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BOARD NEWS

Permanent Rule Amendments - Addressing HB 2764 (Mostly Division 015 Attorney Fee Rules) - Effective January 1, 2016

At its December 10, 2015 meeting, after considering comments received at its December 4, 2015 rulemaking hearing, the Board adopted permanent rules and amendments to its Division 015 (Attorney Fee) rules and OAR 438-005-0035(1) (Board Policy). These rules address statutory amendments arising from HB 2764 (2015) which became effective January 1, 2016, and apply to all claims for which an order is issued and attorney fees are incurred on or after January 1, 2016, regardless of the date on which the claim was filed. Electronic copies of these rules, along with the Board's Order of Adoption are available on WCB's website at www.wcb.oregon.gov (under the category "Laws & Rules"). Copies have also been distributed to parties and practitioners on WCB's mailing list. Some notable actions are summarized below.

Among the rule adoptions is OAR 438-015-0033, which implements procedures regarding the establishment, assessment, and enforcement of a claimant's counsel's hourly attorney fee rate for actual time spent during the personal or telephonic interview or deposition held under ORS 656.262(14)(a). Section 2, HB 2764 (2015). A Board-prescribed form for a billing statement that claimant's counsel may use in claiming this fee is available on WCB's website at http://www.cbs.state.or.us/wcb/pdf_file/forms/billingform.pdf. A majority of the Members (Chair Somers, Members Johnson and Currey) agreed to adopt \$275 as a reasonable hourly rate. Members Weddell and Lanning supported \$300 as a reasonable hourly rate.

Consistent with Sections 9 and 10 of HB 2764 (which provide for a carrier-paid attorney fee for a claimant's counsel's services in obtaining temporary disability either before an ALJ decision or after a hearing request is filed), the Members adopted permanent amendments to its rules to address this legislative change. See OAR 438-015-0010; 438-015-0025; 438-015-0045; 438-015-0055. However, a majority of the Members (Chair Somers, Members Currey and Johnson) determined that the Board was not statutorily authorized to extend the statutory amendments to Own Motion-related temporary disability claims. Consequently, the proposed amendments to OAR 438-015-0080 were not adopted. Members Weddell and Lanning supported the proposed rule amendment.

Addressing Section 5 of HB 2764 (amending ORS 656.382 to add section (3)), the Board amended OAR 438-015-0065 and OAR 438-015-0070 to add new sections (2), which provide that if a carrier raises attorney fees,

penalties, or costs as a separate issue in a request for hearing or a request for review, respectively, and the ALJ or the Board finds that they should not be disallowed or reduced, the ALJ or the Board shall award a reasonable additional attorney fee to the claimant's counsel for efforts in defending the fee, penalty, or costs.

Finally, addressing Section 5 of HB 2764 (which amended ORS 656.382 to add section (4)), the Board amended OAR 438-015-0070 to include a new section (3), which provides that, if the carrier requests/cross-requests review of an ALJ's order and the matter is briefed, but the carrier withdraws the appeal prior to a Board decision resulting in the claimant's prevailing in the matter, the Board shall award a reasonable assessed fee for the claimant's attorney's efforts in briefing the matter to the Board. See subsection (3)(a). Pursuant to subsection (3)(b) of the adopted rule, a matter is considered "briefed" when the carrier has filed its initial brief.

WCB Portal Settlement Submissions - Your Questions Answered

- *By Greig Lowell*

The Workers' Compensation Board (WCB) began accepting settlement documents electronically through the WCB Portal on January 25, 2016. What follows is a list of questions received since the launch.

Q: Why can't I find the settlement tab in my portal account?

A: Account administrators were granted access to the settlements tab during the initial rollout. Your account administrator can grant authorization to submit settlements or, alternatively, give you "read only" access. The "user detail" tab is where authorizations are granted.

Q: I'm unable to type the employer's name or opposing counsel's name in the boxes on the upload screen.

A: Because that information is contained in the settlement documents you upload, WCB is not asking you to give it to us again. WCB staff will create the case information from your settlement documents.

Q: We're settling a case that is set for hearing. The WCB number does not show up on the settlement screen, and I can't type it in the box.

A: If you are submitting settlement documents on a case currently in litigation, you can access that case from your WCB Case Status screen. Click the button on the left to upload the settlement documents. The data fields will populate with the information contained in WCB's Hearings Division file.

Q: I'm trying to upload an addendum, but the "submit" button is not available to me.

A: Only the original submitter can upload additional documents. If you were not the original submitter, you will need to contact opposing counsel to have those documents uploaded. In addition, please note that any initial settlement submission must include a Claim Disposition Agreement (CDA), a Disputed Claim Settlement (DCS) or a Stipulation (Stip) – *i.e.*, a “settlement document.” To submit an addendum after your initial submission, click the “view/update” button on the case from your Settlement list.

Q: If I’m submitting a cover letter with the settlement documents, do I need to upload it as a separate document?

A: You can submit them all in one document, or in multiple documents. WCB can process them either way.

Q: Will the portal system notify opposing counsel that I have submitted a settlement, similar to a portal hearing request? When do those notifications go out?

A: The portal system will generate an email to the submitter and opposing counsel once WCB has begun processing the settlement submission. However, in order to receive those notifications, each party must edit their portal contact to elect receipt of those notifications.

Q: Will the portal notify me when a settlement has been approved?

A: If you’ve elected to receive email notifications, an email will be sent to you announcing approval of a settlement submitted through the portal. Portal users will be directed to view a scanned copy of the order/agreement in their WCB Case Status screen.

Q: Will my client receive a paper copy of the order in the mail?

A: For a DCS or Stipulation, all parties will receive a copy of the approval/dismissal order by mail. Except for those CDAs approved by Board/ALJ order, notice of the CDA approval is posted on WCB’s website, and sent by email to portal users.

Q: When I submit a combination CDA/DCS agreement, will I get an email or electronic notice when both agreements have been approved?

A: You will probably receive notice of the CDA approval first, via WCB’s website or an email from the portal system. The DCS order is not sent electronically, but it can be found in your WCB Case Status screen (“orders and documents” tab). If you are a portal user, you will receive an email notifying you that an order issued. Please note that these “combined” agreements are processed in tandem. Thus, if you have received notice of an approved CDA, the DCS has also been approved.

Q: I’d like to know the status of my settlement submission, but I don’t necessarily want to get more emails.

A: You don't have to sign up for email notifications to see that your settlement is in process at the Board. The Settlements tab will display the status of your cases. However, the email notification system enables the parties to copy opposing counsel via the portal without having to send a paper copy of the transmittal letter.

Q: I would like to file more things electronically in the WCB Portal. When will I be able to file a Response to Issues, a brief, or briefing extension through the portal?

A: WCB has a long-term plan to continue adding features to the portal. Next to come is Response to Issues. Your ideas, requests, and feedback are always welcome. Please contact WCB at portal.wcb@oregon.gov.

Portland Hearings Division Office Move

We are now preparing for our upcoming Portland office move. Details about the office space have been sorted out and construction has begun. The move date, while not etched in stone, is becoming more certain. To make the transition, WCB will be reserving time, approximately three days in the Portland schedule, to move our necessary equipment. PALJ Dougherty will be working closely with docketing to ensure a smooth transition. Notices for hearings scheduled in the new location include a map, which is being provided to all parties. Please continue to send correspondence to our current location until the move. It is WCB's intention to start business at the new location on April 11, 2016. Additional questions may be directed to PALJ Dougherty.

CASE NOTES

Extent: Impairment Findings - "Post-Reconsideration Order" Reports - Evidentiary Limitation - "283(6)"/"268(8)(h)" - "Chronic Condition" Impairment - "Significant Limitation/Repetitive Use"

Cody L. Ervin, 68 Van Natta 22 (January 5, 2016). Applying ORS 656.283(6), the Board held that claimant's submission of "post-reconsideration order" reports from his attending physician and a physical therapist could not be considered at a hearing regarding an Order on Reconsideration because they were not part of the reconsideration record developed during the proceeding before the Appellate Review Unit (ARU). After an Order on Reconsideration affirmed a Notice of Closure (NOC) (which awarded no permanent impairment for a knee condition), claimant requested a hearing. At the hearing level, claimant presented "post-reconsideration order" reports from a physical therapist (who had conducted a functional capacity evaluation before the NOC) and his attending physician. The carrier objected to the admission of those reports, contending that they were not part of the reconsideration record. In response, claimant argued that the reports were admissible because they clarified evidence that had been submitted during the reconsideration proceeding. When the ALJ

excluded the reports and affirmed the Order on Reconsideration, claimant requested Board review, reiterating his argument that the reports were admissible.

The Board disagreed with claimant's contention. Citing ORS 656.283(6), the Board stated that evidence on an issue regarding a NOC that was not submitted during the reconsideration proceeding is not admissible at hearing. Furthermore, relying on ORS 656.268(8)(h), and *Juana M. Lopez*, 52 Van Natta 1654 (2000), the Board noted that, after reconsideration, no subsequent medical evidence of the worker's impairment is admissible for purposes of making impairment findings at claim closure.

"Post-reconsideration" reports from "non-arbiter" were not admissible at hearing.

Turning to the case at hand, the Board concluded that the "post-reconsideration order" reports submitted by claimant were not included in the reconsideration record developed before ARU. Consequently, the Board found no error in the ALJ's exclusion of those reports.

Constitutional challenge to ALJ's exclusion of "post-reconsideration" reports not considered because administrative remedies had not been exhausted during the reconsideration proceeding.

In reaching its conclusion, the Board rejected claimant's contention that the ALJ's exclusion of the "post-reconsideration order" reports violated his constitutional rights to due process of law. Referring to *Michael J. Kivet*, 62 Van Natta 2084, n 2 (2010), the Board noted that claimant had not raised this constitutional argument at the hearing level. Moreover, the Board reasoned that claimant had not exhausted his administrative remedies by presenting the reports during the reconsideration proceeding. See *Trujillo v. Pacific Safety Supply*, 336 Or 349, 374-75 (2004).

Finally, the Board determined that claimant's "attending physician's ratified" impairment findings did not constitute a significant limitation in repetitive use for purposes of a "chronic condition" impairment value. See OAR 436-035-0007(5); *Angelica M. Spurger*, 67 Van Natta 1798, 1804 (2013). The Board acknowledged that the attending physician had released claimant to modified work with the following work restrictions: no kneeling, limited climbing, no crawling, no squatting, no overhead lifting, no lifting over 10-20 pounds.

"Chronic condition" rule focuses on limitations on the repetitive use of a body part, rather than a worker's ability to perform work.

Nevertheless, citing *Gonzalez v. SAIF*, 183 Or App 183, 190-91 (2002), and *Fidel Vivanco*, 59 Van Natta 1287, 1290 (2007), the Board noted that the "chronic condition" rule focuses on limitations on the repetitive use of a body part and not on the worker's ability to perform work. Thus, even if the attending physician's restrictions were relevant to a determination of a "chronic condition" impairment value, the Board concluded that they did not constitute a significant limitation in the repetitive use of claimant's knee "as a whole."

Own Motion: Permanent Impairment -
 "Chronic Condition" Impairment -
 "Significant Limitation/Repetitive Use" -
 WCD's "Industry Notice" Considered

William E. Hannah, 68 Van Natta 55 (January 14, 2016). Applying OAR 436-035-0019(1) and the Workers' Compensation Division's (WCD's) "Industry Notice," in an Own Motion order reviewing a Notice of Closure of a

“post-aggravation rights” new/omitted medical condition claim, the Board held that claimant was entitled to a “chronic condition” permanent impairment value because the record established that his accepted osteoarthritic knee condition had resulted in a significant limitation in the repetitive use of his knee. Relying on claimant’s attending physician-ratified restrictions (which prohibited him from climbing, squatting, kneeling), the Board reasoned such restrictions constituted a “complete” limitation in his ability to use his knee and, as such, satisfied WCD’s “Industry Notice” that the repetitive limitation be more than two-thirds of a period of time.

Citing OAR 436-035-0019(1)(b), the Board stated that a claimant is entitled to a 5 percent permanent impairment value if a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, the claimant is significantly limited in the repetitive use of his right knee. Relying on *Spurger v. SAIF*, 266 Or App 183, 192 (2014), the Board noted that “magic words” are not required, provided that the record contains an opinion from (or ratified by) an attending physician or from a medical arbiter establishing that the claimant is significantly limited in the repetitive use of the body part due to a chronic and permanent medical condition. Referring to *Angelica M. Spurger*, 67 Van Natta 1798, 1804 (2015), the Board reiterated that the plain and ordinary meaning of “significantly limited” denotes a limitation that is “meaningful or important.”

In addition, the Board acknowledged WCD’s “Industry Notice,” which provided that, effective December 23, 2014, it would interpret the relevant inquiry under OAR 436-035-0019(1) to be whether “the worker [is] unable to repetitively use the body part for more than two-thirds of a period of time.” Although recognizing that WCD’s “Industry Notice” did not constitute a “standard” or “rule,” the Board reasoned that deference is given to an agency’s plausible interpretation of its rule, including an interpretation made in the course of applying the rule. See *Godinez v. SAIF*, 269 Or App 578, 583 (2015); *Spurger*, 67 Van Natta at 1802.

Turning to the case at hand, the Board noted that the attending physician-ratified opinion completely restricted claimant from climbing, squatting or kneeling. The Board concluded that these restrictions constituted an “important, meaningful, or notable” limitation in the repetitive use of his right knee because it was a *complete* limitation (*i.e.*, more than two-thirds of a period of time). Under such circumstances, the Board held that a “chronic condition” impairment value was warranted. See *Debra J. Walker*, 67 Van Natta 2153, 2157 (2015); *Jeffrey L. Heintz*, 67 Van Natta 1164, 1168-69 (2015).

Premature Closure: Based on “Medically Stationary” Status of Accepted Condition/Direct Medical Sequelae

Katherine A. Lapraim, 68 Van Natta 39 (January 8, 2016). Applying ORS 656.268(15), and OAR 436-035-0005(6), in determining whether a claim had been prematurely closed, the Board held that its review was confined to whether claimant’s accepted lumbar strain and any direct medical sequelae

WCD’s “Industry Notice” given deference as agency’s plausible interpretation of its “chronic condition” rule.

“Complete” restriction in climbing, squatting, kneeling constituted a “significant limitation” in “repetitive use” of knee condition.

were medically stationary, rather than extending its review to whether all effects of the work-related injury incident had become medically stationary. Following claimant's compensable injury, her attending physician concurred with a physician's opinion that her accepted lumbar strain was medically stationary. After a Notice of Closure closed the claim (which an Order on Reconsideration affirmed), claimant requested a hearing. In doing so, claimant contended that another physician's steroid injections established that her work injury had caused symptoms in her facet joints and, as such, established that her injury-related conditions were not medically stationary.

The Board disagreed with claimant's contention. Citing ORS 656.005(7), the Board stated that "medically stationary" means that no further material improvement would reasonably be expected from medical treatment or the passage of time. Relying on ORS 656.268(15), OAR 436-035-0005(6), and *Manley v. SAIF*, 181 Or App 431, 438 (2002), the Board noted that, when determining whether claim closure was premature, it considers the medically stationary status of only the accepted conditions at the time of claim closure any direct medical sequelae of an accepted condition.

Turning to the case at hand, the Board acknowledged claimant's assertion that, based on the rationale expressed in *Brown v. SAIF*, 262 Or App 640, *rev allowed*, 356 Or 397 (2014), her claim concerning "all the effects of the injury event" must be medically stationary. Nonetheless, referring to *Stuart C. Yekel*, 67 Van Natta 1279, 1283-84 (2015), the Board reiterated that it had declined to apply the *Brown* rationale in the context of rating a claimant's permanent disability at claim closure, but rather confined its review to accepted conditions and their direct medical sequelae.

Consistent with the *Yekel* rationale, the Board declined to apply the *Brown* holding in the context of determining medically stationary status and premature closure. The Board found support for its decision in the reasoning expressed in *Manley*, which determined that the original accepted condition and any direct medical sequelae of the original accepted condition (unless denied) must be medically stationary at the time of claim closure.

Consequently, because direct medical sequelae of the original accepted condition (as opposed to a new/omitted medical condition) must be rated at claim closure, the Board reasoned that *Manley* supported the proposition that direct medical sequelae of the accepted condition must be medically stationary before the claim can be closed. Consistent with such reasoning, the Board determined that the "medically stationary" status of unaccepted conditions (or their direct medical sequelae) were not relevant to a "premature closure" analysis.

Brown holding not applied in context of determining medically stationary and premature closure.

"Medically stationary" status of unaccepted conditions (or their direct medical sequelae) not relevant to "premature closure" analysis.

Third Party Dispute: “Just & Proper” Distribution of Settlement Proceeds - “593(3)” - Claimant’s/Wife’s Shares of Settlement Apportioned - Carrier’s Share Based on Actual/Projected Costs as of “Settlement Date”

David J. Hanson, 68 Van Natta 67 (January 14, 2016). In determining a paying agency’s “just and proper” share of claimant’s third party settlement under ORS 656.593(3), the Board held that it was authorized to resolve a dispute regarding the apportionment of the settlement proceeds between claimant and his wife and to base the paying agency’s share of claimant’s portion of the settlement proceeds on its actual/projected claim costs as of the “settlement date.” After the paying agency approved a settlement (which resolved claimant’s and his wife’s lawsuits against a third party), the paying agency sought Board resolution of a dispute regarding the paying agency’s “just and proper” share of claimant’s portion of the settlement. Following a number of previous Board decisions, *David J. Hanson*, 63 Van Natta 1108 (2011), 66 Van Natta 2131 (2014), claimant disagreed with an ALJ’s proposed recommendation that apportioned approximately 13 percent of the settlement proceeds to claimant’s wife’s loss of consortium claim (which was not subject to the paying agency’s “third party” lien). In addition to asserting several procedural challenges (which the Board had rejected in its previous order), claimant contended that the third party attorney’s opinion regarding the “valuation” of his and his wife’s shares of the settlement was not persuasive.

The Board disagreed with claimant’s contention. Citing ORS 656.593(3), *SAIF v. Wright*, 312 Or 132, 137 (1991), and *Estate of Troy Vance v. Williams*, 84 Or App 616, 619-20 (1987), the Board stated that it is authorized to resolve any conflict regarding a paying agency’s “just and proper” share of a third party settlement (after the distribution of claimant’s attorney fee, litigation expenses, and statutory 1/3 share). Furthermore, relying on *Weems v. American Int’l Adjustment Co.*, 123 Or App 83, 86 (1993), *aff’d Weems v. American Int’l Adjustment Co.*, 319 Or 140 (1994), and *Kim J. Hayes*, 48 Van Natta 1635, 1638 (1996), the Board noted that the proceeds from the settlement of a loss of consortium claim are not subject to a third party lien. Nonetheless, referring to *Weems* and *Hayes*, the Board clarified that it can consider the value of the loss of consortium claim in determining the reasonableness of a claimant’s proposed third party settlement.

Although “loss of consortium” claim is not subject to third party lien, the value of that claim can be considered in determining the reasonableness of a worker’s proposed third party settlement.

Turning to the case at hand, the Board acknowledged claimant’s challenges to the third party attorney’s opinion; e.g., the attorney had not reviewed the entire file and had not considered claimant’s and his wife’s testimony. Nevertheless, the Board observed that claimant had cross-examined the third party’s attorney regarding his failure to consult his entire file and the attorney had testified that such consideration would not have changed his valuation of claimant’s wife’s “loss of consortium” claim (which the attorney estimated was some two to three times higher than usually granted because

Determination of paying agency's "just and proper" share of third party settlement proceeds is based on actual/projected claim costs as of the "settlement date," not "post-settlement."

Third party's attorney's opinion (in absence of countervailing evidence) sufficient to meet paying agency's burden of proof regarding claimant's share of settlement.

of claimant's and his wife's likability). Moreover, noting that a "just and proper" determination is based on a paying agency's actual/projected claim costs as of the "settlement date," the Board reasoned that the third party's attorney's consideration of claimant's and his wife's testimony concerning "post-settlement" matters were of limited probative value. See *Edgar M. Woodbury*, 61 Van Natta 1008 (2009).

Under such circumstances, the Board determined that claimant's challenges did not render the third party's attorney's opinion devoid of probative value. Consequently, in the absence of countervailing "valuation" evidence, the Board considered the third party attorney's opinion sufficient to meet the paying agency's burden of proof regarding claimant's share of the settlement (*i.e.*, approximately 87 percent of the total proceeds).

After accounting for claimant's counsel's attorney fee, litigation expenses, and claimant's statutory 1/3 share under ORS 656.593(1), the Board found that the paying agency's "just and proper" share of the remaining balance of the settlement proceeds was its actual/projected claim costs as of the date of the settlement (rather than on "post-settlement information" regarding the paying agency's claim costs). See *Woodbury*, 61 Van Natta at 1008.

APPELLATE DECISIONS UPDATE

Compensable Injury: "Intentional Injury" - "156(1)"

Wilson v. Trueblue, Inc., ___ Or App ___ (January 6, 2016). The court affirmed without opinion the Board's order in *Trenton Wilson*, 66 Van Natta 521 (2014), previously noted 33 NCN 3:5, that held that claimant's hand injury, which occurred when his hand was crushed between moving rollers of a metallic press machine, was not compensable under ORS 656.156(1), because the carrier established that the injury resulted from his deliberate intention to produce such an injury.

Extent: Impairment Findings - No Impairment Due to Compensable Injury - "Apportionment" Rule ("035-0013(1)") Not Applicable

Magana-Marquez v. SAIF, 276 Or App 32 (January 21, 2016). Applying ORS 656.214(1), the court affirmed the Board's order in *Paula Magana-Marquez*, 66 Van Natta 1300 (2014), previously noted 33 NCN 7:4, which held that claimant was not entitled to a permanent disability award for a low back injury because the record did not establish that her reduced range of motion findings were due to her compensable injury. In reaching its conclusion, the Board had distinguished *Schleiss v. SAIF*, 354 Or 637 (2013), reasoning that in *Schleiss* a portion of the claimant's permanent impairment was attributable to

“Due to,” under “214(1)(a),” describes the necessary causal relationship between a compensable injury and the loss of use/function of a body part.

Because claimant’s impairment was “wholly due to unrelated causes,” “214” did not authorize a permanent disability award.

Schleiss does not require that a claimed disability be treated as “due to” a compensable injury where no causal relationship exists between the compensable injury and the claimed disability.

the compensable injury, whereas in the present case this claimant’s impairment was wholly due to unrelated causes. On appeal, claimant contended that, notwithstanding the lack of a causal relationship between her work injury and her permanent impairment findings, under the *Schleiss* holding, her disabilities were deemed to be due to her accepted condition as a matter of law.

The court disagreed with claimant’s contention. Citing ORS 656.214(1), ORS 656.266(1), and *Schleiss*, the court stated that a claimant is entitled to a permanent disability award only if the claimant has a permanent impairment that is “due to” or “results from” the compensable injury. Referring to *Schleiss*, the court noted that, in defining “impairment” in ORS 656.214(1)(a), the legislature used the term “due to” to describe the *necessary causal relationship* between a compensable injury and the loss of use or function of a body part or system.

Based on the aforementioned points and authorities, the court observed that, claimant must, at a minimum, demonstrate a causal relationship between the compensable injury and the claimed permanent impairment. Because the Board had found that claimant’s impairment was “*wholly due to unrelated causes*” (a finding that claimant did not dispute), the court concluded that ORS 656.214 did not authorize a permanent disability award.

The court distinguished *Schleiss*, where the Supreme Court had held that the apportionment of impairment to conditions apart from accepted conditions as a result of a compensable injury was not permissible unless those other conditions would be “legally cognizable in a combined condition claim.” *Id.*, at 654. Reasoning that the present case did not involve the issue of apportionment (because the Board had found that there was no causal relationship between claimant’s impairment and her compensable injury), the court determined that nothing in *Schleiss* suggested that ORS 656.214 requires that a claimed disability be treated as “due to” a compensable injury where there is no causal relationship between the compensable injury and the claimed disability.

In reaching its conclusion, the court noted that the attending physician and arbiter’s findings focused on the relationship between claimant’s accepted lumbar strain and her permanent impairment, whereas ORS 656.214 refers to impairment or work disability “resulting from the compensable industrial injury or occupational disease.” See, e.g., *Brown v. SAIF*, 262 Or App 640, 647-51, *rev allowed*, 356 Or 397 (2014) (generally differentiating between the statutory phrases “compensable injury” and “accepted condition”). Nonetheless, based on claimant’s acknowledgment that the aforementioned distinction “likely” had no bearing on the determination of whether her work injury caused any permanent impairment, the court treated her work injury and accepted condition as one and the same for purposes of its review under the circumstances of this case.