M E M O R A N D U M

April 8, 2025

To: Bob Livingston, Governor's Office; Kelly Brooks, Governor's Office; Sarah Foster, Governor's Office; and Members of the Management Labor Advisory Committee

From: Joy Dougherty, Workers' Compensation Board Chair

Subject: WCB Update

SIGNIFICANT/NOTEWORTHY CASES
(JANUARY 2025 – MARCH 2025)

Court of Appeals

Fisher v. SAIF, 338 Or App 155 (February 20, 2025). In a nonprecedential memorandum opinion under ORAP 10.30, the court affirmed the Board's order that upheld a denial of the worker's occupational disease claim for bilateral sensorineural hearing loss. Reviewing the Board's order for substantial evidence and reason, the court found that the Board's order satisfied those standards. ORS 183.482(8)(c); *Dorn v. Teacher Standards and Practices Comm.*, 316 Or App 241, 243 (2021).

The court first addressed the worker's contention that the Board erred in declining to analyze the claim as a combined condition under ORS 656.802(2)(b). In doing so, the court found that substantial evidence supported the Board's finding that the worker had conceded that the claim was properly analyzed under ORS 656.802(2)(a), rather than as a combined condition under ORS 656.802(2)(b) .

Additionally, the court held that substantial evidence supported the Board's determination that the examining physician's opinion did not persuasively establish that employment conditions were the major contributing cause of the worker's hearing loss condition. The court cited the examining physician's statement that 60 percent of the worker's hearing loss was attributable to nonwork-related causes.

Workers' Compensation Board

Catherine Booth, 77 Van Natta 21 (January 24, 2025). Applying *Smirnoff v. SAIF*, 188 Or App 438 (2003) and ORS 656.802(2)(a), the Board found that a worker's new or omitted medical condition claim for right wrist osteoarthritis should be analyzed as an occupational disease, rather than an injury. The Board acknowledged that the worker's accepted conditions had been accepted as injuries. However, based on the persuasive medical evidence in the record, the Board found that the worker's osteoarthritis condition developed gradually over time and should be analyzed as an occupational disease under a major contributing cause standard.

Applying the proper legal standard, the Board found that there was insufficient evidence that employment conditions were the major contributing cause of the osteoarthritis condition. ORS 656.266(1); ORS 656.802(2)(a).

Addressing the worker's alternative contention that the claimed osteoarthritis constituted the preexisting component of a combined condition, the Board determined that the record did not establish the existence of a combined condition or explain how two conditions combined. *See Carrillo v. SAIF*, 310 Or App 8, 13 (2021). Therefore, the Board reversed the administrative law judge's (ALJ) decision and reinstated the employer's denial.

A dissenting Member would have affirmed the ALJ's opinion, finding that the condition should be analyzed as an injury.

Maribeth T. Corrigan, DCD, 77 Van Natta 50 (February 5, 2025). On remand from the Court of Appeals, the Board concluded that the claimant, the spouse of the deceased worker, was not a beneficiary under the 2019 version of ORS 656.005(2)(b)(A) because he was "living in a state of abandonment for more than one year" before the decedent's fatal injury.

The Board explained that, in determining whether the claimant and the decedent were living in a state of abandonment for more than one year, the court had directed it to consider whether the parties had, through their conduct, demonstrated an intent to end marital obligations for more than one year before the decedent's fatal injury. In applying that standard, the Board noted that the decedent had filed for separation 15 months before the fatal injury, had not received financial support from the claimant, and had moved out of the marital home. Under such circumstances, the Board found that the claimant was living in a state of abandonment for more than one year and was not a beneficiary under ORS 656.005(2)(b)(A).

Because the Board found that the claimant was not a statutory beneficiary, it declined to award a penalty and a penalty-related attorney fee.

Jennifer Davis, 77 Van Natta 154 (2025). The Board held that an ALJ's interim order that deferred further proceedings pending receipt of a medical arbiter report was not a final order because it did not dispose of a claim so that no further action was required. *See Price v. SAIF*, 296 Or 311, 315 (1984); *Christopher R. Norris*, 54 Van Natta 2013, 2014 (2002). Because jurisdiction remained with the ALJ, the Board remanded the matter to the Hearings Division and dismissed the claimant's request for review.

Anush Forouhar, 77 Van Natta 145 (2025). The Board upheld an ALJ's order that: (1) declined to issue subpoenas for phone and text message records; and (2) upheld the self-insured employer's denial of the worker's injury claim. Reviewing the ALJ's order for abuse of discretion, the Board cited ORS 656.283(6), stating that an ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. In this particular case, the Board upheld the ALJ's decision not to issue subpoenas for phone and text message records that were not relevant to the medical causation issue before the ALJ and the Board. *See Diana L. Flanders*, 64 Van Natta 313, 314 (2012).

Turning to compensability, the Board held that the record lacked a persuasive medical expert opinion to establish that the work event was a material contributing cause of the worker's disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1). Accordingly, the Board affirmed the ALJ's order upholding the self-insured employer's denial.

Donna M. Ruland, 77 Van Natta 132 (2025). The Board held that the worker's occupational disease claim for a left shoulder condition was compensable based on persuasive medical evidence. The Board found that the opinion supporting compensability was well explained and considered the worker's particular circumstances. Conversely, the Board found that the contrary opinions were inconsistent and based on an inaccurate history and understanding of the worker's employment activities. *Denny Shannon*, 76 Van Natta 20, 26 (2024); *Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977).

A dissenting opinion found the physician's opinion supporting compensability insufficiently persuasive. Additionally, the dissent would not have discounted the physicians' opinions that did not support compensability. Rather, based on the

independent medical exam findings and two other physicians' concurrence with them, the dissent would have reversed that portion of the ALJ's order that set aside the employer's denial.

Eugene Walters, 77 Van Natta 102 (February 24, 2025); *Steven G. Hall*, 77 Van Natta 114 (February 24, 2025). On remand from the Court of Appeals, the Board modified those portions of its previous orders that affirmed Orders on Reconsideration that apportioned permanent partial disability (PPD) awards between accepted conditions and denied, noncompensable conditions. In both cases, the physicians' opinions attributed 10 percent of the workers' impairment findings to the accepted conditions and 90 percent to denied conditions.

On remand, citing ORS 656.214(1)(a) and *Johnson v. SAIF*, 369 Or 579 (2022), the Board reiterated that if a worker's impairment is due in material part to the compensable injury, the worker is entitled to the full measure of the total impairment, without apportionment, including that portion attributed to noncompensable conditions. Applying that legal principle under the particular circumstances of these cases, the Board concluded that the workers' impairment findings were caused in material part by the compensable conditions and, therefore, that the workers were entitled to the full measure of their total impairment without apportionment.

In *Walters*, Member Ogawa dissented. She disagreed with the majority opinion's conclusion that the worker's impairment was due in material part to the accepted condition when only 10 percent of it was attributable to that condition. Reasoning that the medical opinion regarding the impairment findings indicated that the impairment attributable to the accepted condition was "minimal," the dissent concluded that it did not establish that the impairment was due in material part to the compensable injury. Consequently, the dissenting opinion would not have awarded the full measure of impairment in this particular case.

In *Hall*, Member Curey dissented, reasoning that 10 percent did not constitute a "material contributing cause." In addition, the dissent encouraged the court to reconsider its decision not to recognize an exception that would allow for the apportionment of impairment when a portion of the impairment was attributable to a denied condition. Alternatively, the dissent recommended that the legislature create such an exception.