Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Staff Attorney Recruitment

WCB will soon be recruiting staff attorney candidates. The key criteria includes 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.

The recruitment is scheduled to begin around November 7 and will run for approximately three weeks. Further details about the position and information on how to apply will soon be available online at http://www.oregon.gov/DCBS/jobs/Pages/jobs.aspx or www.oregonjobs.org. WCB is an equal opportunity employer.

For The Record (FTR) Software Upgrade

WCB is upgrading to the latest version of the FTR Player, which allows parties to listen to recorded proceedings on a CD. Many of you have already downloaded the free FTR player at fortherecord.com. In order to continue to listen to these files, you will need to download the latest version (also free).

The newer version will be "backwards-compatible," *i.e.*, you can listen to older recordings on the new player. However, newer recordings will not be playable on the old version of the player. The Board intends to utilize the new recording system later this year. Users should upgrade now to the new player, which will enable you to listen to both old and new recordings. To download the new version, go to: https://www.fortherecord.com/download-ftr-player/.

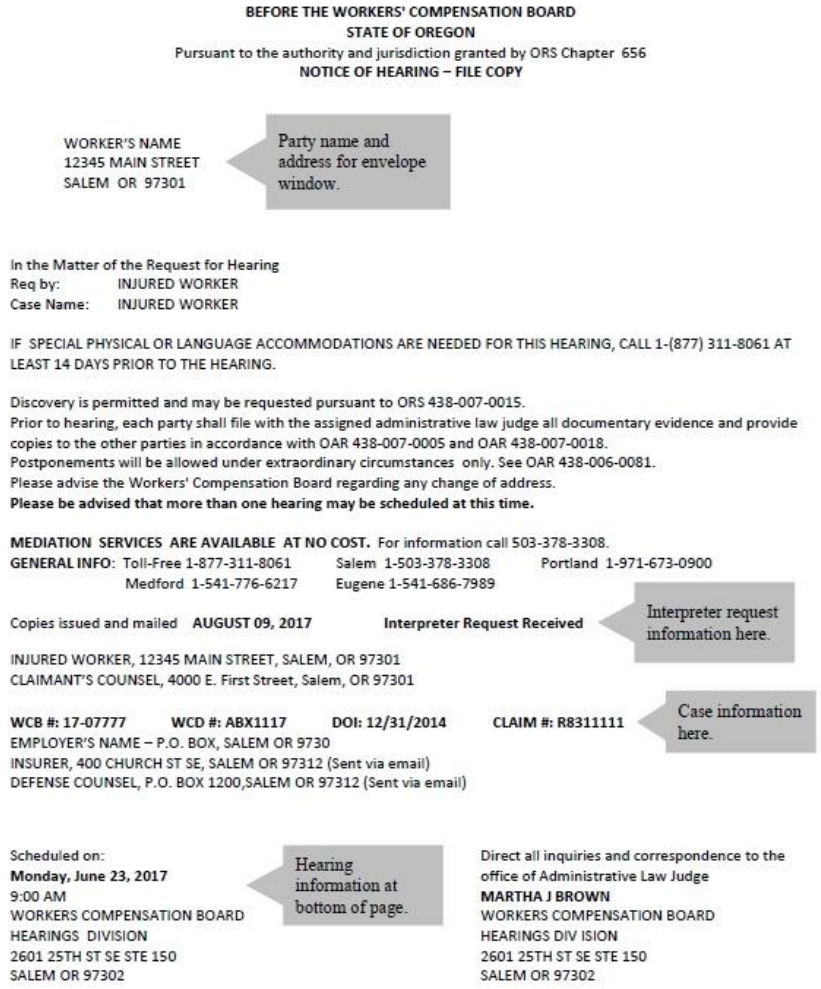
If you have any questions, please contact Autumn Blake, WCB's Transcription Coordinator, at (503)934-0142.

Changes Coming to Hearing Notice

The Board is redesigning the Notice of Hearing, with the new version expected to be in use later this year. The changes have been prompted by an effort to reduce mailing costs. The current version places the party's mailing address at the bottom of the sheet, which required the Board to purchase special "upside-down" mailing envelopes that would frequently jam our machinery.

The new paper version will be easier to fold into standard mailing envelopes, saving the Board time and expense. Below is a mock-up of the new Hearing Notice, showing you the changes and where to find the pertinent information.

APPELLATE DECISIONS



BEFORE THE WORKERS' COMPENSATION BOARD
STATE OF OREGON
Pursuant to the authority and jurisdiction granted by ORS Chapter 656
NOTICE OF HEARING – FILE COPY

WORKER'S NAME
12345 MAIN STREET
SALEM OR 97301

Party name and address for envelope window.

In the Matter of the Request for Hearing
Req by: INJURED WORKER
Case Name: INJURED WORKER

IF SPECIAL PHYSICAL OR LANGUAGE ACCOMMODATIONS ARE NEEDED FOR THIS HEARING, CALL 1-(877) 311-8061 AT LEAST 14 DAYS PRIOR TO THE HEARING.

Discovery is permitted and may be requested pursuant to ORS 438-007-0015.
Prior to hearing, each party shall file with the assigned administrative law judge all documentary evidence and provide copies to the other parties in accordance with OAR 438-007-0005 and OAR 438-007-0018.
Postponements will be allowed under extraordinary circumstances only. See OAR 438-006-0081.
Please advise the Workers' Compensation Board regarding any change of address.
Please be advised that more than one hearing may be scheduled at this time.

MEDIATION SERVICES ARE AVAILABLE AT NO COST. For information call 503-378-3308.
GENERAL INFO: Toll-Free 1-877-311-8061 Salem 1-503-378-3308 Portland 1-971-673-0900
Medford 1-541-776-6217 Eugene 1-541-686-7989

Copies issued and mailed **AUGUST 09, 2017** **Interpreter Request Received**

Interpreter request information here.

INJURED WORKER, 12345 MAIN STREET, SALEM, OR 97301
CLAIMANT'S COUNSEL, 4000 E. First Street, Salem, OR 97301

WCB #: 17-07777 **WCD #: ABX1117** **DOI: 12/31/2014** **CLAIM #: R8311111**
EMPLOYER'S NAME – P.O. BOX, SALEM OR 9730
INSURER, 400 CHURCH ST SE, SALEM OR 97312 (Sent via email)
DEFENSE COUNSEL, P.O. BOX 1200,SALEM OR 97312 (Sent via email)

Case information here.

Scheduled on:
Monday, June 23, 2017
9:00 AM
WORKERS COMPENSATION BOARD
HEARINGS DIVISION
2601 25TH ST SE STE 150
SALEM OR 97302

Hearing information at bottom of page.

Direct all inquiries and correspondence to the office of Administrative Law Judge
MARTHA J BROWN
WORKERS COMPENSATION BOARD
HEARINGS DIV ISION
2601 25TH ST SE STE 150
SALEM OR 97302

Practice Tips/Board Review

Requests for Copies of Briefs

Occasionally, practitioners ask the Board staff for a copy of another party's brief. Practitioners are reminded that copies of briefs must be served on all other parties' counsels. OAR 438-005-0046(2). Thus, before contacting the Board staff for a copy of the brief, it is suggested that the attorney for the other party first be contacted.

Timely service of the appellate brief to the other party's attorney not only complies with the Board's rules, but it is a significant aid in reducing requests for briefing extensions. Furthermore, there may be a time lag between the practitioner's mailing of the brief to the Board, and the Board's receipt of that brief. Thus, if a practitioner is seeking a copy of the brief at or around its filing date, it is likely that the practitioner will receive a copy sooner by requesting it from the opposing counsel.

Motions for Reconsideration

An order of the Board is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties files a petition for judicial review to the Court of Appeals. ORS 656.295(8).

The filing of a request for reconsideration does not automatically toll the time, or "stop the clock," on the 30-day appeal period. In addition, the Board may not abate an order when a party requests reconsideration. Generally, the Board's options are to abate its prior order, issue an Order on Reconsideration (with new 30-day appeal rights), or deny reconsideration.

In all cases, parties should be mindful of the 30-day appeal period from the original order, unless the Board has specifically abated the order, or granted a new 30-day appeal period in an Order on Reconsideration. Therefore, orders should be examined to determine whether the appeal period from the earlier order has been extended.

Practitioners sometimes contact Board staff for the "status" of their reconsideration request. Until issuance of the Board's response to the motion, the staff will be unable to provide any information (other than to acknowledge that the motion has been received).

Once a reconsideration order has issued, it is posted on the Board's website at: http://www.oregon.gov/wcb/board-orders/Pages/index.aspx.

CASE NOTES

Course and Scope: "Parking Lot" Exception/"Going and Coming" Rule Not Applicable - Injury Occurred in "Common Area" Maintained By Landlord - No "Employer Control" Via Lease

Claimant fell off curb on a gravel path while coming to work – area was owned by employer's landlord.

Ashley Bruntz-Ferguson, 69 Van Natta 1531 (October 19, 2017). The Board held that claimant's injury, which occurred when she fell off a curb on a gravel path while coming to work at her employer's office in a building where it was a tenant, did not occur in the course of her employment under the "parking lot" exception because the gravel path was designated as a "common area" under her employer's lease for which the responsibility for maintaining the area exclusively rested with the landlord. Referring to *John R. Benson*, 50 Van Natta 273 (1998), claimant argued that, based on the employer's contribution of funds toward the maintenance of the "common areas" under the lease, and the landlord's compliance with the employer's previous maintenance requests, the employer had sufficient control of the "common area" such that the "parking lot" exception to the "going and coming" applied.

The Board disagreed with claimant's contention. Citing *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 367 (1994), the Board stated that the "parking lot" exception to the "going and coming" rule provides that the "in the course of" prong of the "work-connection" test may be satisfied if the employer exercises some "control" over the place where the injury is sustained. Relying on *Cope v. West Am. Ins. Co.*, 309 Or 232, 239 (1990), the Board noted that such "control" may arise from the employer's property rights to the area. Referring to *Montgomery Ward v. Cutter*, 64 Or App 759, 763 (1983), the Board observed that the employer's obligation to pay for maintenance, together with the right to require maintenance, has also been found to be sufficient "control" under the "parking lot" exception. While ownership or a leasehold interest is not required to establish the requisite "control," the Board commented that the employer must, at a minimum, have some right to require maintenance of the grounds where the injury occurred. *See Kevinia L. Frazer*, 66 Van Natta 761, 765 (2014), *aff'd Frazer v. Enter. Rent-a-Car Co.*, 278 Or App 409 (2016).

Lease provided that landlord would indemnify employer from liability claims.

Turning to the case at hand, the Board noted that the employer's lease specifically designated that the landlord would maintain, manage, and operate the common areas concerning the office building (including the location where claimant was injured) at its "sole discretion." The Board also noted that while the employer's lease contained an indemnity provision, the lease provided that the landlord would indemnify the employer from liability claims.

Employer not authorized to require maintenance.

In reaching its conclusion, the Board distinguished *Benson* and relied on the rationale expressed in *Joni R. Jones*, 65 Van Natta 1676, 1679 (2013). In *Benson*, in contrast to the present case, the Board noted that the requisite "control" over a worker's injury was established because the lease between the employer and the landlord was silent regarding who was responsible for maintenance of the "common area," and the lease also provided that the employer would indemnify the landlord from claims of liability for injury occurring on the premises. Furthermore, the Board considered the case to be more similar to *Jones*, where the employer's payment of a portion of the maintenance, management and operating expenses for the common area did not establish that the employer had sufficient control because it had no right to require maintenance, or an obligation to determine how the area was to be maintained.

Landlord's compliance with employer's maintenance requests not sufficient to establish "employer control."

Finally, the Board disagreed with claimant's assertion that the landlord's compliance with the employer's previous maintenance requests was sufficient to establish "sufficient control." Relying on *Henderson v. S.D. Deacon Corp.*, 127 Or App 333, 337 (1994), and *Beverly M. Helmken*, 55 Van Natta 3174, 3176 (2003), *aff'd without opinion*, 196 Or App 787 (2004), the Board explained that such a course of conduct is not sufficient to establish that the employer had a right to control the maintenance of the common areas, or that it had the responsibility to do so.

CDA: Deceased Worker's "Non-Beneficiary" Daughter - "Claiming Successor" for Decedent's Estate - Authorized to Sign Agreement

Adult daughter of deceased worker submitted affidavit of "claiming successor."

Leslee J. Pierce, Dcd, 69 Van Natta 1438 (October 3, 2017). Analyzing ORS 656.236 and ORS 656.218, in approving a Claim Disposition Agreement (CDA), the Board held that the deceased worker's adult daughter status as the "claiming successor" of the estate was sufficient to establish that she was statutorily authorized to sign the CDA. In submitting a proposed CDA for Board approval, the deceased worker's adult daughter included an "Affidavit of Claiming Successor of Small Estate (Intestate Estate)," which provided that she was the "claiming successor" to the decedent's estate, along with her adult brother.

Citing ORS 656.204 and ORS 656.218, the Board held that the successor's affidavit was sufficient to establish that she was the statutorily authorized to sign the CDA on behalf of the deceased worker's estate. Concluding the CDA was in accordance with the terms and conditions prescribed by its rules, the Board approved the CDA.

Heirs required to submit "age/education/vocational background" information as though they were beneficiaries.

In reaching its conclusion, the Board acknowledged that, in the event that the worker has died, OAR 438-009-0022 requires "age and educational/vocational background" from the deceased worker's "beneficiaries." Although recognizing that the deceased worker's adult heirs did not qualify as "beneficiaries," the Board reasoned that they were heirs of the decedent's "estate." Under such circumstances, the Board determined that the aforementioned information was required from the heirs as though they were "beneficiaries." Because the heirs had provided the required information, the Board found that approval of the CDA was appropriate.

Claim Processing: "Recon Order" Modified "Med Stat" Date, But Not TTD Award - Carrier Not Entitled to Apply "Offset" For Alleged "Overpayment"

Annette M. Lane, 69 Van Natta 1537 (October 20, 2017). The Board held that a carrier was obligated to pay temporary disability benefits for the time periods identified in a Notice of Closure (NOC) because an unappealed Order on Reconsideration had only modified the "medically stationary" date determined in the NOC, but had not adjusted the TTD awarded in the NOC. Following claimant's authorized vocational training program, an NOC issued, which awarded temporary disability benefits through a date a few months before the NOC. After claimant requested reconsideration and a medical arbiter, a reconsideration order awarded additional permanent impairment/work disability awards and found claimant's condition medically stationary as of a date some

Carrier applied "offset" of TTD paid after "medically stationary" date found in unappealed reconsideration order.

15 months before the date found in the NOC. Although the reconsideration order expressly stated that "the remaining issues addressed by the Notice of Closure * * * are unchanged," the order also included a statement that "[d]eduction of overpaid temporary disability and/or previously paid permanent disability from any unpaid permanent disability" was approved. After the Order on Reconsideration became final, the carrier offset claimant's permanent impairment/work disability awards by temporary disability benefits paid after the "medically stationary" date determined in the order. Claimant requested a hearing, asserting that the carrier had not complied with the final Order on Reconsideration (which had left her temporary disability award unchanged) and seeking those withheld benefits, as well as penalties and attorney fees.

Reconsideration order changed medically stationary date, but did not modify NOC's TTD award.

The Board held that the carrier was required to pay the withheld temporary disability benefits. Citing OAR 436-030-0036(2) and *Kevin W. McClellan*, 65 Van Natta 560, 563 (2013), the Board acknowledged that, except as provided in section (3) of the rule and ORS 656.268(10), a worker is not entitled to a temporary disability award for any period of time in which the worker was medically stationary. Nonetheless, relying on *Chester J. Dzienies, Jr.*, 66 Van Natta 1090, 1092 (2014), the Board noted that, when a reconsideration order changed a medically stationary date provided in a NOC to a date beyond that set forth in the NOC, but did not modify the claimant's temporary disability award granted in the NOC, the claimant was not entitled to additional temporary disability benefits when the reconsideration order became final.

Turning to the case at hand, the Board acknowledged that in modifying the "medically stationary" determination prescribed in the NOC, the reconsideration order had also approved an offset against claimant's permanent impairment/work disability awards of any overpaid temporary disability benefits. Nonetheless, notwithstanding the change in the "medically stationary" date, the Board emphasized that the reconsideration order had expressly stated that "the remaining issues addressed by the [NOC] * * * are unchanged."

Carrier must provide TTD benefits listed in the NOC and affirmed by reconsideration order.

Because the reconsideration order (containing such a statement) had become final, the Board concluded that the carrier must provide the temporary disability benefits listed in the NOC (which were expressly left unchanged by the reconsideration order). *See David A. Fulcer*, 65 Van Natta 979, 982 (2013); *Rosalyn Hickmon-Williams*, 54 Van Natta 2151, 2153 (2002). Likewise, the Board found that the carrier was not authorized to apply an offset for these temporary disability benefits against claimant's permanent impairment/work disability awards.

Based on blanket "offset" authorization in Order on Reconsideration, carrier's "offset" not unreasonable.

Addressing claimant's penalty/attorney fee request under ORS 656.262(11)(a), the Board concluded that the carrier had a legitimate doubt as to its liability for temporary disability benefits after the "medically stationary" date. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991); *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988). Reiterating that the reconsideration order had modified the "medically stationary" date prescribed in the NOC and had included generic language authorizing the recovery of overpaid compensation from any unpaid permanent disability benefits, the Board reasoned that the blanket "offset authorization" suggested that the carrier had a statutory right to recover any overpaid temporary disability benefits created by the amendment to the "medically stationary" date determined in the reconsideration order. *See* OAR 436-030-0036(2); *Lebanon Plywood v. Seiber*, 113 Or App 651, 654 (1992);

Brandon Grove, 61 Van Natta 2565, 2567 (2009). Under such circumstances, the Board held that the carrier's claim processing had not been unreasonable and, therefore, penalties/attorney fees pursuant to ORS 656.262(11)(a) were not warranted.

Third Party Dispute: Reimbursable Litigation Costs - Filing Fees, Copying Expenses, Consultant Fees - Reasonably/Necessarily Incurred in Third Party Litigation - "593(1)(a)"

Cecil Harper, 69 Van Natta 1510 (October 16, 2017). Applying ORS 656.593(1)(a), the Board held that claimant was entitled to recover from the proceeds of a third party settlement reimbursement for filing/prevailing party fees, copying expenses, and consultants' fees because those costs were reasonably and necessarily incurred in the litigation of his third party cause of action. After the carrier's approval of claimant's settlement totaling $500,000, a dispute arose concerning his proposal to receive reimbursement for litigation costs (of approximately $53,000) incurred by his counsel; *i.e.*, prevailing party/filing fees; copying expenses, and medical experts/consultants' fees.

The Board granted claimant's request for reimbursement of the disputed litigation costs. Citing ORS 656.593(3), the Board stated that, from the proceeds of a third party settlement, a worker is entitled to a recovery under subsections (1) and (2) of 656.593. Referring to ORS 656.593(1)(a), the Board noted that a worker shall receive from a third party recovery costs and attorney fees incurred in the third party litigation. Relying on *Thomas Lund*, 41 Van Natta 1352 (1989), the Board reiterated that all costs that were reasonably and necessarily incurred during the litigation of the third party cause of action are reimbursable. Referring to *William Coultas*, 63 Van Natta 781, *on recons*, 63 Van Natta 963, 965 (2011), the Board observed that costs that are not attributable to the litigation regarding the third party defendant involved in the settlement are not reimbursable.

Claimant sought reimbursement for a "prevailing party/filing fee" paid to a third party defendant who was dismissed.

Turning to the case at hand, the Board acknowledged that claimant was seeking reimbursement for a prevailing party/filing fee he had paid to a third party defendant that was dismissed from the proceeding before claimant's settlement with another third party defendant. Nonetheless, the Board noted that claimant had filed one complaint against both third party defendants that had been based on the same facts and legal theories.

Such costs were reasonably and necessarily incurred during litigation.

Under such circumstances, the Board found that claimant's costs that resulted from the dismissal of one of the third party defendants were reasonably and necessarily incurred during the litigation of the cause of action against the third party defendant who eventually entered into the settlement. Accordingly, the Board concluded that claimant was entitled to reimbursement of these litigation costs.

Addressing claimant's copying expenses, the Board noted that he had submitted declarations from his counsel and his counsel's paralegal, which described the type and amount of copies produced during the litigation (*e.g.*, approximately 35,000 copies of medical records, discovery/depositions, and trial exhibits (several hundred of which were color pages/prints)) and explained that it was standard practice to provide "hard copies" of such documents in the particular venue for the third party action. Considering claimant's detailed description in response to the carrier's questioning of the need for such copying expenses, the Board determined that the costs were reasonably and necessarily incurred for the litigation of his third party action that had resulted in the settlement.

Finally, concerning claimant's expenses for medical expert and consultant fees, the Board observed that he had submitted invoices substantiating these fees. Based on claimant's detailed documentation in response to the carrier's questioning of the amount/purpose for such expenses, the Board was persuaded that the claimed fees had been reasonably incurred in the litigation of his third party action. Consequently, the Board determined that these fees were reimbursable litigation costs.

APPELLATE DECISIONS UPDATE

Claim Processing: Claim Closure - "Pre-Closure" Denied Combined Condition Not Rated, Even if Denial Overturned "Post-Closure"

Yi v. City of Portland, 288 Or App 135 (October 4, 2017). Analyzing ORS 656.268(1)(a), (5), and ORS 656.267(2)(a), the court affirmed the Board's order in *Minkyu Yi*, 67 Van Natta 296 (2015), previously noted 34 NCN 2:3, that, in reviewing an Order on Reconsideration concerning claimant's accepted lumbar strain condition, declined to evaluate her permanent impairment from a combined low back condition because, at claim closure, that condition had been denied, even though by the time of hearing concerning an Order on Reconsideration regarding that claim closure, the carrier's combined condition denial had been overturned. Noting the "post-closure" reversal of the carrier's combined condition denial, claimant contended that her impairment attributable to that condition should also be considered in the review of the claim closure. In response, the carrier asserted that the scope of review did not concern any additional compensation related to the newly-compensable combined condition.

The court agreed with the Board's decision. Citing ORS 656.283(6), the court stated that, in reviewing an Order on Reconsideration, only the record as it existed at the time of the reconsideration order must be considered.

Because "pre-closure" denial had been later overturned, carrier was required to reopen, reclose, and re-evaluate the claim.

Turning to the case at hand, the court noted that, at the time of the reconsideration proceeding, claimant's combined condition had been denied. Nonetheless, the court reasoned that, because the denial had been subsequently overturned, the carrier was required to reopen the claim for processing to closure. *See* ORS 656.262(7)(c).

Combined condition not evaluated because in "denied" status at claim closure.

Under such circumstances, the court determined that the path for reevaluation of claimant's disability from her combined condition was not through a modification of the initial Notice of Closure. Instead, in accordance with ORS 656.262(7)(c), the court concluded that the statutory route for reevaluation of her disability was through a new Notice of Closure and, if necessary, a second reconsideration proceeding under ORS 656.268(5).

Course & Scope: "Traveling Employee" Doctrine - "Personal Errand" - "Post-Work" MVA While Returning From Personal Trip

MVA while returning from "personal errand" while worker was traveling employee.

Beaudry v. SAIF, 288 Or App 139 (October 4, 2017). The court affirmed the Board's order in *William R. Beaudry*, 67 Van Natta 743 (2015), previously noted 34 NCN 4:7, which held that a deceased worker's death, which occurred as a result of a motor vehicle accident (MVA) while he was returning to his hotel room (where he was lodging while performing "out-of-town" work) from a 90-mile round trip with another co-worker to visit a gift shop, did not occur in the course of his employment because, although he was a traveling employee, his shopping trip constituted a distinct departure on a personal errand. Although acknowledging that the deceased worker was a "traveling employee," the Board had concluded that his trip to the gift shop was "a departure from his employment on a distinctly personal errand." Reasoning that the trip was purely personal and not necessitated by the deceased worker's traveling status and required travel over a significant distance, the Board determined that the trip was a "distinct departure" on a personal errand and, consequently, his death did not occur within the course of his employment.

On appeal, claimant (the decedent's beneficiary) contended that the deceased worker was in the course of his employment at the time of the MVA because employers reasonably expect traveling employees to engage in recreational and leisure activities, such as the decedent's trip to the gift shop. In response, the carrier asserted that the shopping trip (although not forbidden by the employer) was not within the course of employment because it did not bear any relationship to the deceased worker's employment and because it was not an activity that arose from the necessity of travel.

Considerations are "geographic proximity" and whether activity was reasonably contemplated/anticipated by employer.

The court agreed with the carrier's position. Citing *SAIF v. Scardi*, 218 Or App 403, 408, *rev den*, 345 Or 175 (2008), the court reiterated that a person in the status of a traveling employee is continuously within the course and scope of employment while traveling, except when it is shown that the person has engaged in a "distinct departure on a personal errand." Relying on *Slaughter v. SAIF*, 60 Or App 610, 615 (1982), the court stated that injuries are compensable when resulting from activities reasonably related to the claimant's travel status. Referring to *Savin Corp. v. McBride*, 134 Or App 321, 326 (1995), *Proctor v. SAIF*, 123 Or App 326, 333 (1993), and *Scardi*, the court observed that, in determining whether the activity at the time of injury was reasonably related to the employee's traveling status, it has considered geographic proximity and whether the activity was reasonably contemplated or anticipated by the employer.

Turning to the case at hand, the court noted that it was undisputed that the deceased worker's trip was a personal errand that did not itself bear any relation to his employment. Instead, the court identified the issue as whether the shopping trip was a leisure activity that was reasonably anticipated because employees were permitted to use company vehicles for personal errands.

No evidence that shopping trip bore any relationship to "traveling employee" status.

After analyzing the aforementioned cases, the court reasoned that, unlike *Slaughter, Proctor,* and *McBride*, there was no evidence that the deceased worker's shopping trip bore any relationship to the necessity of being a traveling employee. Consequently, the court concluded that the shopping trip constituted a "distinct departure on a personal errand" and, as such, his death from the MVA occurred outside the course of his employment.

Reconsideration Proceeding: "268(5)(c)" - Carrier's "Recon" Request Did Not Raise "PTD" & Recon Order Did Not Address "PTD" - Could Not Be Raised at Hearing

Patrick v. SAIF, 288 Or App 168 (October 4, 2017). The court affirmed without opinion the Board's order in *Brian S. Patrick*, 68 Van Natta 366 (2016), previously noted 35 NCN 3:12, that applied ORS 656.268(5)(c) and held that, because a carrier's "reconsideration" request from a Notice of Closure was limited to contesting claimant's impairment findings and because claimant's "cross-request" for reconsideration was untimely filed, his request for a permanent total disability (PTD) award at hearing did not arise out of the Order on Reconsideration (which had not addressed his entitlement to PTD) and, as such, could not be considered.

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 Claim Costs as of "Settlement Date"

Hanson v. ITC Management USA, Inc., 288 Or App 168 (October 4, 2017). The court affirmed without opinion the Board's order in *David J. Hanson*, 68 Van Natta 67 (2016), previously noted 35 NCN 1:8, which, in determining a carrier's "just and proper" share of proceeds from a third party settlement, the Board held that it was authorized to apportion the proceeds between claimant and his wife and to base the carrier's share of claimant's portion of the settlement on its actual/projected claim costs as of the "settlement date."

APPELLATE DECISIONS
COURT OF APPEALS

Appellate Review: "Contingent" Cross-Petition Dismissed as "Moot" (Based on Affirmance of Appealed Board Order) - Other Party Designated as "Prevailing Party," But No Costs Awarded

Vaida v. Howells Custom Cabinets, 288 Or App 386 (October 25, 2017). On reconsideration of its prior decision, 280 Or App 848 (2016), which designated claimant as a prevailing party concerning the carrier's cross-petition when the court affirmed without opinion a Board order finding that claimant was not a "subject worker," the court found that its previous decision had rendered the carrier's cross-petition moot (and thereby did not entitle claimant to costs), but that claimant remained the prevailing party because the carrier's cross-petition had been dismissed. Noting that the carrier's cross-petition was "precautionary," to be addressed only if the Board's order was reversed, the court concluded that the cross-petition was rendered moot when the Board's order was affirmed. Consequently, the court removed its previous award of costs to claimant on the cross-petition and dismissed the cross-petition as moot.

Statute directed court to designate prevailing party in any decision.

However, the court adhered to its designation of claimant as the prevailing party on the cross-petition. Citing ORS 19.450(1), the court stated that the plain terms of the statute directed it to designate the prevailing party or parties in any decision. *See also* ORAP 13.05 and (3).

Regardless of "prevailing party" designation, no costs allowed by court.

Taking those provisions together and applying them to the case at hand, the court reasoned that: (1) cross-respondent (claimant) was the prevailing party concerning the carrier's cross-petition; and (2) it was required to designate the cross-respondent as such. Nonetheless, regardless of the "prevailing party" designation, the court determined that no costs should be allowed on either the petition or cross-petition.

"Contingent" cross-appeal no different than any other cross-petition.

In reaching its conclusion, the court acknowledged the carrier's characterization of its cross-petition as "contingent." Nevertheless, observing that no statute or rule provided for the filing of a "contingent" cross-appeal or petition, the court considered the carrier's cross-petition to be no different from any other petition or cross-petition.

Workers' Compensation Board
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