Workers' Compensation Board

Volume XXXVI, Issue 12

December 2017

News & Case Notes

BOARD NEWS

Changes to Hearing Notice

In the October issue of the Board's News & Case Notes, a mock-up of the new Hearing Notice was published. This change was prompted by WCB's efforts to reduce mailing costs. The parties' address will now show through a standard window envelope, unlike the previous notice, which required a special mailing envelope that would frequently jam the machinery.

After additional testing and reviewing feedback, a further modification to the Hearing Notice has been implemented to better highlight the hearing date and contact information. The new version, shown below, is now in use.

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

In the Matter of the Request for Hearing
Req by: REQUESTING PARTY
Case Name: **CLAIMANT NAME**

PARTY TO CASE
P.O. BOX 12345
SALEM, OR, 97302-1280

Party name and address for envelope window.

Scheduled on:
Monday, June 04, 2018
1:00 PM
WCB HEARINGS DIVISION
1140 WILLAGILLESPIE RD
EUGENE OR 97401

Hearing information here.

Direct all inquiries and correspondence to the office of Administrative Law Judge
ALJ NAME
WCB HEARINGS DIVISION
ROOM 38
1140 WILLAGILLESPIE RD
EUGENE OR 97401

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 **DECEMBER 21, 2017** **Interpreter Request Received**

Interpreter request information here.

CLAIMANT, PO BOX 5678, SALEM OR OR 97302
CLAIMANT ATTORNEY, 123 MAIN STREET, PORTLAND OR 97282

WCB #: 18-00456 **WCD #: IGX3427** **DOI: 3/17/2016** **Claim #: 22W82580**

Case information here.

EMPLOYER, PO BOX 345, EUGENE, 97401
INSURER/ TPA, 678 FIRST ST NE, SALEM OR 97312 (Sent via email)
DEFENSE COUNSEL, PO BOX 4321, PORTLAND OR 97777 (Sent via email)

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APPELLATE DECISIONS (CONT.)

Court of Appeals

ALJ Anonymous Survey - Coming Soon!

WCB's 2017 ALJ Anonymous Survey will be sent electronically to practitioners this month. Your participation in WCB's annual ALJ survey is greatly appreciated.

CASE NOTES

Combined Condition: "005(7)(a)(B)" & "266(2)(a)" Applied to Initial Injury Claim - *Brown* Analysis Does Not Require *Accepted* Condition for "Otherwise Compensable Injury"

Amanda Cooper, 69 Van Natta 1742 (December 13, 2017). Applying ORS 656.005(7)(a)(B) and 656.266(2)(a), the Board upheld a carrier's denial of claimant's low back injury claim, finding that the carrier had established that claimant's "otherwise compensable injury" was not the major contributing cause of her need for treatment/disability of her combined low back condition. Asserting that the rationale expressed in *SAIF v. Brown*, 361 Or 241, 251 (2017) requires a "legally cognizable" combined condition before the application of ORS 656.005(7)(a)(B) and ORS 656.266(2)(a), claimant contended that the carrier must first accept a medical condition to establish an "otherwise compensable injury" before the aforementioned statutes become applicable.

Brown did not change well-established process for determining the compensability of combined condition in an initial injury claim.

The Board disagreed with claimant's contention. To begin, the Board noted that the *Brown* decision concerned an analysis of the meaning of the phrase "otherwise compensable injury" under ORS 656.005(7)(a)(B) in the context of a "ceases" denial under ORS 656.262(7)(b). As such, the Board did not interpret the *Brown* holding to be that the phrase "otherwise compensable injury" *always* means a previously accepted condition. The Board further reasoned that *Brown* did not change the well-established process for determining the compensability of a combined condition in an *initial injury* claim.

Brown rationale has previously been applied without first requiring an accepted condition.

Discussing *SAIF v. Drews*, 318 Or 1 (1993), *Tektronix, Inc. v. Nazari,* 117 Or App 409 (1992), *recons*, 120 Or App 590 (1993), and *Slater v. SAIF*, 287 Or App 84, 86-87 (2017), the Board reiterated that, in an initial injury claim, when an "otherwise compensable injury" combines with a qualifying preexisting condition to cause or prolong disability/need for treatment, the carrier has the burden to establish that the "otherwise compensable injury" is not the major contributing cause of disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a). Finally, referring to *Cynthia H. Falk*, 69 Van Natta 1634, 1637-38 (2017) as an example, the Board noted that it had previously applied the *Brown* rationale in upholding denials involving a combined condition without first requiring the carrier to accept a condition.

Turning to the case at hand, the Board found that the persuasive medical evidence established that claimant's work injury had combined with her preexisting spondylosis (an arthritic condition) to prolong disability/need for

treatment and that her "otherwise compensable injury" was not the major contributing cause of disability/need for treatment of her combined low back condition. Accordingly, the Board upheld the carrier's denial.

New/Omitted Medical Condition: 827 Form (Including ICD-9 "Diagnosis Code") - Perfected Claim Requiring Timely Acceptance/Denial - "262(7)(a)," "267(1)"

Attorney Fee: Carrier's "Pre-Hearing" Acceptance Encompassed *De Facto* Denied New/Omitted Medical Condition Claim - "386(1)"

827 form listed an ICD-9 diagnosis code.

Edgar Negrete, 69 Van Natta 1722 (December 4, 2017). Applying ORS 656.262(7)(a) and ORS 656.267(1), the Board held that claimant's 827 form (which referred to an ICD-9 diagnosis code that pertained to a congenital foot deformity) constituted a new/omitted medical condition claim and because the record established that the carrier's eventual acceptance of an "aggravation of preexisting fibrous coalition of the subtalar joint" encompassed the claimed condition, claimant was entitled to a penalty/related attorney fee award for unreasonable claim processing under ORS 656.262(10)(a) and an attorney fee award pursuant to ORS 656.386(1) for the carrier's "pre-hearing" rescission of its *de facto* denial of the claimed condition. Claimant and his attending physician completed an 827 form, which requested acceptance of a new/omitted medical condition. Although the space on the form for listing the condition was left blank, the form stated that claimant's current diagnosis per the ICD-9 code was "Q66.89," which coincided with "other specified congenital foot deformity." This diagnosis was consistent with a contemporaneous chart note from the attending physician, which suspected an injury to the "fibrous coalition of the talar calcaneal middle facet." When the carrier did not respond to the claim within 60 days, claimant requested a hearing, seeking penalties and attorney fees under ORS 656.262(11)(a). After the carrier accepted an "aggravation of preexisting fibrous coalition of the subtalar joint," claimant also sought an attorney fee award pursuant to ORS 656.386(1)(a). In response, the carrier contended that: (1) a penalty was not warranted because claimant's 827 form did not constitute a perfected new/omitted medical condition claim; and (2) an ORS 656.386(1) attorney fee award was not justified because the 827 form had not requested acceptance of the condition that was ultimately accepted.

The Board disagreed with the carrier's contentions. Citing ORS 656.267(1), the Board stated that to initiate a new/omitted medical condition claim, a worker must clearly request formal written acceptance of a new/omitted medical condition. Relying on *SAIF v. Stephens*, 241 Or App 470, 480 (2011)

and *John R. Waldrupe*, 61 Van Natta 619, 621 (2009), the Board reiterated that, if a worker files a new/omitted medical condition claim, a carrier must respond with written notice of acceptance or denial within 60 days, even when the claim does not identify a specific condition.

Because new/omitted medical condition was perfected, carrier was obligated to timely process.

Turning to the case at hand, the Board acknowledged that the 827 form (which specifically requested "acceptance of a new or omitted medical condition") had referred to a current diagnosis per the ICD-9 code of "Q66.89" (which referred to other specified congenital foot deformity). Nonetheless, the Board reasoned that because claimant had submitted a perfected new/omitted medical condition claim, the carrier was obligated to timely process it. Furthermore, considering the long-standing case precedent concerning the carrier's claim processing responsibility, the Board found that the carrier's failure to process the claim was unreasonable, warranting a penalty/attorney fee award under ORS 656.262(11)(a).

Carrier's failure to timely process the claim was a de facto denial.

Addressing claimant's entitlement to an attorney fee award under ORS 656.386(1)(a), the Board stated that a carrier's failure to respond within 60 days to a new/omitted medical condition claim under ORS 656.267(1) constitutes a *de facto* denial for purposes of ORS 656.386(1). *See John L. Crafton*, 65 Van Natta 163, 168 (2013). Relying on *Labor Ready v. Mogensen*, 275 Or App 491, 497 (2015) and *Crawford v. SAIF*, 241 Or App 470, 477-78 (2011), the Board noted that whether a denied new/omitted medical condition claim encompasses the claim that was ultimately accepted is a question of fact to be determined in the context of the entire record.

Carrier's acceptance encompassed claimed condition – rescission of the de facto denial.

After reviewing the record, the Board reasoned that, because the carrier had not timely responded to claimant's new/omitted medical condition claim (*i.e.*, the 827 form requesting acceptance of ICD-9 code Q66.89), it had *de facto* denied the claim. The Board further determined that, in the context of the medical record as a whole, the denied new/omitted medical condition claim for ICD-9 code Q66.89 (which referred to "other specified congenital foot deformities") encompassed the ultimately accepted condition (*i.e.*, aggravation of preexisting fibrous coalition of the subtalar joint). Consequently, the Board concluded that an attorney fee award under ORS 656.386(1)(a) (for claimant's counsel's services concerning the carrier's "pre-hearing" rescission of its *de facto* denial) was warranted.

Premature Closure: WCD "'Post-ATP' Claim Closure" Rules Applied, Even if Claim Reopened" Before ATP - "268(1), (10)," "030-0020(14)"

"Post-ATP," carrier did not obtain a current determination of medically stationary status.

Gary W. Fallis, 69 Van Natta 1734 (December 11, 2017). Applying ORS 656.268(1), (10) and OAR 436-030-0020(14), the Board held that a Notice of Closure (which issued following claimant's participation in an "Authorized Training Program" (ATP)) was premature because the carrier had not obtained a "current" (*i.e.*, within three months before claim closure) determination of claimant's "medically stationary" status. Noting that the claim had been

reopened before the ATP had commenced and closed for reasons unrelated to the ATP, the carrier contended that WCD's "post-ATP claim closure" rules (OAR 436-030-0020(14)) did not apply.

The Board disagreed with the carrier's contention. Citing ORS 656.268(10), the Board stated that, if a worker becomes enrolled and actively engaged in training after a Notice of Closure, the claim closure must occur as prescribed by the Director's rules. The Board further noted that, under OAR 436-030-0020(14), a carrier must obtain a determination of medically stationary status within three months before the claim closure if the worker becomes actively engaged in an ATP. Relying on *Liberty Northwest Ins. Corp. v. Olvera-Chavez*, 267 Or App 55, 60-62 (2014), the Board reiterated that "post-ATP" claim closure requirements are in addition to, not in lieu of, other claim closure requirements specified in OAR 436-030-0020.

Because claim was reopened for an ATP, the "post-ATP" closure rules applied, even though closure was unrelated to the ATP.

Turning to the case at hand, the Board reasoned that neither the aforementioned statute nor rule distinguished between claim closures that result from the reopening of a claim for the processing of new/omitted medical conditions and those closures that result solely from the worker's participation in an ATP. Under such circumstances, the Board determined that, because claimant enrolled and actively engaged in the ATP after the first closure of his claim, the carrier was required to obtain a "determination of medically stationary status" within three months before the claim closure following the ATP. OAR 436-030-0020(14); OAR 436-030-0035(1)(b).

Because the carrier had relied on a physician's opinion addressing claimant's condition some seven months before the claim closure, the Board concluded that the Notice of Closure was premature. Furthermore, considering the unambiguous requirements prescribed in OAR 436-030-0020, the Board found that the carrier's failure to comply with the rule's "post-ATP claim closure" obligations had been unreasonable. *See Fairlawn Care Center v. Douglas*, 108 Or App 698, 701 (1991). Consequently, the Board also awarded penalties and attorney fees. *See* ORS 656.268(5)(f); ORS 656.382(1).

APPELLATE DECISIONS UPDATE

Course & Scope: "Break-Related" Injury - "Personal Comfort" Doctrine Precedes "Going & Coming" Rule

Mandes v. Liberty Mutual Holdings, 289 Or App 268 (December 6, 2017). The court reversed the Board's order in *Katherine Mandes*, 67 Van Natta 38 (2015), previously noted 34 NCN 1:2, which had held that claimant's injury, which occurred when she tripped and fell on a sidewalk while returning from her paid break to the building where she worked, did not arise out of and in the course of her employment because her injury was subject to the "going and coming" rule. In reaching its conclusion, the Board had reasoned that the "personal comfort" doctrine did not represent an exception to the "going and coming" rule. Relying on *U.S. Bank v. Pohrman*, 272 Or App 31, 47, *rev den*, 358 Or 70 (2015) (a decision issued subsequent to the Board's order), the court

"Personal comfort" doctrine is part of "course & scope" inquiry; precedes "going & coming" rule.

noted that it had held that, because the "personal comfort" doctrine is a part of the "course and scope" inquiry, it necessarily precedes any discussion of the "going and coming" rule, which applies when the worker has left the course and scope of employment.

Turning to the case at hand, the court determined that the Board did not have the benefit of the *Pohrman* decision when it rejected claimant's contention that her injury occurred during the course and scope of her employment because she was engaged in a personal comfort activity. Under such circumstances, the court remanded for reconsideration of claimant's reliance on the "personal comfort" doctrine in light of the *Pohrman* decision.

Combined Condition: "Ceases" Denial ("262(6)(c)") - "Otherwise Compensable Injury" (Accepted Lumbar Strain) Ceased to be Major Cause of "Combined" Low Back Condition

Sather v. SAIF, 289 Or App 375 (December 13, 2017). On remand from the Supreme Court, 357 Or 122 (2015), the court, *per curiam*, affirmed the Board's order in *Gary D. Sather*, 63 Van Natta 1727 (2011), previously noted 30 NCN 9:14, that, in upholding a carrier's "ceases" denial of a combined low back condition under ORS 656.262(6)(c), concluded that the "otherwise compensable injury" (*i.e.*, claimant's accepted lumbar strain) had ceased to be the major contributing cause of his combined low back condition. The court cited *Brown v. SAIF*, 361 Or 241 (2017).

APPELLATE DECISIONS

SUPREME COURT

Exclusive Remedy: "018"/"019" - Exception to "Exclusive Remedy" Procedurally Applies to Denied Subsequent Claims (Based on "Major Contributing Cause") Where Final Order Determines Not Compensable

Bundy v. Nustar GP, LLC, 362 Or 282 (December 29, 2017). Analyzing ORS 656.018 and ORS 656.019, the Supreme Court held that a worker's negligence claims were not procedurally barred by the "exclusive remedy" provision of the Workers' Compensation Law because claimant's new/omitted medical condition claims had been determined to be not compensable because he had not established that a work-related incident was the major contributing cause of his injury. In reaching its conclusion, the Court rejected the trial court and Court of Appeals' decisions that ORS 656.019 (which sets forth an exception to the "exclusive remedy" provision under ORS 656.018)

did not apply to the negligence action because the condition on which the action was based had been denied as new/omitted medical conditions after the carrier had accepted a compensable workers' compensation claim.

Court disagreed with carrier's contention that exception to exclusive remedy applies only when the initial claim is denied.

Specifically, the Supreme Court concluded that "the claim" to which ORS 656.019 refers includes not only initial workers' compensation claims, but also subsequent claims. In doing so, the Court disagreed with the carrier's argument that, because there is one workers' compensation claim for any given work incident (which is either accepted or denied entirely), ORS 656.019 applies only when the initial claim is denied.

Claimant pursued civil negligence action for his denied new/omitted conditions.

After reviewing ORS 656.019 and *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), *overruled by Horton v. OHSU*, 359 Or 168 (2016), the Supreme Court determined that a plain reading of the statute described requirements that the worker had satisfied; *i.e.*, each of his two new/omitted medical conditions (somatoform disorders) for which he was pursuing a civil negligence action, was a "work-related injury"; the conditions had "been determined to be not compensable because the worker had failed to establish that a work-related incident was the major contributing cause"; and he received a final "order determining that the claim [for each condition] is not compensable."

Relying on *Brown v. SAIF*, 361 Or 241, 254-55 (2017), the Court observed that it had construed the use of the term "injury" in ORS 656.005(7)(a) in a way that suggested a reference to "a medical condition that is the *result* of an accidental incident" rather than the incident itself. Consistent with the *Brown* rationale and the references in ORS 656.019(1)(a) to "work-related injury" and "work-related incident," the Court concluded that the term "work-related injury" refers to a medical condition that is the result of a work-related incident. Thus, the Court reasoned that the worker's claim for his work-related injury (*i.e.*, his new/omitted medical conditions) fell within the reference in ORS 656.019 to "an order determining that the claim is not compensable."

After reviewing the context provided by related statutes, the Supreme Court further reasoned that the legislature used "the claim" in ORS 656.019 in the expansive sense that encompasses subsequent requests for compensation that are denied after an initial claim has been accepted. Noting that several statutes refer to an "initial claim" elsewhere in SB 485 (the legislation that adopted ORS 656.019), the Court reasoned that the legislature's failure to qualify the term "claim" in that way in ORS 656.019 strongly suggested that it did not intend the term "claim" to refer to only an "initial claim."

Legislature used "work-related injury" and "claim" in the expansive sense.

Addressing the legislative history concerning ORS 656.019, the Supreme Court found that the history did not disclose a clear intent to limit the reach of ORS 656.019 to initial workers' compensation claims. Consequently, based on the "best evidence" of the legislature's intention (*i.e.*, the wording of the statute that the legislature adopted into law), the Court was persuaded that the legislature used the terms "work-related injury" and "the claim" in ORS 656.019 in the expansive sense that encompasses claims (like the worker's) for a condition that is denied on "major contributing cause" grounds after an initial claim acceptance has been issued.

Court reserved question of whether "019" functioned as a substantive exception to "exclusive remedy" provision of "018."

Finally, the Supreme Court emphasized that its holding resolved only the single issue of statutory construction as to whether ORS 656.019 procedurally applies if the negligence action is for injuries that were determined to be not compensable after an initial workers' compensation claim was accepted. In doing so, the Court expressly reserved for another day the question of whether the legislature intended ORS 656.019 to function as a substantive exception to the "exclusive remedy" provision of ORS 656.018.

APPELLATE DECISIONS
COURT OF APPEALS

Combined Condition: "Ceases" Denial ("262(6)(c)") - "Otherwise Compensable Injury" (Accepted Condition) Ceased to be Major Cause of "Combined" Condition

Roble v. SAIF, 289 Or App 441 (December 20, 2017). On remand from the Supreme Court, 361 Or 241 (2017), the court, *per curiam*, affirmed the Board's order in *Felix V. Roble*, 65 Van Natta 206 (2013), which had upheld a carrier's "ceases" denial of claimant's combined low back condition. The court cited *Brown v. SAIF*, 361 Or 241 (2017).

Sieczkowski v. Lane County, 289 Or App 440 (December 20, 2017). On remand from the Supreme Court, 361 Or 241 (2017), the court, *per curiam*, affirmed the Board's order in *Steven N. Sieczkowski*, 64 Van Natta 1588 (2012), which had upheld a carrier's "ceases" denial of claimant's combined low back condition, finding that his accepted lumbar strain was no longer the major contributing cause of his combined low back condition. The court cited *Brown v. SAIF*, 361 Or 241 (2017).

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