Workers' Compensation Board

Volume XXXVII, Issue 2

February 2018

News & Case Notes

BOARD NEWS

February 15 Board Meeting – "Translation/ Notice" Concepts Referred to Advisory Committee; "Cost Bill" Concept Deferred

At its February 15 meeting, the Board Members discussed two proposed rule concepts, which were presented by the Oregon State Bar's Workers' Compensation's Access to Justice Committee. The concepts concerned the following subjects: (1) procedures for addressing the translation of "non-English" written evidence at hearing, and (2) requiring that certain documents sent to injured workers be accompanied by a separate notice in multiple languages (Spanish, Russian, Vietnamese, and Chinese) advising the workers of the importance of the document and possible avenues for assistance.

After discussing the concepts and considering comments from the public and its staff presented at the meeting, the Members decided to refer these matters to an advisory committee.

The Members also revisited its "cost bill" concepts, reviewing the results from its cost bill survey, as well as considering comments from the public and its staff presented at the meeting. After doing so, the Members decided to defer further action until such time as the court issued its decision concerning *Keith J. Siegrist*, 68 Van Natta 1283 (2016), 69 Van Natta 92 (2017), which is the case on which the concepts are based.

ALJ Recruitment

WCB intends to fill an Administrative Law Judge position in the Salem Hearings Division. The position involves conducting workers' compensation and OSHA contested case hearings, making evidentiary and other procedural rulings, conducting mediations, analyzing complex medical, legal, and factual issues, and issuing written decisions which include findings of fact and conclusions of law. Applicants must be members in good standing of the Oregon State Bar or the Bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia. The position requires periodic travel, including but not limited to Eugene, Roseburg, and Coos Bay, and working irregular hours. The successful candidate will have a valid driver's license and a satisfactory driving record. Employment will be contingent upon the passing of a fingerprint-based criminal background check. The announcement (number DCBS18-0049), found on the Department of Consumer and Business Services (DCBS) website at http://www.oregon.gov/DCBS/jobs/Pages/jobs.aspx, contains additional

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information about compensation and benefits of the position and how to apply. Questions regarding the position should be directed to Ms. Kerry Garrett at (503) 934-0104. The close date for receipt of application materials is April 16, 2018. DCBS is an equal opportunity, affirmative action employer committed to workforce diversity.

New Location For Ontario Hearings

The Board is moving its Ontario hearings to the Four Rivers Cultural Center at 676 SW 5th Ave. in Ontario, beginning on March 1, 2018. Four Rivers Map

Hearing notices for cases set in Ontario will include the new facility address. Please review your notices carefully.

The Four Rivers facility is equipped with multiple conference rooms, spacious common areas, and has parking with handicapped access close to the building. The center also includes multiple areas for witnesses to wait, and for attorneys to confer with clients.

"We are happy to be holding hearings in an improved facility for our stakeholders in Eastern Oregon," said Presiding Administrative Law Judge Joy Dougherty. "We spent a lot of time researching the area and viewing facilities before deciding on this one. We're committed to providing great access for our stakeholders in the area."

CASE NOTES

Course & Scope: "Going and Coming" Rule - "Parking Lot" Exception Not Applicable - Employer's Lease Did Not Establish "Control" Over Parking Lot

Tracey Curtis, 70 Van Natta 237 (February 23, 2018). The Board held that claimant's injury, which occurred after her workday had ended when she slipped/fell in an icy parking lot of an office building where her employer was a tenant, did not arise out of and in the course of her employment as a paralegal because her employer's lease did not establish that it had control over the parking lot. Claimant, who received her employer's permission to leave work early due to inclement weather, fell on ice in the parking lot. After the carrier denied her injury claim, she requested a hearing. Asserting that the employer had sufficient control over the parking lot where her injury occurred, claimant contended that her injury arose out of and in the course of her employment.

"Parking Lot" Exception applies when employer exercises control over area where injury occurs, such as right to require maintenance of the area.

The Board disagreed with claimant's contention. Citing *Norpac Foods, Inc. v. Gilmore,* 318 Or 363, 366 (1994), the Board noted that, generally, injuries sustained while an employee is going to or coming from the place of employment do not occur "in the course of" employment. However, again referring to *Gilmore*, the Board stated that the "parking lot" exception to the "going and coming" rule applies when an employee traveling to or from work sustains an injury "on or near" the employer's premises, and the employer exercises some

"control" over the place where the injury is sustained. Referring to *Cope v. West Am. Ins. Co*. , 309 Or 232 (1990), the Board observed that such "control" may arise from the employer's property rights to the area or as a result of an increased employer-created hazard. Relying on *Montgomery Ward v. Malinen*, 71 Or App 457 (1984) and *Montgomery Ward v. Cutter*, 64 Or App 759 (1983), the Board commented that such "control" may also arise from the employer's obligation to maintain or the right to require maintenance of the area where the injury occurred.

Because employer did not pay additional rent for parking spaces & landlord could close the lot for repairs, employer lacked sufficient "control" over the parking lot.

Turning to the case at hand, after reviewing the employer's lease, the Board noted that the employer did not pay additional rent for its unreserved parking spaces and that the landlord had the right to close the lot for repairs and maintenance. Under such circumstances, the Board concluded that the employer did not have sufficient control of the parking lot such that claimant's injury would be subject to the "parking lot" exception to the "going and coming" rule. *See Maria L. Duran-Angel*, 63 Van Natta 2580, 2581 (2011); *Garnette D. Cone*, 51 Van Natta 848, 849 (1999).

The Board further acknowledged that claimant was being paid at the time of her injury. Nonetheless, referring to *Frazer v. Enter. Rent-A-Car Co*., 278 Or App 409 (2016), the Board noted that such a circumstance was not dispositive in analyzing the applicability of the "parking lot" exception to the "going and coming" rule.

"Greater Hazard" Exception did not apply because parking lot did not expose claimant to hazards in greater degree than general public.

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In addition, the Board determined that the "greater hazard" exception to the "going and coming" rule did not apply to claimant's injury claim. Relying on *Nelson v. Douglas Fir Plywood Co*., 260 Or 53, 57 (1971), the Board reasoned that there was more than one means of ingress or egress from the employer's premises and that claimant was not exposed to hazards in a greater degree than the general public.

Finally, addressing the "arising out of" element of the "work connection" test, the Board found that claimant was injured after her workday had ended and after she had left the employer's premises. Moreover, the Board identified nothing to indicate that claimant's injury resulted from the nature of her work or which originated from a risk to which she was exposed by her work environment as a paralegal. Consequently, the Board concluded that claimant's injury did not "arise out of" her employment. *See Fred Meyer, Inc. v. Hayes,* 325 Or 592, 596 (1997); *Krushwitz v. McDonald's Rests*., 323 Or 520, 525-26 (1996).

Offset: Carrier Not Authorized to Unilaterally Offset CDA Proceeds by Alleged PPD Overpayment

Penalty/Attorney Fees: Carrier's Unauthorized "Offset" Unreasonable, But Penalty/Fees Waived by CDA

Javier Pimentel-Espinoza, 70 Van Natta 183 (February 9, 2018). Applying ORS 656.236(1)(a), the Board held that a carrier was not entitled to unilaterally offset its payment of proceeds from an approved Claim Disposition Agreement (CDA) by a permanent disability (PPD) lump sum payment it had made before submission of the CDA because the CDA did not include a provision authorizing such an action. Before the filing of the parties' CDA, claimant requested that the carrier pay a PPD award granted by a Notice of Closure in a lump sum. After the carrier complied with that request, the parties filed a CDA, which did not refer to the lump sum PPD payment. Following approval of the CDA, the carrier paid the CDA proceeds, less the lump sum PPD payment. Claimant requested a hearing, seeking recovery of the entire CDA proceeds, as well as penalties and attorney fees.

The Board directed the carrier to pay the entire CDA proceeds, but determined that penalties/attorney fees were not awardable. Referring to the rules of construction for contracts, the Board found no ambiguity in the terms of the CDA, which provided for the payment of specific amounts and did not provide explicitly for the offset of permanent disability payments. In rejecting the carrier's assertion that its retention of "all rights regarding all matters not specifically and expressly waived" gave it the right to offset the PPD award, the Board referred to its previous decision's holding that compensation that is otherwise due and payable before the submission of a CDA to the Board does not constitute valid consideration for a CDA (unless the CDA specifically addresses such "pre-CDA submission" benefits). *See Goriel Garcia-Perez*, 67 Van Natta 1067 (2015); *George T. Taylor*, 43 Van Natta 676 (1991).

Because CDA did not provide for offset of PPD payments that had already been paid prior to submission of CDA, carrier not authorized to apply offset.

Turning to the case at hand, the Board found that claimant's PPD benefits were due and payable before the filing of the CDA. Furthermore, the Board determined that the CDA did not provide for the offset of PPD payments against the CDA proceeds. Under such circumstances, the Board directed the carrier to pay the entire CDA proceeds.

Reasoning that the carrier's unilateral offset of the CDA proceeds was not supported by statute, rule, or case precedent, the Board considered the carrier's claim processing to have been unreasonable. Nonetheless, relying on ORS 656.236(1)(a) and *Grazin v. Rockford Corp*., 284 Or App 613, 614 (2017), the Board noted that a CDA waives the right to "non-medical service-related" attorney fees and penalties unless that right is specifically reserved in the CDA.

Because CDA did not reserve claimant's right to "non-medical service related" penalties/fees, no entitlement to such awards despite carrier's unreasonable offset.

Applying those principles to the present case, the Board observed that the CDA did not expressly address penalties and attorney fees or provide specifically for their release or their reservation if the carrier unreasonably delayed/refused to pay compensation. Under such circumstances, the Board reasoned that, under ORS 656.236(1) and in accordance with the terms of the CDA, claimant's entitlement to "non-medical service-related" penalties/attorney fees had been released and, as such, could not be granted for the carrier's unreasonable claim processing.

Own Motion: Penalties/Attorney Fees - Failure to Pay TTD on "Reopened" Claim, Noncompliance with Prior Board Order - Carrier's Claim Processing Unreasonable

Sandra L. Sanders, 70 Van Natta 218 (February 21, 2018). Applying ORS 656.278(1)(b), ORS 656.262(4), and OAR 438-012-0035(4)(b), the Board held that, within 14 days of its voluntarily reopening of claimant's Own Motion claim for a new/omitted medical condition (a left shoulder tendon/rotator cuff tear), a carrier was obligated to pay temporary disability benefits effective as of the date that his attending physician recommended surgery for the condition. Following a previous Board order (which directed the carrier to either voluntarily reopen claimant's Own Motion claim for a new/omitted left shoulder condition or file an Own Motion Recommendation for or against the reopening of the claim), the carrier voluntarily reopened the claim some 45 days after the Board order. In addition, the carrier neither paid temporary disability (TTD) benefits commencing with claimant's surgery nor penalties/attorney fees that had been granted by the Board's previous order (which were based on the carrier's unreasonable failure to timely process the Own Motion claim). Thereafter, claimant requested Own Motion relief, seeking TTD benefits payable from the date his attending physician proposed the surgery, as well as penalties and attorney fees for the carrier's additional acts of unreasonable claim processing.

The Board awarded TTD benefits. Citing ORS 656.278(1)(b), *Butcher v. SAIF*, 247 Or 684, 689, *rev den*, 352 Or 25 (2012), and *James M. Kleffner*, 57 Van Natta 3071, 3075 (2005), the Board stated that entitlement to TTD benefits on a reopened Own Motion claim begins when a physician recommends hospitalization, surgery, or other curative treatment and an attending physician authorizes TTD benefits related to the hospitalization, surgery, or other curative treatment (which may be the date the requisite treatment is recommended). Referring to OAR 438-012-0035(4)(b), the Board reiterated that the first payment of TTD benefits must be made within 14 days from the date the carrier voluntarily reopens the Own Motion claim provided that the criteria prescribed in ORS 656.210, ORS 656.212, and ORS 656.262(4) has been satisfied.

Because "AP" authorized TTD concerning proposed surgery, carrier obligated to pay TTD effective as of authorization request (once Own Motion claim was voluntarily reopened).

Turning to the case at hand, the Board found that, when claimant's attending physician recommended left shoulder surgery, the physician had also authorized TTD benefits "until further notice." Reasoning that the attending physician's TTD authorization pertained to claimant's proposed surgery, the

Board determined that, once the carrier voluntarily reopened the Own Motion claim, it was required to pay TTD benefits commencing with the attending physician's surgery authorization request.

Board not authorized to award penalty for carrier's unreasonable act (based on same "amounts then due"), but could award an attorney fee under "382(1)."

Because the carrier had not begun paying TTD benefits within 14 days of its voluntary reopening of claimant's Own Motion claim and had not paid the penalty/attorney fee awards granted by the previous order, the Board concluded that the carrier's claim processing had been unreasonable. However, noting that a penalty had previously been assessed (for the carrier's unreasonable failure to initially process the Own Motion claim), the Board concluded that it was not authorized to award a duplicative penalty based on the same amounts "then due." *See Eliseo Sales-Parra*, 68 Van Natta 679, 682 (2016); *Terry A. Newton*, 69 Van Natta 1009, 1013 (2017). Nonetheless, relying on *Newton*, the Board held that it was authorized to award a carrier-paid attorney fee under ORS 656.382(1) for the carrier's additional acts of unreasonable claim processing.

Own Motion: TTD - "Curative" Treatment for "New/Omitted Medical Condition" - Physical Therapy/Steroid Injection - Temporary Pain Relief - "278(1)(b)"

Preston E. Page, 70 Van Natta 229 (February 23, 2018). Applying ORS 656.278(1)(b), the Board awarded temporary disability (TTD) benefits on a voluntarily reopened Own Motion claim for a new/omitted low back condition because his attending physician-prescribed physical therapy and steroid injections constituted "curative" treatment. Citing *Butcher v. SAIF*, 247 Or App 684, 689-90 (2012), the Board stated that TTD benefits on a reopened Own Motion claim for a new/omitted medical condition are payable from the date the attending physician authorizes TTD "for the hospitalization, surgery, or other curative treatment." Referring to *SAIF v. Camerena,* 264 Or App 400, 405-06 (2014), the Board stated that a record need not contain expert medical opinion explicitly stating that a course of treatment is curative. Relying on *David M. Williams*, 69 Van Natta 593, 602 (2017), the Board reiterated that "curative treatment" relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery. Finally, citing *Oscar Cano-Sanchez*, 67 Van Natta 2115, 2117 (2015), *recons*, 68 Van Natta 303, 304 (2016), the Board observed that it had found that a steroid injection (which resolved a claimant's leg pain and allowed him to return to work) had established "curative" treatment.

"Curative" treatment relates to/used in the cure of diseases, tends to heal, restore to health, or to bring about recovery.

Turning to the case at hand, the Board acknowledged that no physician had expressly addressed whether claimant's treatment was "palliative" or "curative." Nonetheless, the Board noted that, following his physician's prescription of physical therapy and a steroid injection, claimant had experienced "excellent" pain relief for three weeks before its "unfortunate" return. Under such circumstances, the Board concluded that the treatment was directed toward healing claimant's low back condition and, as such, it constituted "curative" treatment.

"AP" prescription for physical therapy and steroid injection (along with "excellent" pain relief) found sufficient to constitute "curative" treatment.

Finally, applying ORS 656.262(11)(a), the Board awarded a penalty and attorney fee for the carrier's failure to pay TTD benefits on claimant's reopened Own Motion claim for his new/omitted medical condition. Reasoning that the *Butcher* holding clarified that TTD benefits were payable based on an attending physician's authorization for "curative" treatment, the Board concluded that the carrier's failure to pay such benefits (on the basis that claimant did not require hospitalization or surgery) was unreasonable.

Penalty: "268(5)(f)" - Unreasonable Claim Closure - "Correctness" of Closure Placed at Issue Via Hearing Request Seeking "Penalty"

Warren D. Duffour, 70 Van Natta 176 (February 9, 2018). Applying ORS 656.268(5)(f), on remand from the court (*Duffour v. Portland Community College*, 283 Or App 680 (2017)) the Board held that claimant was entitled to a penalty for the carrier's unreasonable Notice of Closure (NOC), finding that his hearing request seeking such relief was sufficient to place the "correctness" of the claim closure at issue. A reconsideration order set aside the carrier's NOC as premature. Claimant requested a hearing from the reconsideration order, seeking a penalty and an attorney fee award for the carrier's unreasonable claim closure. Asserting that claimant's request had not placed the "correctness" of the NOC at issue, the carrier contended that a penalty under ORS 656.268(5)(f) was not awardable.

The Board disagreed with the carrier's contention. Citing ORS 656.268(5)(f), the Board stated a claimant is entitled to a penalty if, among other things, the "correctness" of a NOC is at issue in a hearing. Relying on *Karen M. Griffis*, 68 Van Natta 1406 (2015), *Silviu V. Moisescu*, 68 Van Natta 664, *recons*, 67 Van Natta 1406 (2015), and *Roger D. Samples*, 67 Van Natta 1672 (2015), the Board reiterated that a claimant places the "correctness" of a closure notice at issue by requesting a hearing from the reconsideration order seeking an ORS 656.268(5)(f) penalty.

"Correctness" of claim closure placed at issue via hearing request from Order on Reconsideration, seeking "268(5)(f)" penalty.

Turning to the case at hand, the Board concluded that claimant had placed the "correctness" of the closure notice at issue in the hearing for purposes of ORS 656.268(5)(f) because he requested a hearing from the reconsideration order seeking an ORS 656.268(5)(f) penalty. Addressing the merits of the penalty issue, the Board determined that that the carrier's claim closure had been unreasonable and that a penalty under ORS 656.268(5)(f) was justified.

In reaching its conclusion, the Board noted that claimant had also filed a hearing request seeking a penalty under ORS 656.268(5)(f) *before* the issuance of an Order on Reconsideration concerning the NOC. Because future hearing requests in such cases would likely be dismissed as premature, the Board observed that it would be incumbent on future claimants to file a hearing request from an Order on Reconsideration expressly seeking the aforementioned penalty and accompanying attorney fees.

TTD: Rate - *Former* "060-0025(4)" - "Irregular Earnings" - Calculation of AWW Based on 52-Week Average of Weekly Earnings - W/I Director's Authority

Richard Poland, 70 Van Natta 172 (February 8, 2018). Applying ORS 656.210(2) and *former* OAR 436-060-0025(4) (WCD Admin. Order 16-055, effective January 1, 2017), the Board found that a carrier had properly calculated claimant's average weekly wage (AWW) based on his weekly average of total earnings for 52 weeks before the date of his injury. In reaching its conclusion, the Board rejected claimant's contentions that the amendments to OAR 436-060-0025 for determining the rate of compensation for "irregular wages" exceeded the Director's authority and, alternatively, that the carrier incorrectly and unreasonably calculated his AWW.

Citing ORS 656.210(2)(d)(A), the Board noted that a worker's benefits shall be based on the "wage of the worker at the time of injury." Relying on *Hadley v. Cody Hindman Logging*, 144 Or App 157 (1996), the Board stated that ORS 656.210(2)(e) (*former* ORS 656.210(2)(c)) delegates to the Director broad authority to prescribe by rule "methods" for approximating the wage amount at the time of injury for workers whose remuneration is not based solely upon daily or weekly wages. Explaining that "wage * * * at the time of injury" is an "inexact term" (*i.e.,* the "legislature has expressed its meaning completely, but that meaning remains to be spelled out in the agency's rule or order"), the Board observed that ORS 656.210(2)(d)(A) (*former* ORS 656.210(2)(b)(A)) contained a "clear expression of legislative policy to pay injured workers benefits based on the wage of the worker at the time of injury." Referring to *Cook v. Workers' Comp. Dep't*, 306 Or 134 (1988), and *Dennis W. Erickson*, 61 Van Natta 523 (2009), the Board reiterated that its task was to determine whether the agency's rule was within the range of discretion allowed by the general policy of the statute.

WCD's methods for establishing "AWW" for workers with "irregular wages" fell within scope of Director's "210(2)(d)(A)" authority.

Applying the aforementioned principles to the case at hand, the Board found that the method described in OAR 436-060-0025(4) was within the Director's rulemaking authority under ORS 656.210(2)(e) to prescribe methods for establishing the weekly wage of workers whose remuneration is not based solely upon daily or weekly wages, and that the methods prescribed therein fell within the ambit of the purpose of ORS 656.210(2)(d)(A) to provide temporary disability benefits to a worker at a rate based on the worker's wage at the time of injury. Under such circumstances, the Board concluded that the Director's rule was not invalid and was properly followed.

Effective Feb. 21, 2018, "060-005" & "060-0025" amended.

[*Editor's Note: On February 8, 2018, the Director adopted temporary amendments to OAR 436-060-0005 and 436-060-0025 (to become effective February 21, 2018), which pertain to the calculation of AWW for purposes of determining a worker's TTD rate.]

APPELLATE DECISIONS UPDATE

Claim Filing: "Good Cause" For Untimely Filed Claim - "Subjective" Belief Sufficient if Based on Actual Occurrence/Objectively Reasonable

Kuralt v. SAIF, 290 Or App 479 (February 28, 2018). Analyzing ORS 656.265(4)(c), the court reversed the Board's order in *Andrew Kuralt*, 67 Van Natta 589 (2015), previously noted 34 NCN 4:3, that had found that claimant did not have "good cause" for an untimely filed shoulder injury claim. In reaching its conclusion, the Board had reasoned that claimant's subjective belief that he would be fired/laid off if he filed another workers' compensation claim did not constitute "good cause" because his belief was not based on an "actual occurrence"; *i.e.*, an actual threat to lay him off by a person with authority. On appeal, claimant argued that the Board had erred in determining what constituted good cause for purposes of ORS 656.265(4)(c).

Worker's subjective belief of being laid off as basis for good cause of untimely claim must be "induced by some actual occurrence which is susceptible to such an interpretation" by the worker.

The court agreed with claimant's contention. Citing ORS 656.265(4), the court stated that a failure to give timely notice of a claim bars the claim, unless the notice is given within one year and the worker establishes "that [he/she] had good cause for the failure to give [timely] notice." Referring to *Riddel v. Sears, Roebuck & Co.*, 8 Or App 438, 441 (1972), the court acknowledged that it had previously stated that a worker's subjective belief of being laid off as the basis for good cause of an untimely filed claim must be "induced by some actual occurrence which is susceptible to such an interpretation by him."

If worker's subjective belief that he/she will be laid off is based on actual occurrence from which he/she reasonably could conclude that he/she would be laid off, "good cause" for an untimely claim has been established.

The court explained that what it meant to say in *Riddel*, was that the worker's subjective belief must be objectively reasonable. In other words, the court clarified that if the worker's subjective belief that he/she will be laid off is based on an actual occurrence from which the worker reasonably could conclude that he/she would be laid off, the worker has established good cause.

Turning to the case at hand, the court determined that the Board had found that claimant had a subjective belief that he would be laid off based on a conversation that he had with his employer's controller. Reasoning that such a conversation was an "actual occurrence," the court remanded to the Board to determine whether claimant's subjective belief based on that actual occurrence was objectively reasonable.

In reaching its conclusion, the court recognized that its "good cause" analysis under ORS 656.265(4) was a different standard than the determination of "good cause" under ORS 656.319, relating to timely hearing requests from claim denials. *See Sekermestrovich v. SAIF*, 280 Or 723 (1977) ("mistake, inadvertence, surprise or excusable neglect" under ORCP 71 B). Nevertheless, the court observed that neither the Board nor the court had addressed the *Sekermestrovich* standard or defined "good cause" in the context of a claimant's obligation to prove timely notice of an injury under ORS 656.265.

APPELLATE DECISIONS
COURT OF APPEALS

Combined Condition: "Ceases" Denial - Change of Combined Condition - Accepted Lumbar Strain Resolved

Fillinger v. The Boeing Co., 290 Or App 187 (February 14, 2018). The court affirmed the Board's order in *Lawrence Fillinger*, 67 Van Natta 927 (2015), that upheld a carrier's "ceases" denial of claimant's combined low back condition. Finding persuasive a physician's opinion that claimant's accepted lumbar strain had resolved, the Board had concluded that the carrier established that his combined low back condition had changed such that the "otherwise compensable injury" was no longer the major contributing cause of his disability/need for treatment for his combined condition.

On appeal, claimant contended that, under ORS 656.266(2)(a), the carrier must establish that the accepted *combined condition* itself has changed. Furthermore, asserting that the medical evidence did not support such a conclusion (but, instead, indicated that he was continuing to experience the same low back symptoms, which had worsened), claimant argued that the Board had erred in upholding the carrier's "ceases" denial of his combined low back condition.

"Combined condition" acceptance does not preclude later denial of combined condition should circumstances change so that the otherwise compensable condition is no longer the major cause of combined condition.

The court disagreed with claimant's contention. Quoting from *Brown v. SAIF*, 361 Or 241, 251-52 (2017), the court recited that if a carrier accepts a combined condition, that acceptance does not preclude the carrier from later denying the combined condition, "should circumstances change so that the otherwise compensable condition is no longer the major contributing cause of the combined condition." Again referring to the *Brown* court's explanation, the court stated that the required "change" in the worker's condition or circumstances is that "the otherwise compensable condition is no longer the major contributing cause of the combined condition. *Id.* at 251. Finally, relying on *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, 638 (2002), the court noted that it is legally permissible to rely on medical evidence that an accepted strain has resolved in support of a finding that a claimant's condition had changed such that a carrier can deny a combined condition.

"Combined condition" denial permitted when the "otherwise compensable injury" (i.e., the "accepted injury") is no longer the major contributing cause of disability/ need for treatment for combined condition.

Turning to the case at hand, the court appreciated claimant's frustration with the Board's conclusion that symptoms that were once deemed compensable are no longer. Nonetheless, based on the definitive statutory texts (ORS 656.005(7)(a)(B), ORS 656.262(6)(c), (7)(b), ORS 656.268(1)(b), and ORS 656.266(2)(a)), the court reasoned that a combined condition denial was permitted when the "otherwise compensable injury" (*i.e.*, the "accepted injury") is no longer the major contributing cause of the worker's combined condition or the disability/need for treatment from the combined condition.

Finally, even assuming the correctness of claimant's contention that the evidence must show a change in the combined condition itself, the court determined that the physician's opinion (which stated that claimant's lumbar strain had resolved) constituted evidence that claimant's combined condition

Physician's opinion that accepted lumbar strain had resolved constituted evidence that combined condition had changed such strain was no longer major cause of combined condition.

had changed such that the accepted strain was no longer the major contributing cause of his symptoms. In reaching its conclusion, the court found that the physician's opinion represented substantial evidence in support of the Board's finding that the accepted lumbar strain (which had resolved) no longer combined with claimant's preexisting low back degenerative disc disease. *See* ORS 183.482(8)(c).

"Substantial Evidence" Review: "183.482(7) & (8)" - Board Decision Discounting Physician's Opinion - Unsupported by Substantial Reasoning

Minor v. SAIF, 290 Or App 537 (February 28, 2018). The court reversed the Board's order in *Sheila L. Minor*, 67 Van Natta 1556 (2015) that upheld a carrier's denial of claimant's mental disorder claim for post-traumatic stress disorder (PTSD). In reaching its conclusion, the Board had found the opinion of claimant's treating psychiatrist unpersuasive, reasoning that the psychiatrist had not explained/analyzed why claimant's work-related stressors were the major contributing cause of her claimed PTSD, did not have an accurate history, and had relied on aspects of claimant's work (as a 911 operator) that were conditions that were "generally inherent in every workplace" (*e.g.*, issues with her supervisors and her perceptions of being singled out). On appeal, claimant argued that substantial evidence and substantial reason did not support the Board's finding that her psychiatrist's opinion was unpersuasive.

Board order must provide rational explanation of how factual findings lead to legal conclusions on which the order is based.

The court agreed with claimant's contention. In reviewing for substantial evidence and substantial reason under ORS 183.482(7) and (8), the court stated that a Board order must "provide [ ] a rational examination of how its factual findings lead to the legal conclusions on which the order is based." *See Arms v. SAIF*, 268, Or App 761, 767 (2015). In addition, citing *Jenkins v. Board of Parole*, 356 Or 186, 208 (2014), the court reiterated that there must be "no indication that, in making its decision, the Board relied on evidence that did not qualify as substantial evidence."

The court identified the following three lines of reasoning behind the Board's ultimate determination that the claim was not compensable because the treating psychiatrist's opinion was unpersuasive: (1) the attending psychiatrist's opinion lacked explanation and analysis; (2) the attending psychiatrist's opinion was based on an inaccurate history; and (3), the attending psychiatrist had not properly accounted for excludable work conditions in analyzing the compensability of the claim.

Reviewing for substantial evidence/reasoning, the court determined that the attending psychiatrist's opinion sufficiently explained his assessment that claimant's "family stressors" could not have caused her PTSD, as well as why the disciplinary letter she had received had not contributed to her distress or mental condition. Furthermore, the court noted that the attending psychiatrist's treatment records referenced an awareness of claimant's "off-work stressors such as financial and caregiving difficulties." Finally, notwithstanding the attending psychiatrist's prior chart notes (which had referred to claimant's

"statutorily excludable" work-related stress), the court observed that the attending psychiatrist had subsequently issued an opinion letter that only non-excluded work-related factors were considered in offering his opinion.

Substantial reasoning did not support Board's decision to discount attending psychiatrist's opinion.

Under such circumstances, the court concluded that substantial reasoning did not support the Board's decision to discount claimant's attending psychiatrist's opinion. Consequently, the court remanded.

Vocational Assistance: "Substantial Handicap to Employment" - "Regular Employment" Includes All Jobs Performed For Multiple Employers on "Injury Date" - "340(6)(b)(iii)"

Chu v. SAIF, 290 Or App 194 (February 14, 2018). Analyzing ORS 656.340(6)(b)(iii), the court reversed a Workers' Compensation Division's (WCD's) order, which determined that claimant was not eligible for vocational assistance because she had not sustained a "substantial handicap to employment" as a result of her compensable injury. In reaching its determination, WCD had found that claimant could be employed at a weekly wage within 20 percent of her weekly wage at her "job at injury." Noting that, in addition to her one day per week job for her "at-injury" employer, she worked part-time for two other employers, claimant argued that her earnings from all of her employers at the time of her compensable injury should be considered for purposes of analyzing whether she had incurred a "substantial handicap to employment" to determine her eligibility for vocational assistance.

The court agreed with claimant's contention. Citing ORS 656.340(5), the court stated that "regular employment" is defined as "the employment the worker held at the time of the injury." In addition, based on ORS 656.340(5), and (6), the court noted that the legislative objective of vocational assistance is "to return the worker to employment which is as close as possible to the weekly wage currently being paid for employment which was the worker's regular employment." Finally, referring to *Welliver Welding Works v. Farmen*, 133 Or App 203, 210 (1995), the court observed that one purpose of workers' compensation benefits is to compensate workers "who are active in the labor market, for wages lost because of inability (or reduced capacity) to work as a result of a compensable injury."

"340(6)" requires that the worker's remuneration from all three jobs for multiple employers performed at time of compensable injury (not just "at injury" job) must be considered in determining eligibility for vocational assistance; i.e., "substantial handicap."

Turning to the case at hand, the court acknowledged the carrier's argument that the legislature's use of the phrase "regular employment" (rather than "employments") expressed an intention that ORS 656.340(5) refers only to the "at injury" job. Nonetheless, the Board noted that such an analysis would not take into consideration claimant's remuneration from the three jobs she was performing at the time of her compensable injury. Reasoning that the remuneration from those three jobs provided the basis for the determination of claimant's weekly wage for purposes of calculating her temporary disability benefits under ORS 656.210(2)(a)(B), the court concluded that ORS 656.340(6) required that the remuneration from those three jobs also provided the basis for determining her eligibility for vocational assistance.

Because WCD rule (former "120-0007(1)(g)") limited the basis on which to determine vocational assistance eligibility to "at injury" job (even when worker held multiple jobs), rule was inconsistent with "340(5), (6)(b)(B)(iii), and, invalid.

In reaching its conclusion, the court recognized that *former* OAR 436-120-0007(1)(g) provided that the determination for eligibility for vocational assistance for a non-seasonal or temporary work is "wage loss replacement for the job at injury." However, reasoning that the administrative rule limits the basis on which to determine vocational assistance eligibility to the "at injury" job (even when the worker held multiple jobs), the court held that the administrative rule was inconsistent with ORS 656.340(5), (6)(b)(B)(iii), and, as such, invalid. *See Cook v. Workers' Compensation Department*, 306 Or 134, 144 (1988).

The court further noted that the phrase "regular employment" as defined in ORS 656.340(5) pre-dated the 2001 enactment of ORS 656.210(2)(a)(B), which required that the calculation of temporary disability benefits be based on wages from all of a worker's subject employments. Yet, the court did not consider such circumstances meant that (as with the "pre-2001" calculation of temporary disability benefits) "regular employment" under ORS 656.340(5) meant only a worker's employment at the job of injury for purposes of eligibility for vocational assistance.

Finally, the court acknowledged that the 2001 legislative history showed that witnesses opined that changes to ORS 656.210 relating to the calculation of temporary disability benefits would not affect eligibility for other benefits. Nonetheless, reasoning that such testimony did not address ORS 656.340 or shed light on the eligibility requirements for vocational assistance, the court declined to interpret the statute in a manner that would conflict with the construction of the statutory text. *See Deluxe Cabinet Works v. Messmer*, 140 Or App 548, 556, *rev den*, 324 Or 305 (1996).