim for compensation on the ground that the claim "otherwise does not give rise to an entitlement to any compensation." In reaching that conclusion, the Board distinguished cases decided before the 1995 amendment to ORS 656.386, in which the legislature added the "otherwise does not give rise to an entitlement to any compensation" language. Accordingly, the Board awarded an assessed attorney fee under ORS 656.386(1) for the claimant's counsel's services regarding the "subjectivity" issue.

Attorney Fees: No ORS 656.383 Fee Awardable Where Order on Reconsideration Found Claim Prematurely Closed But Did Not Award or Address Temporary Disability Benefits

Record did not establish that the claimant's attorney was instrumental in obtaining temporary disability benefits.

Brandon E. Lamb, 75 Van Natta 167 (March 22, 2023). Analyzing ORS 656.383(1), the Board held that the claimant's attorney was not entitled to an assessed attorney fee under that statute in a reconsideration proceeding in which an Order on Reconsideration found that the claimant's new or omitted medical condition claim was prematurely closed. Because the reconsideration order did not award temporary disability benefits or otherwise address the claimant's entitlement to those benefits, the Board concluded that the record did not establish that the claimant's attorney was instrumental in obtaining temporary disability benefits, as required under ORS 656.383(1). In reaching that conclusion, the Board distinguished *Dancingbear v. SAIF*, 314 Or App 538 (2021), in which an Order on Reconsideration had awarded additional temporary disability benefits. Accordingly, the Board did not find error in the reconsideration process and affirmed the Order on Reconsideration that did not award an ORS 656.383(1) attorney fee.

CDA: "Pre-closure" Agreement to Pay Under $2,500 to *Pro Se* Claimant, Where Information Revealed Several Areas of Benefits that were Potentially Awardable, Held

Unreasonable As a Matter of Law under ORS 656.236(1)(a)(A).

Matthew E. Owens, 75 Van Natta 152 (March 15, 2023). Applying ORS 656.236(1)(a)(A), the majority opinion found a proposed CDA between a *pro se* claimant and the carrier was unreasonable as a matter of law. In doing so, it noted several potential areas of permanent (including impairment and work disability) and temporary disability benefits that would well exceed the proposed $2,494.26 in CDA proceeds. This information was based on additional information that was requested by the Board from the parties. Citing *Bradford Sexton*, 49 Van Natta 183, 183-84 (1997) (CDA was unreasonable as a matter of law on its face because it released the surviving spouse's substantial monthly benefits, which involved a minimum value of $34,414,80, in exchange for a consideration of $1), and *Louis R. Anaya*, 41 Van Natta 1843, 1844 (1990) (a CDA must be rejected under ORS 656.236(1)(a) if it exceeds the bounds of existing statutes, rules or applicable case law, or if a reasonable fact-finder could only conclude that the agreement was unreasonable as a matter of fact), and in the absence of a closing examination, the majority was persuaded that the agreement was unreasonable as a matter of law on its face. Thus, it disapproved the proposed disposition.

CDA was unreasonable as a matter of law on its face and therefore disapproved.

Member Curey dissented. Given the limited information available to the Board regarding the settlement, she would not have found the proposed CDA unreasonable as a matter of law pursuant to ORS 656.236(1)(a)(A).

Compensability: New/Omitted Medical Condition Did Not Require Medical Services, Denial Upheld

Cecilia Avila-Morales, 75 Van Natta 143 (March 13, 2023). Applying ORS 656.802(2)(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 claim for right bicipital tendinitis. In doing so, the Board determined that the claimed condition, which was diagnosed by an examining physician on a single occasion, did not result in a need for medical services. ORS 656.005(7)(a); ORS 656.802(1)(a); *see Andrew C. Shipley*, 53 Van Natta 745, 746 (2001). Therefore, the Board upheld the SAIF Corporation's denial of the claimant's new/omitted medical condition claim.

Claimed condition was diagnosed by an examining physician on a single occasion.

Mental Disorder: Denial Set Aside, Persuasive Opinion Properly Weighed Non-Excluded Work-Related Factors Against All Other Factors; Attorney Fee: $35,000 Award at Hearing Upheld as Reasonable

Rachel Bonine, 75 Van Natta 117 (March 3, 2023). Analyzing ORS 656.802(2), the Board agreed with the ALJ's conclusion finding claimant's mental disorder compensable, noting that the physician's opinion on which the ALJ relied was persuasive because it addressed contrary opinions and weighed the non-excluded work-related factors against all excluded factors. *See* ORS 656.802(3)(b); *Whitlock v. Klamath County Sch. Dist.*, 158 Or App 464, 471

(1999); *Jessica R. Cilione*, 72 Van Natta 944, 945 (2020); *Lisa M. Howe*, 70 Van Natta 288, 296 (2018).

Citing OAR 438-015-0010(4) for the determination of a reasonable attorney fee, the Board considered the "rule-based" factors and determined that the $35,000 awarded to claimant's counsel for services at the hearing level was reasonable. Specifically, the Board noted that claimant's counsel's fee was justified due to the reported hours spent on the case at hearing level, the time spent preparing for and conducting the hearing testimony and closing argument, her skill in litigating these types of complex cases, her work product, the benefits claimant would receive due to the claim being accepted, and the high risk of going uncompensated in this particular case. Furthermore, particularly considering the time devoted to the issues, the complexity of the issues, the value of the interest involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law, the Board awarded a $5,500 attorney fee for claimant's counsel's services on review.

Counsel's fee was justified due to the reported hours spent on the case at hearing level, her skill in litigating these types of complex cases, the benefits claimant would receive, and the high risk of going uncompensated in this particular case.

Own Motion: "Hearing Referral" Request Denied – No "Credibility" Dispute, Record Concerning Claimant's "PTD" Request Not Insufficiently Developed - "Worsened Condition" Claim – No Entitlement to PTD Benefits

Katherine A. Whitner, 75 Van Natta 175 (March 27, 2023). In an Own Motion Order on Reconsideration, the Board adhered to its previous decision, 75 Van Natta 81, which had held that, on closure of claimant's "worsened condition" claim, she was not entitled to additional permanent disability benefits (including permanent total disability (PTD)). In its initial order, after finding that the medical record did not establish that her chronic pain constituted a "direct medical sequelae" of her accepted "worsened" hernia conditions, the Board had concluded that her "worsened condition" had not been prematurely closed. Furthermore, relying on ORS 656.278(1)(a), and *Richard D. Slocum*, 67 Van Natta 2180, 2184 n 4 (2015), the Board determined that claimant was not entitled to an evaluation of permanent disability benefits (including PTD) on closure of her "worsened condition" claim.

Board determined that claimant was not entitled to an evaluation of permanent disability benefits (including PTD) on closure of her "worsened condition" claim.

Claimant requested reconsideration, seeking referral of the Own Motion matter to the Hearings Division for further development of the record concerning the premature closure and permanent disability issues, including a PTD award. The Board denied claimant's "hearing referral" request and adhered to its previous determinations.

Concerning the "hearing referral" request, the Board reiterated that such requests have previously been granted when it considers a record insufficiently developed to determine a claimant's entitlement to PTD benefits and when credibility is at issue. *See, e.g.*, *Laura A. Heisler*, 55 Van Natta 3974, 3975 (2003).

Turning to the case at hand, the Board reasoned that an assessment of claimant's credibility and veracity was not required. Moreover, the Board considered the record sufficiently developed to analyze her entitlement to PTD

benefits. Under such circumstances, the Board concluded that a "fact-finding" hearing was unnecessary. *See Lloyd D. Irwin, Jr.*, 70 Van Natta 797, 801-02, *recons*, 70 Van Natta 1093 (2018); *John R. Taylor*, 68 Van Natta 1866, 1871 n 4 (2016).

Addressing claimant's request for PTD benefits, the Board reiterated that, on closure of an Own Motion claim, a PTD evaluation does not include consideration of any permanent disability from a worsened condition after the expiration of a claimant's 5-year "aggravation rights" because to do otherwise would be contrary to the statutory scheme and the rationale expressed in *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004), and *Shirley M. Samel*, 56 Van Natta 931 (2004). *See James S. Daly*, 58 Van Natta 2355, 2362 (2006). Consequently, because claimant's request for review concerned the closure of her "worsened condition" Own Motion claim, the Board continued to hold that she was not entitled to PTD benefits.

Own Motion: "Worsened" Condition – Claimant Not In "Work Force" – No "Presumption" of "Work Force" Existed; No "TTD" Entitlement Until Claim Reopened; Penalty/Fee – Untimely "Recommendation", But Without Reopening Penalty/Fee Not Awardable

Michael D. Millspaugh, 75 Van Natta 163 (March 20, 2023). Applying ORS 656.278(1)(a), in an Own Motion Order, the Board declined to reopen claimant's "worsened condition" claim for a previously accepted inguinal hernia condition because the record did not establish that he was in the work force at the time of his disability. In reaching its conclusion, the Board rejected claimant's assertion that there was a presumption that he was in the work force before his worsened hernia condition became disabling. Citing ORS 656.266(1), the Board determined that claimant had the burden of proving the nature and extent of disability resulting from his compensable condition.

After conducting its review, the Board found no indication that, in the six years since his claim was last closed (at which time he was released to "sedentary/light" work activities), claimant (who was 65 years of age at the time of his current hernia surgery) had either returned to the work force or had a physician consider it futile for him to seek employment. Under such circumstances, the Board was not persuaded that claimant was in the work force when his worsened accepted hernia condition became disabling. Consequently, the Board concluded that claimant was not a "worker" and, as such, reopening of his Own Motion claim for a worsened condition was not justified. *See* ORS 656.278(1)(a); *Stuart T. Valley*, 55 Van Natta 475, 478-79 (2003).

Board was not persuaded that claimant was in the work force when his worsened accepted hernia condition became disabling .

The Board also denied claimant's request for temporary disability benefits based on his attending physician's work restrictions. Relying on OAR 438-012-0035(4)(a), (b), and *Edward A. Billman*, 55 Van Natta 693, 694 (2003), the Board reiterated that a carrier's obligation to pay temporary disability benefits concerning an Own Motion claim is not triggered unless and until the claim has been reopened (either voluntarily or by Board order).

Finally, the Board acknowledged that the carrier had not submitted its Own Motion Recommendation within 30 days of its decision not to oppose

claimant's physician's surgery request. See OAR 438-012-0001(3)(a); OAR 438-012-0030(1)(a), (b). Although reminding the carrier of its obligation to timely process Own Motion claims, the Board concluded that, because it had determined that the claim would not be reopened, neither penalties nor attorney fees under ORS 656.262(11)(a) were awardable. *See Noel Brown*, 62 Van Natta 2303 (2010); *Donald L. Duquette*, 60 Van Natta 797 (2008).