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BOARD NEWS

WCB Salem Office - Notice of Road Construction

Please be advised that the intersection of Madrona Ave. SE and 25^h St. SE will be closed for construction from June 1 to October 31. Motorists should expect delays as traffic will need to use alternate routes. WCB access will continue to be available.

WCB Reappointment - Steve Lanning

WCB is pleased to announce that Board Member Steve Lanning was nominated by Governor Brown for reappointment to the Workers' Compensation Board. On May 25, 2016, he was confirmed by the Oregon Senate.

Rulemaking Hearing: July 29, 2016 - Proposed Amendments Regarding "E-Mail Filing" (OAR 438-005-0046(1)(f)(B)) and "Representation by Counsel" (OAR 438-006-0100)

At their May 17 meeting, the Members proposed amendments to the Board's Division 005 (Filing and Service) and Division 006 (Representation by Counsel) rules. The Members took this action after considering public comment regarding possible jurisdictional challenges to an "e-mail filing" under OAR 438-005-0046(1)(f)(B), and to conform OAR 438-006-0010(1) with statutory amendments to ORS 9.320.

The proposed change to OAR 438-005-0046(1)(f)(B) would state that strict compliance with the rule requiring a "Request for Hearing Form" (as an attachment to an "email" request) would not be a jurisdictional requirement. Furthermore, the Members propose to remove any reference to specific attachment formats, instead requiring that the format be readable by the Board.

The proposed change to OAR 438-006-0100(1) would replace the word "corporations" with the phrase "parties that are not natural persons" in referring to parties who must be represented by a member of the Oregon State Bar. This amendment is proposed to conform the rule to statutory amendments to ORS 9.320.

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Notice of this rulemaking action has been filed with the Secretary of State's office. Electronic copies of these rulemaking materials 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.

A rulemaking hearing for these proposed rule amendments has been scheduled for July 29, 2016, at 10 a.m. at the Board's Salem office (2601 25th St. SE, Ste. 150, Salem, OR 97302-1280). Any written comments submitted in advance of the hearing may be directed to Debra Young, the rulemaking hearing officer. Those comments may be mailed to the above address, faxed to 503-373-1684, e-mailed to rulecomments.wcb@oregon.gov or hand-delivered to a permanently staffed Board office (Salem, Portland, Eugene, Medford).

Bulletin 1 (Revised) - Annual Adjustment to Attorney Fee Awards - Effective July 1, 2016

On June 1, 2016 "WCB Bulletin No. 1 (Revised)" published the annual adjustment to attorney fee awards under ORS 656.262(11)(a) and ORS 656.308(2)(d). See OAR 438-015-0038; OAR 438-015-0055(5); OAR 438-015-0110(3).

Effective July 1, 2016, an attorney fee awarded under ORS 656.262(11)(a) may not exceed \$4,225, absent a showing of extraordinary circumstances. OAR 438-015-0110(3). Also effective July 1, 2016, an attorney fee awarded under ORS 656.308(2)(d) shall not exceed \$3,047, absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5).

These adjustments apply to all attorney fee awards under these statutes granted by orders beginning July 1, 2016. The bulletin can be found on the Board's website at: <http://www.cbs.state.or.us/wcb/wcbbulletin/bulletin1-rev2016.pdf>

New WCB Website Coming this Summer

The Board will be releasing a revision of its external website soon. Please keep an eye out for the announcement. You will likely need to update your "bookmarks" and "favorites" links when the new website becomes active.

The changes to the WCB website are part of an enterprise-wide change to most Oregon.gov websites. The new web pages are designed to work better on mobile devices and are built on an updated platform with better stability and security.

Many of you participated in a survey about the WCB website more than a year ago. Since that time, the Board has been reviewing and implementing your ideas and suggestions in developing the new web pages. Your input was very helpful in the design and content of the new website. Thank you again for your participation.

Here's a preview of WCB's new home page:

Staff Attorney Recruitment

WCB is recruiting candidates for a staff attorney position. To be chosen, the applicant must have a law degree and extensive experience reviewing case records, performing legal research, and writing legal arguments or proposed orders. Excellent research, writing, and communication skills are essential. Preference may be given for legal experience in the area of workers' compensation.

Further details about the position and information on how to apply is available online at <http://www.oregon.gov/DCBS/jobs/Pages/jobs.aspx> or www.oregonjobs.org. The recruitment will run until July 29, 2016. WCB is an equal opportunity employer.

CASE NOTES

Claim Preclusion: Prior Unappealed Denial (Based on Specific Work Incident) - Precluded Later Claim for Same Work Incident (Based on Subsequent Medical Treatment)

James S. Zimmerman, 68 Van Natta 759 (May 18, 2016). The Board held that, because the carrier's earlier claim denial for a finger condition stemming from a work incident had not been appealed, claimant's subsequent finger claim resulting from the same work incident was precluded, even though

Two-day delay in treatment did not transform claim to new injury date.

the subsequent claim was based on medical treatment he received after the work incident. Asserting that the carrier's previous denial pertained to a work incident that had not resulted in medical treatment, claimant contended that his subsequent injury claim for his finger condition was separate from the earlier claim because the subsequent claim pertained to the medical treatment that had been sought two days after the work incident.

The Board disagreed with claimant's contention. Citing *Drews v. EBI Cos.*, 310 Or 134, 142-43 (1990), the Board stated claim preclusion bars the litigation of a claim based on the same factual transaction that could have been litigated between the parties in a prior proceeding that has reached a final determination. Referring to *Mills v. Boeing Co.*, 212 Or App 678, 684-85 (2007), the Board noted that, where there was only one injurious work event upon which the claimant's claim could have been based, a carrier's final denial of that claim, even though it had an incorrect date of injury due to a typographical error, precluded the claimant from relitigating whether his later-diagnosed condition was work-related.

Turning to the case at hand, the Board acknowledged that claimant's first finger injury claim had been denied based on "non-cooperation" under ORS 656.262(15). The Board further recognized that claimant had not sought medical treatment for his finger injury until two days after the work incident. Nonetheless, finding that there was only one "work-related injury incident," the Board reasoned that the fact that claimant did not seek treatment until two days after the work incident did not transform the date of injury to a later date.

Under such circumstances, the Board concluded that the date of claimant's alleged compensable injury was the date of the "work-related injury incident," which had subsequently resulted in disability/need for treatment. Because it was undisputed that claimant's prior injury claim asserting the compensability of the "work-related injury incident" had been subject to a final "non-cooperation" denial, the Board determined that the subsequent claim was based on the same factual transaction that could have been previously litigated to a final determination. Consequently, the Board held that claim preclusion barred the litigation of claimant's subsequent claim.

Course & Scope: "Arising Out Of" Employment - Knee "Gave Out" at Work - No "Work Connection Established

Bridget D. Ridimann, 68 Van Natta 766 (May 20, 2016). The Board held that claimant's right knee injury, which occurred when her right knee "gave way" at work after she stood up from the stool where she had been "de-linting" towels and walked to a linen cabinet, did not arise out of her employment because the medical evidence did not establish a work-related risk connection between her employment and her knee condition. Referring to physicians' opinions (which either attributed claimant's knee condition to advanced arthritis or were unable to attribute her condition to her work activity), the carrier denied her injury claim. Claimant requested a hearing, contending that her knee injury arose as a result of a risk connected with her work activity.

Board relied on medical evidence that knee giving out was due to arthritis, not work activity.

The Board disagreed with claimant's contention. Citing *Redman Indus., Inc. v. Lang*, 326 Or 32, 36 (1997), the Board stated that to satisfy the "arising out of" requirement, the "causal connection must be linked to a risk connected with the nature of the work or a risk to which the work environment exposes [the] claimant." Referring to *Phil A. Livesley Co. v. Russ*, 246 Or 25, 29-30 (1983), the Board noted that risks are generally categorized as employment-related risks (which are compensable), personal risks (which are noncompensable), or neutral risks (which, having no particular employment or personal character, are compensable if the employment conditions put the claimant in a position to be injured by the neutral risk).

Turning to the case at hand, the Board acknowledged claimant's reliance on *Hubble v. SAIF*, 56 Van Natta 154, *rev den*, 293 Or 103 (1982), where a worker's knee injury claim had been found compensable when the knee "buckled" as he was walking at work. The Board recognized the *Hubble* court's reasoning that a sufficient work relationship had been established because walking had been part of the worker's job. However, in contrast to *Hubble*, where the worker's surgeon had attributed the worker's knee injury to walking (which was part of the worker's job), the Board reasoned that an examining physician in the present case had attributed claimant's knee "giving out" to her preexisting arthritis and that claimant's family physician was ultimately unable to relate her knee condition to her work activity.

Under such circumstances, the Board found that the record did not persuasively establish that claimant's knee injury was due to walking or another risk connected with the nature of her work. Accordingly, the Board concluded that claimant's injury did not arise out of her employment.

Course & Scope: "In the Course Of" Employment - "Lunch Break" Injury While Walking - "Employer-Designated" Area During "Walking Program" - "Personal Comfort" Doctrine

Laura Brown, 68 Van Natta 774 (May 24, 2016). Applying the "personal comfort" doctrine, the Board held that claimant's injury, which occurred when she was walking during her unpaid lunch break on an "employer-designated" route while participating in the employer's walking program, arose out of and in the course of her employment. When she was injured, claimant, a customer service representative, was participating in an employer-initiated walking program on an employer-designated route located around the outside of the mall where the employer's office was located. Claimant had decided to walk on the designated outdoor lap during her unpaid lunch break to earn more miles. She was encouraged by her "team supervisor" to walk to earn more points for the team, and program participation was "strongly recommended" and "created morale." As she was walking on the employer-designated route, claimant stepped into a depressed area on the pavement and twisted her leg. The carrier denied the claim, asserting that, under the "going and coming" rule, her injury

did not arise out of and in the course of her employment. Claimant requested a hearing, contending that her injury was compensable under the “personal comfort” doctrine.

The Board agreed with claimant’s contention. Relying on *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997), the Board noted that whether an injury “arises out of” and occurs “in the course of” employment concerns two prongs of a unitary “work connection” inquiry that asks whether the relationship between the injury and employment has a sufficient nexus such that the injury should be compensable. Referring to *Robinson v. Nabisco, Inc.*, 331 Or 178, 186 (2000), the Board observed that the requirement that an injury occur “in the course of” employment depends on “the time, place and circumstances” of the injury.

Citing *U.S. Bank v. Pohrman*, 272 Or App 31, *rev den*, 358 Or 70 (2015), the Board stated that the “in the course of” analysis begins with an inquiry into the nature of claimant’s activity when injured to determine whether it bears a sufficient connection to employment so that she cannot be considered to have left the course of employment, making the “personal comfort” doctrine applicable and the “going and coming” rule inapplicable. Based on *Pohrman*, the Board further noted that, if it is determined that claimant had not engaged in a personal comfort activity, but rather was injured while on a personal mission, or that the personal comfort activity did not bear a sufficient connection to the employment, then it may consider whether the “going and coming” rule, or any exceptions to that rule, would properly apply. Finally, in accordance with the *Pohrman* rationale, the Board observed that the seven factors from *Jordan v. Western Electric*, 1 Or App 441, 443 (1970), are used to determine whether the “personal comfort” doctrine applies, with a general focus on whether the activity was contemplated, directed by, or acquiesced in by the employer, where the activity occurred, and whether the employer benefits from the activity.

Turning to the case at hand, the Board concluded that consideration of the *Jordan* factors preponderated in favor of a finding that claimant was still acting in the course of her employment when injured. In doing so, the Board found that claimant’s walking activity was for the benefit of the employer as well as herself, was contemplated by the employer and claimant, was acquiesced in by the employer, involved an element of employer control because the route was designated as part of the employer’s walking program, and claimant was not on a personal mission.

Under such circumstances, the Board concluded that claimant had not “left work” when her injury occurred, but rather was engaged in an activity incidental to her employment. Therefore, the Board held that claimant was injured within the course of her employment under the “personal comfort” doctrine.

Finally, addressing the “arising out of” prong of the unitary “work connection” inquiry, the Board observed that the requirement that an injury “arise out of” employment depends on the causal link between the injury and the employment. See *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996). Applying those principles to the present case, the Board determined that the employer’s outdoor route put her in a more congested, less-maintained area, which created the risk of her having to avoid traffic and stepping into a

Walking program initiated by employer and route was designated by employer. Claimant encouraged by supervisor to participate in program.

depressed area of pavement when participating in the employer's walking program. Consequently, the Board concluded that claimant's injury also arose out of her employment.

In reaching its conclusion, the Board emphasized that its decision should not be interpreted as a determination that every injury occurring during a lunch break or employer-sponsored walking program is *per se* compensable. Instead, the Board reasoned that considering the particular circumstances in the present case (e.g., an employer-sponsored walking program, a designated walking route, employer encouraged participation, employer acquiescence, contemplation by both the employer and the worker) such factors weighed in favor of a finding that claimant's injury arose out of and in the course of her employment.

Course & Scope: "In the Course Of" Employment - "Rest Break" Injury While Entering Office Building After "Employer- Approved" Walk - "Personal Comfort" Doctrine

Angelina Cox, 68 Van Natta 792 (May 25, 2016). Applying the "personal comfort" doctrine, the Board held that claimant's injury, which occurred when she slipped and fell at the entrance to an office building where her employer was a tenant after returning from her paid rest break, arose out of and in the course of her employment. Claimant's employer required all employees to take two paid 15-minute rest breaks during their work day. Employees were permitted to go wherever they wished during their break. With the employer's knowledge, claimant often went for walks on her rest break. On the day of her injury, claimant went for a walk around the outside of the office building and, while returning to one of the building's entrances, slipped and fell. Asserting that claimant's injury was excluded from compensability under the "going and coming" rule, the carrier denied her claim. Claimant requested a hearing, contending that her injury was compensable pursuant to the "personal comfort" doctrine.

The Board agreed with claimant's contention. Relying on *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997), the Board noted that whether an injury "arises out of" and occurs "in the course of" employment concerns two prongs of a unitary "work connection" inquiry that asks whether the relationship between the injury and employment has a sufficient nexus such that the injury should be compensable. Referring to *Robinson v. Nabisco, Inc.*, 331 Or 178, 186 (2000), the Board observed that the requirement that an injury occur "in the course of" employment depends on "the time, place and circumstances" of the injury.

Citing *U.S. Bank v. Pohrman*, 272 Or App 31, *rev den*, 358 Or 70 (2015), the Board stated that the "in the course of" analysis begins with an inquiry into the nature of claimant's activity when injured to determine whether it bears a sufficient connection to employment so that she cannot be considered to have left the course of employment, making the "personal comfort" doctrine

Walking during mandatory break incidental to employment. "Going and Coming" rule not applied.

applicable and the “going and coming” rule inapplicable. Based on *Pohrman*, the Board further noted that, if it is determined that claimant had not engaged in a personal comfort activity, but rather was injured while on a personal mission, or that the personal comfort activity did not bear a sufficient connection to the employment, then it may consider whether the “going and coming” rule, or any exceptions to that rule, would properly apply.

Relying on *Pohrman*, the Board emphasized that the “going and coming” rule generally does not apply when the worker, although not engaging in his/her appointed work activity at a specific moment, still remains in the course of employment and, therefore, has not left work. 272 Or App at 44. Finally, in accordance with the *Pohrman* rationale, the Board observed that the seven factors from *Jordan v. Western Electric*, 1 Or App 441, 443 (1970), are used to determine whether the “personal comfort” doctrine applies, with a general focus on whether the activity was contemplated, directed by, or acquiesced in by the employer, where the activity occurred, and whether the employer benefits from the activity.

Turning to the case at hand, the Board acknowledged that claimant derived pleasure from her walks and that her injury did not occur on her employer’s premises. Nonetheless, finding that claimant was required/encouraged to take the paid rest break and regularly walked while on her break (with the employer’s knowledge/acquiescence), the Board reasoned that she was not on a personal mission when she was injured, but rather was engaged in an activity incidental to her employment. See *Mellis v. McEwen, Hanna, Gisvold, Rankin & Van Koten*, 74 Or App 571, 575, rev den, 300 Or 249 (1985); *Halfman v. SAIF*, 49 Or App 23, 29-30 (1980).

Under such circumstances, the Board concluded that claimant had not “left work” when she sustained her injury, but rather was engaged in a “personal comfort” activity that was incidental to her employment. Consequently, the Board determined that her injury was not subject to the “going and coming” rule and, as such, occurred in the course of her employment.

Finally, addressing the “arising out of” prong of the unitary “work connection” inquiry, the Board observed that the requirement that an injury “arise out of” employment depends on the causal link between the injury and the employment. See *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996). Applying that analysis, the Board determined that, because claimant’s fall occurred during work hours as she was entering the office building after returning to the workplace after a paid break (with her employer’s acquiescence in the break and walking activity), her injury arose out of a risk to which her employment exposed her.

In reaching its conclusion, the Board emphasized that its decision should not be interpreted as a determination that every injury occurring during a paid break is *per se* compensable. Instead, citing *Andrews v. Tektronix, Inc.*, 323 Or 154 (1996), the Board noted that the compensability determination is made by evaluating all of the factors in a particular case that are pertinent to the question of work-connectedness, and weighing those factors in light of the policy underlying the Workers’ Compensation Act.

Hearing Procedure: Hearing “Request” Did Not Refer to “Denial” - Did Not Encompass Compensability Issue or Denied Claim - “Request” Untimely Filed Under “319(1)”

Timely filing to WCD may be considered timely appeal to WCB, but claimant’s letters to WCD did not appeal denial.

Samuel Goodwin, 68 Van Natta 730 (May 13, 2016). Applying ORS 656.319(1)(a), the Board held that, because claimant’s hearing request neither referred to the carrier’s claim denial nor raised compensability as an issue, its Hearings Division lacked authority to consider the merits of the denied claim. Within the 60-day appeal period following the carrier’s denial of a new/omitted medical condition claim, claimant sent a letter with several enclosures to the Workers’ Compensation Division (WCD). The letter neither specifically referred to, nor enclosed, a copy of the denial. On the 60th day from the claim denial, the WCD’s Ombudsman’s office called claimant about the letter. When claimant stated that he intended to appeal the denial, the Ombudsman’s office explained the appeal process and advised him to write to the Board, within 60 days (or 180 days if he could show “good cause”), specifically appealing the denial. Three days later, claimant mailed a second letter to the WCD, which objected to the Notice of Closure on the claim and referred to a suspension notice and postponement of the reconsideration proceeding. Thereafter, the Ombudsman’s office hand-delivered claimant’s letters and a copy of the denial to the Board’s office. Asserting that the hearing request was not timely filed, the carrier moved to dismiss the request. In response, claimant contended that his request (which had been initially filed with WCD) was timely and constituted filing with the Board under ORS 656.704(5).

The Board dismissed claimant’s hearing request as untimely filed. Citing ORS 656.704(5), the Board stated that when a hearing request is timely filed with WCD, but should have been filed with the Board, the request is considered timely filing with the Board. However, relying on *Naught v. Gamble, Inc.*, 87 Or App 145 (1987), the Board noted that claimant has an obligation to request a hearing in response to the denied claim in order to place the denial before an ALJ. Furthermore, referring to *Guerra v. SAIF*, 111 Or App 579 (1992) and *Peggy J. Barnett*, 60 Van Natta 843, 848 (2008), *aff’d without opinion*, 232 Or App 439 (2009), the Board emphasized that a request for hearing must be referable to a particular denial. See also *Kevin C. O’Brien*, 44 Van Natta 2587 (1992), *recons*, 45 Van Natta 97 (1993) (request, read as a whole and in the context in which it was submitted, is considered in determining whether a hearing request is referral to a particular denial).

Turning to the case at hand, the Board noted that claimant’s initial letter (assuming that it constituted a “hearing request”) mentioned his surgery, but neither referred to the carrier’s denial of his new/omitted medical condition nor raised compensability as an issue. Moreover, based on its review of the record, the Board was not persuaded that claimant had enclosed a copy of the carrier’s denial with his letter.

Under such circumstances, the Board was not persuaded that claimant had timely filed a request for hearing from the carrier's claim denial. Consequently, the Board concluded that it lacked authority to consider the merits of the denied claim. See ORS 656.319(1).

Editor's Note: On May 27, 2016, the Board abated its order to consider claimant's contention that he had established "good cause" under ORS 656.319(1)(b) for his untimely filed hearing request.

New/Omitted Medical Condition: "Crush Injury" Not Established to be a "Physical Status of the Body"

Penalty: Alleged Discovery Violation - "Receipt/Delivery" to Carrier Not Proven by "Banner" on Fax

Justin T. Jones, 68 Van Natta 754 (2016). The Board held that, because the medical evidence did not establish that claimant's claimed "crush injury" to his hand and fingers represented a "physical status of the body," the carrier was not required to accept his new/omitted medical condition claim. Following claimant's compensable injury, the carrier accepted multiple conditions. Thereafter, based on his physician's description of the work incident as involving a "crush injury," claimant initiated a new/omitted condition claim. The carrier denied the claim, asserting that the claimed "crush injury" did not constitute a "condition."

Based on its review of the record, the Board agreed with the carrier's contention. Citing *Young v. Hermiston Good Samaritan*, 223 Or App 99, 105 (2008), the Board stated that "condition" is defined as "the physical status of the body as a whole * * * or of one of its parts." Relying on *Royal S. Buell*, 50 Van Natta 702 (1998), *aff'd without opinion*, 157 Or App 723 (1998), the Board noted that a carrier is required to accept a "condition," not a mechanism of injury, which is an issue of fact that is determined on a "case-by-case" basis.

Turning to the case at hand, the Board acknowledged that, in *Jeremy Schaffer*, 65 Van Natta 2191, 2194 (2013), it had found that a claimed "crush injury" condition was compensable as a new/omitted medical condition. However, in contrast to *Schaffer* (where specific medical evidence had established that the worker's "crush injury" was not only a mechanism of injury, but was also an appropriate medical diagnosis describing his specific condition), the Board reasoned that claimant's physician in the case at hand had included the term "crush injury" in the history section of his chart note, but did not list it as a diagnosis, or otherwise explain that it was a "condition."

Mention of "crush injury" in history section of chart note did not establish that it was a condition.

Under such circumstances, the Board determined that the record did not establish the existence of the claimed “crush injury” as a new/omitted medical condition. Moreover, the Board noted that the record did not support a distinction between the claimed “crush injury” to claimant’s hand and fingers from his previously accepted conditions. See *Michael L. Long*, 63 Van Natta 2134, *recons*, 63 Van Natta 2300 (2011) (a new/omitted medical condition claim may be denied, even if the claimed condition is compensable, if the claimed condition is neither “new” nor “omitted”).

As a final matter, the Board addressed claimant’s contention that the carrier had violated OAR 438-007-0015(2) by allegedly providing untimely discovery. Referring to a “fax banner” on his discovery request, claimant asserted that the carrier’s response was untimely and that penalties/attorney fees were justified.

The Board disagreed with claimant’s assertion. Citing OAR 438-007-0015(2), the Board stated that a carrier must disclose documents pertaining to a claim within 15 days of the “mailing or delivering” of a written demand or hearing request. Relying on OAR 438-007-0015(8), and *Micah Blotter*, 65 Van Natta 1578, 1580 (2013), the Board noted that the failure to comply with discovery responsibilities may result in the imposition of penalties and attorney fees.

Turning to the case at hand, the Board acknowledged that the carrier had not provided discovery within 15 days of the date of the “banner” on claimant’s faxed document which had requested discovery. However, noting that the faxed document only confirmed the time claimant’s “discovery” request was sent, the Board reasoned that the “fax banner” did not establish when, or whether, the faxed request was received by the carrier.

Consequently, in the absence of corroborating evidence, the Board concluded that the “fax banner” did not establish when claimant’s discovery request had been either “mailed” or “delivered.” In reaching its conclusion, the Board noted that, unlike “mailed” documents, there was no statutory presumption concerning the receipt of a faxed document. See *David J. Lampa*, 66 Van Natta 1052, 1055 (2014).

Penalty: “262(11)(a)” - Multiple Acts of Unreasonable Claim Processing - Same “Amounts Then Due” - One Penalty, But Separate “382(1)” Attorney Fee Awards

Eliseo Sales-Parra, Dcd, 68 Van Natta 679 (May 5, 2016). Applying ORS 656.262(11)(a), the Board held that, despite a carrier’s multiple acts of unreasonable claim processing (e.g., an unreasonable claim denial and an unreasonable resistance to the issuance of a “307” order), claimant was only entitled to one 25 percent penalty based on the same “amounts then due.” Claimant (the decedent’s surviving cohabitant) asserted that the carrier had conducted an unreasonable claim investigation, issued an unreasonable “subject

Fax banner did not establish carrier’s receipt. No statutory presumption for fax delivery.

worker” denial (asserting that the deceased worker had not been a subject worker of a towing company, a noncomplying employer with whom the alleged employer, a car dealership, had contracted to provide towing services), unreasonably resisted the issuance of a “307” order designating a paying agent, and unreasonably refused to rescind its denial before a hearing (when the owner of the towing company subsequently changed her previous position that the decedent was an independent contractor, but rather agreed that he was an employee of the towing company). Under such circumstances, claimant sought multiple penalties and attorney fees under ORS 656.262(11)(a) and ORS 656.382(1). Contending that the total penalty on the same “amounts then due” may not exceed 25 percent, the carrier argued that claimant was entitled to one 25 percent penalty based on those amounts.

The Board agreed with the carrier’s contention. Citing *Sue J. Brock*, 67 Van Natta 2066, 2067 (2015), the Board stated that only one 25 percent penalty under ORS 656.262(11)(a) may be assessed based on a single “amount then due.” Furthermore, relying on *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 463 (2009), the Board noted that a claimant’s counsel is not entitled to an attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1) for the same unreasonable conduct. However, referring to *Andrew A. Veluscek*, 64 Van Natta 686, 693, *recons*, 64 Van Natta 1286 (2012), the Board reiterated that separate attorney fee awards under ORS 656.262(11)(a) and ORS 656.382(1) may be granted based on separate claim processing infractions.

Turning to the case at hand, the Board found that, despite the carrier’s multiple acts of unreasonable claim processing, there was only one amount then due; *i.e.*, the compensation “then due” as of the date the carrier withdrew its unreasonable denial in advance of the hearing. Consequently, the Board determined that only one 25 percent penalty based on those amounts then due was awardable.

Nonetheless, reasoning that, in addition to its initial unreasonable claim denial, the carrier’s resistance to the issuance of a “307” order and its refusal to withdraw its denial for some two months after the owner of the towing company agreed that claimant was an employee were also unreasonable, the Board concluded that separate attorney fee awards under ORS 656.382(1) for the latter two unreasonable actions were warranted. In reaching its conclusion, the Board declined to award a separate attorney fee award for the carrier’s unreasonable claim investigation. Reasoning that the carrier’s investigatory actions were encompassed within an analysis of whether the carrier’s denial was based on a legitimate doubt, the Board considered the carrier’s investigation to have been a component of its earlier determination that the carrier’s denial was unreasonable. Under such circumstances, the Board concluded that a separate “unreasonable claim investigation” finding (in addition to its “unreasonable denial” finding) would be duplicative.

Carrier issued unreasonable denial, unreasonably resisted “307” order, and refused to withdraw denial.

One penalty for single amounts due, but separate attorney fee awards.

Penalty: “262(11)(a)” - Untimely Denial - “60-Day” Period Did Not Start With Employer’s Notice of Work Incident (Rather, “Treatment” Date)

Penalty: “262(11)(a)” - Unreasonable Denial - No “Legitimate Doubt” Established - Only Physician’s Opinion Supported Causal Connection Between Work Injury/Medical Treatment

Bryan V. Dechand, 68 Van Natta 703 (May 10, 2016). Applying ORS 656.262(11)(a), the Board found that a carrier’s denial of claimant’s shoulder injury claim was not untimely because, although the employer had notice of his work incident (which did not result in any missed work or disability) when it occurred, the carrier issued its denial within 60 days of receiving notice that he had sought medical treatment arising from the incident. After returning to work following a previous shoulder injury, claimant experienced an audible pop and burning sensation in left shoulder while lifting. Although he immediately notified his employer of the incident, claimant did not seek treatment until approximately one month later. The carrier did not receive notice of that medical service for the work incident until another month later. Within 60 days of receiving that notice, the carrier denied the injury claim. Contending that the carrier’s obligation to accept or deny his claim within 60 days was triggered by his employer’s knowledge of his work incident, claimant argued that the carrier’s denial was untimely and, as such, he was entitled to penalties/attorney fees under ORS 656.262(11)(a).

The Board disagreed with claimant’s contention. Citing ORS 656.005(6), the Board stated that a claim is a written request for compensation or any compensable injury of which a subject employer has notice or knowledge. Relying on ORS 656.262(6)(a), the Board noted that a carrier is required to accept or deny claims within 60 days of notice or knowledge of the claim. Referring to *Praxedis Alvarez-Barrera*, 65 Van Natta 183 (2013), the Board reiterated that an employer’s receipt of a work incident report, in the absence of knowledge that a worker was seeking medical treatment, generally does not constitute a “claim” under ORS 656.005(6).

Turning to the case at hand, the Board acknowledged that the employer had received notice of claimant’s work incident on the day it occurred. The Board further recognized that claimant had sought medical treatment resulting from the incident approximately one month later (which was some three months before the carrier issued its claim denial). Nonetheless, relying on *Alvarez-Barrera*, the Board reasoned that the employer’s knowledge that

No penalty/fee for late denial, but penalty awarded for lack of evidence to support denial.

claimant was seeking medical treatment, missing work, or experiencing any disability) was not sufficient to constitute a “claim.” Moreover, because the carrier had issued its denial within 60 days of its receipt of claimant’s physician’s report (which referred to the work incident), the Board concluded that the denial was timely and, therefore, no penalty or attorney fee for an untimely denial was warranted.

Finally, the Board agreed with claimant’s assertion that the carrier’s denial had been unreasonable and, as such, penalties and attorney fees under ORS 656.262(11)(a) were justified. Citing *Int’l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991), the Board stated that the standard for determining an unreasonable resistance to the payment of compensation under ORS 656.262(11)(a) is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. Referring to *James S. Hurlocker*, 66 Van Natta 1930, 1937 (2014), the Board reiterated that, where physician opinions were based on accurate histories and supported the compensability of the claim, a carrier’s denial was unreasonable because it lacked legitimate doubt concerning its liability for the claim.

Based on its review of the record, the Board found that, when the carrier issued its denial, the only physician’s report in its possession explained that claimant’s work incident had resulted in his need for medical treatment for his shoulder. Reasoning that there was no medical evidence supporting the basis for the carrier’s denial (*i.e.*, that claimant’s most recent work-related shoulder injury was encompassed within his previous shoulder injury), the Board determined that the carrier’s denial was unreasonable.

APPELLATE DECISIONS SUPREME COURT

Exclusive Remedy (“018”): *Smothers* Holding Overruled

Horton v. Or. Health & Sci. Univ., 359 Or 168 (May 5, 2016). The Supreme Court overruled its decision in *Smothers v. Gresham Transfer, Inc.*, 332 Or 82 (2001), which had previously determined that, if a workers’ compensation claim for an alleged injury is denied because the worker has failed to prove that the work-related incident was major, rather than merely a contributing, cause of the injury, then the exclusive remedy provisions of ORS 656.018 (1995) are unconstitutional under the remedy clause in Article I, Section 10 of the Oregon Constitution.

In *Horton* (which concerned a medical malpractice suit involving a state employee doctor and the Tort Claims Act, which limited the doctor’s tort liability), the Supreme Court held that the Act did not violate the aforementioned remedy clause. In reaching that decision, the Court explained that, contrary to the *Smothers* rationale, “the remedy clause does not protect only those causes of action that pre-existed 1857, nor does it preclude the legislature from altering either common law duties or the remedies available for a breach of those duties.” *Horton*, 359 Or at 218-19. The Court further noted that “[b]ecause we overrule *Smothers*, it follows that its conclusion – that the workers’ compensation statute

“Remedy clause” does not preclude legislature from altering common law duties.

was unconstitutional as applied – cannot stand. We express no opinion on whether our remedy clause cases that preceded *Smothers*, which we affirm today, would lead to the same conclusion.” *Horton*, 359 Or at 188 n 9.

APPELLATE DECISIONS UPDATE

Course & Scope: Fall During Rest Break -
Returning From “Smoking Hut” in Public
Parking Lot - “Parking Lot” Exception N/A -
No Employer Control

Appellate Procedure: Scope of Board’s
Review on Remand - Limited to
Consideration of “Parking Lot” Exception

Frazer v. Enterprise Rent-A-Car Co., 278 Or App 409 (May 18, 2016). The court affirmed the Board’s order in *Kevinia L. Frazer*, 66 Van Natta 761 (2014), previously noted 33 NCN 5:8, which held that claimant’s injury (which occurred when she fell while returning to her employer’s office after a rest break at a “smoking hut” located in the parking lot of a business mall where her employer was a tenant) did not occur in the course of her employment. In reaching its conclusion, the Board found that, based on the court’s opinion in *Enterprise Rent-A-Car Co. of Oregon v. Frazer*, 252 Or App 726 (2012), *rev den*, 353 Or 428 (2013), the only issue before it was to determine whether the “parking lot” exception to the “going and coming” rule applied to establish that claimant’s injury was compensable. Analyzing the “parking lot” exception, the Board held that the “parking lot” exception did not apply because the employer did not control, or have any right to control, the area of the parking lot where claimant had fallen. On appeal, claimant contended that the Board had impermissibly narrowed the scope of its decision to the “parking lot” exception and should have determined whether the claim was compensable under the “personal comfort” doctrine or another exception to the “going and coming” rule.

The court disagreed with claimant’s contention. Citing *Gearhart v. PUC*, 356 Or 216, 234 (2014), the court stated that, generally, its remand to an agency is without specific instructions so as not to invade the province of the agency on remand. However, referring to *Sprague v. United States Bakery*, 199 Or App 435, 440, *adh’d to on recons*, 200 Or App 569 (2005), *rev den*, 340 Or 157 (2006), and *SAIF v. Sprague*, 221 Or App 413, 426, *aff’d on other grounds*, 346 Or 661 (2009), the court clarified that, in specific situations, it has limited the scope of the Board’s review on remand.

Turning to the case at hand, the court noted that, until its remand order to the Board, the only exception to the “going and coming” rule put at issue by either party was the “parking lot” exception. Under such circumstances, the

Court determined Board could decline to review arguments not made previously, and may limit scope of review on remand.

court determined that the Board could limit its task on remand to addressing the “parking lot” exception to the “going and coming” rule and could properly decline to review any arguments that claimant had not made before the court’s previous decision to remand to the Board. Consequently, the court held that the Board had not erred in limiting the scope of its review on remand.

Addressing the Board’s analysis of the “parking lot” exception, the court concluded that the Board’s finding that the employer did not control, or have any right to control, the area where claimant had fallen and was injured was supported by substantial evidence. Consequently, the court affirmed the Board’s decision that the “parking lot” exception to the “going and coming” rule had been established. See *Legacy Health Systems v. Noble*, 232 Or App 93, 99 (2009).

New/Omitted Medical Condition Claim: “Combined Condition” Under “266(2)(a)” - *Brown* Standard Applied

Brown standard applies to new/omitted condition.

Providence Health System Oregon v. Janvier, 278 Or App 447 (May 18, 2016). The court affirmed without opinion the Board’s order in *Jean M. Janvier*, 66 Van Natta 1827 (2014), previously noted 33 NCN 11:8, which held that, in analyzing the compensability of a new/omitted medical condition claim under ORS 656.262(7)(a)(B) and ORS 656.266(2)(a), the court’s holding in *Brown v. SAIF*, 262 Or App 640, 652 (2014) (concerning the proposition that “otherwise compensable injury” means “work-related injury incident” for purposes of a “ceases” denial under ORS 656.262(6)(c)) was likewise applicable.

APPELLATE DECISIONS COURT OF APPEALS

Attorney Fee: “386(1)” - “Pre-Hearing” Rescinded Denial - Claimant’s Counsel’s “Post-Rescission” Services Considered in Determining Reasonable Fee

Bowman v. SAIF, 278 Or App 417 (May 18, 2016). Applying ORS 656.386(1), the court reversed the Board’s order in *Vernon L. Bowman*, 66 Van Natta 681 (2014), which, in awarding a reasonable carrier-paid attorney fee for claimant’s counsel’s services in being instrumental in obtaining a “pre-hearing” rescission of a carrier’s claim denial, limited its consideration to claimant’s attorney’s services performed before the carrier’s notification of its rescinded denial. On appeal, claimant contended that a reasonable attorney fee award concerning a “pre-hearing” rescinded denial must include consideration of pertinent work that occurred relating to the rescission, even if after the rescission.

The court agreed with claimant's contention. Citing ORS 656.386(1)(a), the court stated that, where an attorney is instrumental in obtaining a rescinded denial before an ALJ's decision, a reasonable attorney fee shall be allowed. Furthermore, relying on OAR 438-015-0010(4), the court noted that one of the factors for consideration in the determination of a reasonable attorney fee was an attorney's time devoted to the case.

Turning to the case at hand, the court found nothing in the statutory text suggesting that the legislature intended that only work occurring before the rescission of a denial could be considered in determining a reasonable attorney fee. Moreover, after examining the legislative history regarding the 1991 statutory amendment enacting the provision in question, the court observed that, in addition to addressing the perceived systemic harm from *Jones v. OSCI*, 107 Or App 78, 80, *withdrawn on recons*, 108 Or App 230 (1991), the amendment was also based on the premise that claimants' attorneys should be reasonably compensated when they obtain benefits for claimants, and that such compensation should not be cut off arbitrarily.

Reasoning that a case is not necessarily over when a carrier rescinds its denial and that some of an attorney's work relating to the litigation of the denial may occur after the carrier provides notice of the rescission, the court concluded that the attorney must be credited for all relevant and reasonable time (and for the crucial services a claimant receives as a result of the attorney's "post-rescission" efforts) as part of a reasonable attorney fee award.

Under such circumstances, the court held that the Board had erred in categorically refusing to consider claimant's counsel's "post-rescission" time. Consequently, the court remanded for a determination concerning how much of claimant's counsel's "post-rescission" time was spent on pertinent, litigation-related issues, which should be taken into account as part of a reasonable attorney fee award under ORS 656.386(1)(a).

New/Omitted Medical Condition: "267" - Claimed Condition Must "Exist"

DeLos-Santos v. Si Pac Enterprises, Inc., 278 Or App 254 (May 11, 2016). Applying ORS 656.267, the court affirmed the Board's order in *Lucila DeLos-Santos*, 66 Van Natta 904, *on recon*, 66 Van Natta 1145 (2014), that, in upholding a new/omitted medical condition denial, was not persuaded that the claimed "radiculopathy/radiculitis" condition existed. On appeal, claimant contended that she was not required to prove that her claimed condition existed to establish a new/omitted medical condition claim.

The court found no legal error in the Board's determination. Citing ORS 656.266, ORS 656.268, and *SAIF v. Bales*, 274 Or App 700, 708 (2015), the court stated that the accepted conditions provide the mechanism by which the nature and extent of a claimant's disability is assessed. The court reasoned that those points and authorities suggested that the legislature intended that a claimant would bear the burden of proving the existence of a claimed new/omitted medical condition in the context of a claim under ORS 656.267. Furthermore, relying on *Young v. Hermiston Good Samaritan*, 223 Or App 99,

Attorney's time concerning rescission of denial (even "post-rescission" time) must be considered in determining attorney fee award.

For new/ omitted medical condition claim, condition must exist. Specific diagnosis not required.

107 (2008), the court reiterated that to prevail on a new/omitted medical condition claim, a claimant must establish (with medical evidence) that he/she, in fact, has a condition, rather than mere symptoms.

Turning to the case at hand, the court acknowledged claimant's contention that she was not required to prove a specific *diagnosis* to establish a claimed new/omitted medical condition. However, the court did not understand the Board's holding to require a specific diagnosis, but rather to have simply held that claimant was required to prove the existence of the claimed new/omitted medical condition. Because the Board's finding that claimant did not prove that the claimed radiculopathy/radiculitis condition existed was supported by substantial evidence, the court concluded that the Board had correctly upheld the carrier's denial.

In reaching its conclusion, the court distinguished cases such as *Horizon Air Industries, Inc. v. Davis-Warren*, 266 Or App 388 (2014), *Boeing Aircraft Co. v. Roy*, 112 Or App 10 (1992), and *K-Mart v. Evenson*, 167 Or App 46, *rev den*, 331 Or 191 (2000), which addressed what showing must be made to establish a compensable injury. Noting that it was undisputed that claimant had suffered a compensable injury, the court reasoned that the issue was whether the carrier was required to accept the new/omitted medical condition claim, which was an issue expressly addressed by the *Young* decision.

Substantial Evidence/Reasoning: Mental Disorder Claim - Physical Condition (Heart Attack)

Long v. SAIF, 278 Or App 88 (2016). The court affirmed the Board's order in *Everett J. Long, Dcd*, 66 Van Natta 269 (2014), that in upholding a carrier's denial of claimant's cardiac arrest claim, the Board was not persuaded that his employment conditions were the major contributing cause of his heart condition and that there was not clear and convincing evidence that the cardiac arrest arose out of and in the course of his employment as required by ORS 656.802(3)(d). On appeal, claimant contended that the carrier's medical record reviewer's opinion was flawed and, therefore, the Board's order lacked substantial reasoning.

The court disagreed with claimant's contention. Citing ORS 656.802(2)(c), the court stated that a claimant must prove that employment conditions were the major contributing cause of the claimed condition. Furthermore, relying on ORS 656.802(1)(b), the court noted that for any physical disorder caused or worsened by mental stress, a claimant must also establish the requirements in ORS 802(3)(a) through (d), including proving by clear and convincing evidence that the mental disorder arose out of and in the course of employment. Referring to *Riley Hill Contractors v. Tandy Corp.*, 303 Or 390, 402 (1987), the court observed that to meet the clear and convincing evidence standard, the truth of the facts must be highly probable. Finally, based on ORS 183.482(8)(c), *Jenkins v. Board of Parole*, 356 Or 186, 195-96 (2014), and *Walker v. Providence Health System Oregon*, 254 Or App 676, 686, *rev den*, 353 Or 714 (2013), the court reiterated that a Board order must be supported by substantial evidence and reason.

Sufficient facts and detailed review by Board constituted substantial evidence.

After reviewing the record, the court determined that there were sufficient facts for the Board to give weight to the carrier's medical record reviewer's conclusion that claimant's heart attack was caused by his preexisting conditions, which had been previously treated and were significant enough to cause the event. Noting that the reviewer's findings/conclusions were further substantiated by EKG findings (which indicated ventricular hypertrophy) and an operative report (which showed occlusions in the femoral and carotid arteries), the court concluded that the Board's order was supported by substantial evidence.

Finally, reasoning that the Board recited each of the medical reports in great detail and addressed each of those reports in reaching its conclusion that the medical opinions proffered by claimant were not sufficient to sustain his burden of proof (in light of the carrier's medical record reviewer's analysis), the court held that the Board's order was supported by substantial evidence and reasoning.