Workers' Compensation Board

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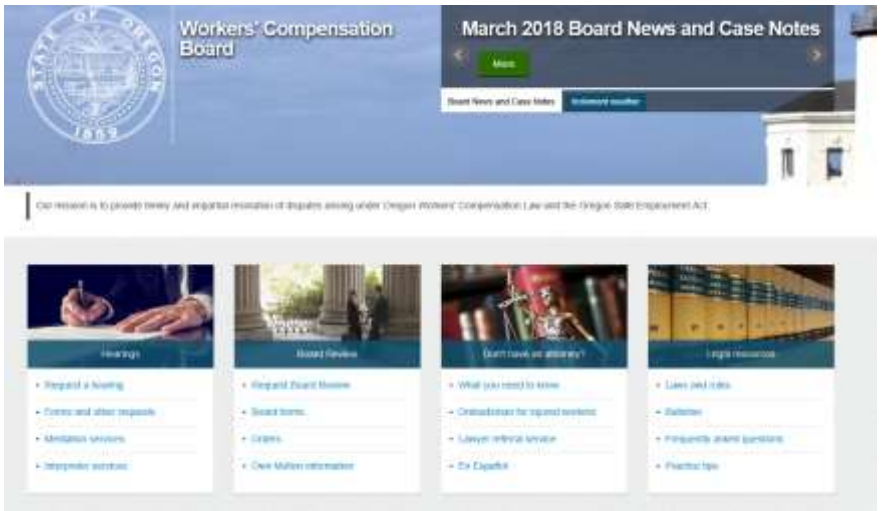
BOARD NEWS

Legal Research Using WCB's Website

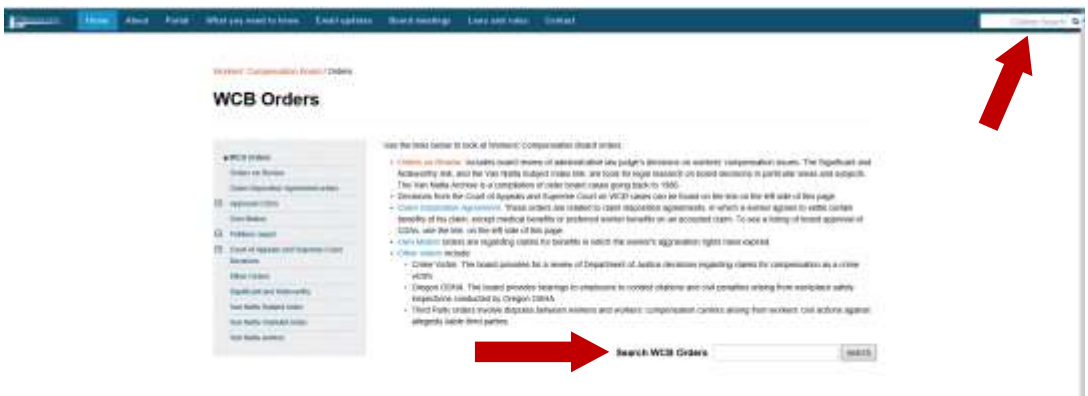
- By Greig Lowell

WCB's website has an extensive database of case decisions extending from 1982, with various indexes and tools to assist your legal research. Below are some basics on how to navigate and search through the orders.

To access the various indexes of orders, begin at the "Orders" link from the main page, which is located in the Board Review box: http://www.oregon.gov/wcb/board-orders/Pages/index.aspx



Once you are in the **Orders** section, you can view different types of cases, such as Claim Disposition Agreement approvals, Own Motion cases and Court decisions. The library of Board decisions includes the Significant and Noteworthy index, Subject index, and Claimant index.



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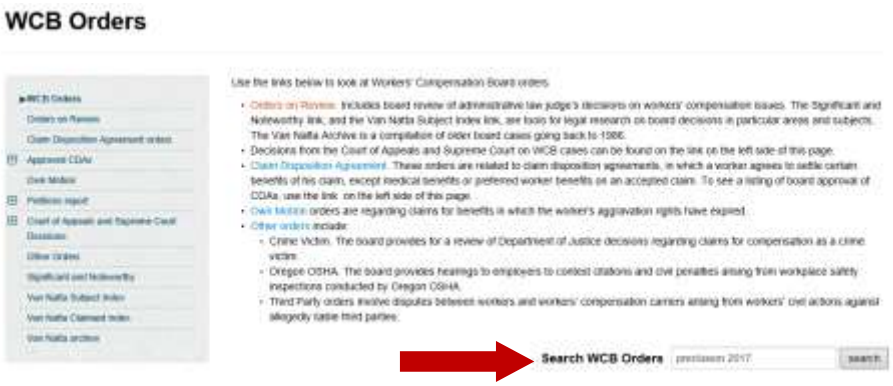
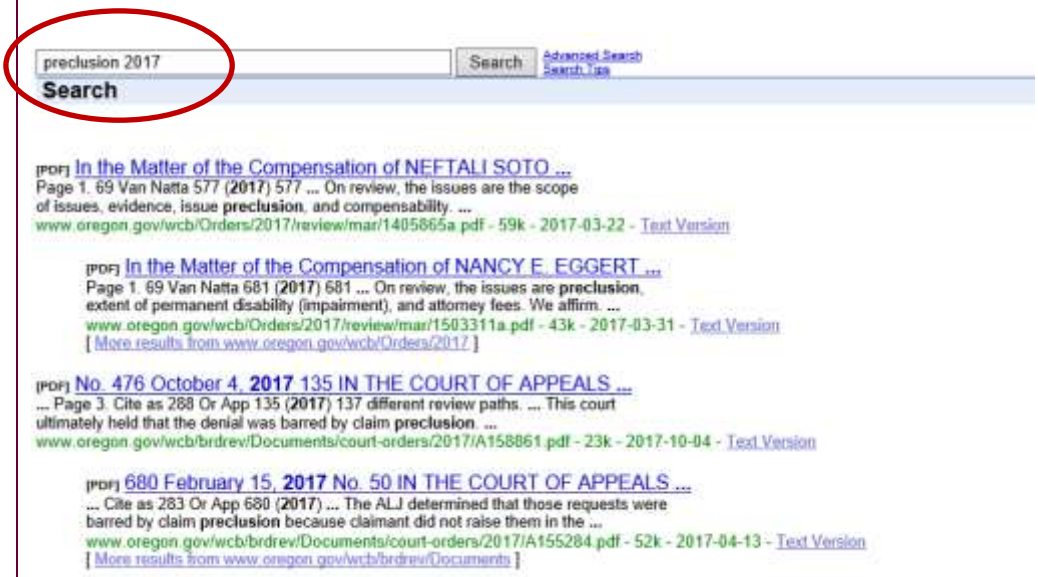
There are two Search boxes on this page. At the top right of that page is a Search box that is fairly general for Oregon.gov websites. It will **not** take you into the Orders from the Board. Instead, use the box in the lower right of the page, labeled "Search WCB Orders." That box will respond to plain text inquiries, and will search the complete database of orders for results.

For example, when researching for recent decisions involving "claim preclusion" or "issue preclusion," you can search both by typing the following:



Here are the results:



Because the search function scans the text of the orders, it helps to have an understanding of the phrases commonly used by the Board. For example, to see cases in which preclusion may apply to a previous decision by an ALJ on the same claim, a phrase used by the Board is "prior ALJ." Using those terms in the search box gives these results:

preclusion prior ALJ | Search | Advanced Search | Search Tips

Search

[PDF] In the Matter of the Compensation of DARNELL M. LUCAS ...
... to demonstrate what issues were, for issue **preclusion** purposes, actually ... The **prior ALJ's** order also expressly concluded (in the "order portion") that ...
www.oregon.gov/wcb/Orders/2005/review/mar/0209259c.pdf - 51k - 2016-04-23 - Text Version

[PDF] In the Matter of the Compensation of KIMBERLY K. BOLEN ...
... 1161, 1163 (2003) (where **prior** litigation established ... condition was compensable, issue **preclusion** barred further ... we agree with the **ALJ** that the ...
www.oregon.gov/wcb/Orders/2004/review/feb/0208493a.pdf - 18k - 2016-04-23 - Text Version

[PDF] In the Matter of the Compensation of TARI PERRY, Claimant ...
... Based on our review of the **prior ALJ's** order, we find that the issue ... the remaining four factors necessary for the doctrine of issue **preclusion** to apply. ...
www.oregon.gov/wcb/Orders/2004/review/nov/0307210b.pdf - 19k - 2016-04-23 - Text Version
[More results from www.oregon.gov/wcb/Orders/2004]

[PDF] In the Matter of the Compensation of KEVIN B. NELSON ...
... **ALJ's** order with the following supplementation regarding the claim **preclusion** issue. ... 4-4). On January 9, 2006, a **prior ALJ** determined that the work ...
www.oregon.gov/wcb/Orders/2007/review/mar/0603126.pdf - 27k - 2016-04-23 - Text Version

[PDF] In the Matter of the Compensation of LAURA R. JONES ...
... 4 2 A final decision is one of the issue **preclusion** requirements. ... 27, 2007 order in the Notice of Closure litigation, affirming the **ALJ's prior** order, has ...
www.oregon.gov/wcb/Orders/2007/review/aug/0505391f.pdf - 52k - 2016-04-23 - Text Version
[More results from www.oregon.gov/wcb/Orders/2007]

[PDF] In the Matter of the Compensation of ALBA ESCOBAR ...
... to the issue before the **prior ALJ** because the **prior ALJ** determined the ... different claim, not subject to the principles of claim and issue **preclusion**. ...
www.oregon.gov/wcb/Orders/2009/review/oct/0800979b.pdf - 35k - 2016-04-24 - Text Version

The "Van Natta archive" consists of large .PDF files, which are scans from the original binders. The Board is working its way back through older Van Natta volumes, with an eventual goal of including all volumes in the archive section. The search box on the main Orders page will also produce results from the Van Natta archive, although the actual page numbers are not immediately displayed. To delve further into the archives, here's an example:

To produce results from the archive, I typed this old medical procedure into the search box:

WCB Orders

Search WCB Orders | search

From that search term, I was given these results from the Van Natta archive:

Once you have clicked to open the Archive volume, use the Ctrl-F keys to open the search box. Re-enter your term and you will get the page in which the word shows up:

VAN NATTA'S WORKERS' COMPENSATION REPORTER

VOLUME 38

(Pages 1-412)

A compilation of the decisions of the Oregon Workers' Compensation Board and the opinions of the Oregon Supreme Court and Court of Appeals relating to workers' compensation law.

JANUARY-MARCH 1986

On receipt of billings for the surgery, the insurer wrote the hospital and Morris that payment could not be made without chart notes and reports. In March, 1983, Morris provided a surgical report to claimant's counsel describing the operation. In July, 1983, Morris wrote to claimant's counsel:

> "It appears that the percutaneous nuclectomy was successful in alleviating her sciatica symptoms. This procedure is done under local anaesthesia using a standard posterolateral approach. The results are similar to those for chymopapain injection. Chymopapain removes nuclear material chemically while this procedure does so mechanically. The success rate in relieving sciatica in carefully selected patients is seventy percent. The surgery costs of $2,000.00 compared to $10,000.00 for a laminectomy. The length of hospital stay is two days compared to seven or eight days for a laminectomy. The procedure has been covered by at least some of the workman compensation carriers in California."

If you have any questions about WCB's website and case indexes, please contact me at (503) 934-0151 or greig.lowell@oregon.gov.

CASE NOTES

Attorney Fee: "383(1)" - Not Applicable to TTD Award From Order on Reconsideration - "268(6)(c)" Controls

Order on Reconsideration granted additional TTD and awarded an "out-of-comp" fee. Claimant sought assessed fee.

Mekayla N. Dancingbear, 70 Van Natta 550 (April 27, 2018). Analyzing ORS 656.383(1), the Board, *en banc*, held that claimant's counsel was not entitled to a carrier-paid attorney fee for services rendered during the reconsideration proceeding that resulted in an Order on Reconsideration's increased temporary disability award. After claimant requested reconsideration of a Notice of Closure, an Order on Reconsideration awarded additional temporary disability (TTD) benefits and an "out-of-compensation" attorney fee under ORS 656.268(6)(c). Claimant requested a hearing, seeking a carrier-paid attorney fee for her counsel's services rendered during the reconsideration proceeding because the attorney had been instrumental in obtaining increased TTD benefits before an ALJ decision. *See* ORS 656.383(1).

Board determined that ORS 656.383(1) does not apply to reconsideration proceeding.

The Board concluded that ORS 656.383(1) did not apply to the reconsideration proceeding. Summarizing ORS 656.383(1), the Board stated that a carrier-paid attorney fee is allowable if the claimant's counsel is instrumental in obtaining TTD compensation pursuant to ORS 656.210, 656.212, 656.268, or 656.325 prior to an ALJ decision. However, referring to ORS 656.268(6)(c), the Board noted that *in any reconsideration proceeding* under this section, the Director *shall* award a worker's attorney an "out-of-compensation" fee equal to 10 percent of the additional compensation award.

Turning to the case at hand, the Board acknowledged that ORS 656.383(1) refers to ORS 656.268 (which includes the reconsideration process before the Director) and does not specifically exclude the "pre-ALJ decision/increased TTD" carrier-paid attorney fee award from the reconsideration proceeding. Nonetheless, after reviewing the text, context, and legislative history of the statute, the Board determined that ORS 656.383(1) was not intended to apply to the reconsideration proceeding.

"268(6)(c)" "out-of-comp" attorney fee pertains to "recon order" TTD; "383(1)" concerns "post-recon order/ pre-ALJ decision" additional TTD

In reaching its conclusion, the Board reasoned that applying ORS 656.383(1) to the reconsideration proceeding would directly conflict with the "out-of-compensation" attorney fee mandated by ORS 656.268(6)(c) and would run counter to the proposition that two statutes should not be applied to award attorney fees for the same conduct. *See Cayton v. Safelite Glass Corp.*, 232 Or App 454, 463 (2009). Moreover, the Board observed that the two statutes could be reconciled by applying the ORS 656.268(6)(c) "out-of-compensation" fee for an attorney's "reconsideration proceeding" services and applying the ORS 656.383(1) "carrier-paid" fee when an attorney is instrumental in obtaining additional TTD benefits from a carrier after an Order on Reconsideration, but before an ALJ decision.

Further noting that the legislature chose to use the term "obtaining" (rather than "award") in ORS 656.383(1), the Board determined that "obtaining" indicated that a claimant's counsel must be instrumental in procuring the additional TTD benefits independent from a "pre-ALJ" administrative decision.

In support of this reasoning, the Board observed that the phrase "instrumental in obtaining" is also present in ORS 656.386(1) that pertains to the entitlement to a carrier-paid attorney fee when a carrier rescinds its claim denial before an ALJ's decision.

Finally, after reviewing the legislative history, the Board summarized that the comments regarding the statute's intent referred to the then-current system of "out-of-compensation" attorney fees, which were limited to 25 percent of the increased TTD benefits and "capped at $1,500." Reasoning that those references pertained to the then-existing Board "out-of-compensation" attorney fee rules for increased TTD awards at the hearing level and finding no mention of the "reconsideration proceeding" attorney fee award under ORS 656.268(6)(c) (which equals 10 percent of the increased compensation award without a cap), the Board concluded that the legislative history supported its interpretation of ORS 656.383(1) that the statute was not designed to apply to the reconsideration proceeding and to replace ORS 656.268(6)(c).

Dissent observed that ORS 656.383(1) expressly refers to ORS 656.268 reconsideration process and "pre-hearing request" decision for additional TTD.

Members Lanning and Ousey dissented. Because the reconsideration process (which could result in increased TTD benefits from an Order on Reconsideration) occurs prior to an ALJ decision, the dissent asserted that the wording of ORS 656.383(1) (which also expressly refers to ORS 656.268) supported an intention to apply to the ORS 656.268 reconsideration process. Moreover, in contrast to ORS 656.383(2) (which provides for a carrier-paid attorney fee after a hearing request has been filed), the dissenting Members observed that ORS 656.383(1) did not contain such a limitation, which suggested that that a carrier-paid attorney fee award was allowable for a "pre-hearing request" decision in which a represented claimant obtained TTD benefits.

In addition, Members Lanning and Ousey found no conflict between ORS 656.268(6)(c) and ORS 656.383(1) because the "out-of-compensation" fee would simply be supplemented, which would further the policy of the Workers' Compensation Act to provide access to adequate legal representation for injured workers. *See* ORS 656.012(2)(b). Furthermore, if the statutes conflicted, the dissenting Members asserted that ORS 656.383(1) controlled because, unlike ORS 656.268(6)(c), it specifically governed TTD benefits.

Evidence: Claimant's Submission of Report Under "7-Day" Rule - Report Admissible - Denial of Carrier's "Rebuttal Evidence" Motion (With "Cross-Examination" Opportunity) & Exclusion of Carrier's "Post-Hearing" Submission of Documents (Which Were Not Presented at Hearing) - No "Abuse of Discretion" in ALJ's Rulings

Claimant's report admitted under "7-day" rule; carrier allowed "cross-exam" but no "rebuttal."

Marty J. Stark, 70 Van Natta 499 (April 19, 2018). Analyzing OAR 438-006-0081, OAR 438-006-0091, OAR 438-007-0015, OAR 438-007-0017, and OAR 438-007-0018, the Board found no abuse of discretion in an ALJ's evidentiary rulings regarding the admission of a physician's report submitted by claimant under the "7-day" rule, the denial of the carrier's motion for "rebuttal" (rather than "cross-examination") evidence, and the exclusion of the carrier's reports that it submitted after the hearing. Five days before a hearing regarding a carrier's claim denial, claimant's attorney submitted a physician's report, prompting the carrier to move for a postponement/continuance of the hearing to present "rebuttal" evidence and to assert that its "procedural due process" rights would be violated if it were required to present its "case-in-chief" before the close of claimant's "case-in-chief." Claimant did not oppose the carrier's right to cross-exam the report's author, but objected to its "rebuttal" request, contending that he had the right to the last presentation of evidence. *See* OAR 438-007-0023.

At hearing, the carrier declined to offer any of its submitted reports/letters and objected to claimant's recent submission of the physician's report. In doing so, the carrier argued that claimant must submit all documents within 14 days before the hearing and, alternatively, that it should receive a continuance/ postponement of the hearing to develop additional evidence (beyond cross-examination of the report's author), because it could not have done so with due diligence. *See* OAR 438-006-0091(5); OAR 438-006-0081(1)(d).

Carrier declined to offer its exhibits at the hearing but offered them after a continuance for "cross-exam" opportunity.

Ultimately, the ALJ continued the hearing solely for the purpose of the carrier's cross-examination of the author of claimant's report. Thereafter, the carrier withdrew its cross-examination request and offered its physician's reports/letters that it had previously submitted (but had not presented for admission into the record) at the hearing. The ALJ declined to admit the proposed exhibits, reasoning that the appropriate time for the carrier to seek admission of the documents was at the hearing and that the proposed evidence was not within the scope of the "continuance/cross-examination" ruling. In response, the carrier argued that the disputed physician's report had not been timely exchanged under OAR 438-007-0018(2) and that it was entitled to present additional evidence due to the "material prejudice" provision of OAR 438-007-0018(5) or, alternatively, its submitted report was admissible as

"impeachment" evidence (OAR 438-007-0017(1)(d), (f)). Finding that the reports did not constitute "impeachment" evidence and adhering to the previous rulings, the ALJ denied the carrier's motions and found the claim compensable.

On review, the carrier contended that the ALJ had erred in admitting claimant's physician's report, as well as in denying its various procedural motions. Moreover, the carrier argued that the ALJ's rulings violated its "due process" rights by not admitting the proposed evidence at the close of claimant's "case-in-chief."

The Board found no abuse of discretion in the ALJ's rulings. Citing ORS 656.283(6), the Board stated that ALJs are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct a hearing in any manner that will achieve substantial justice. Relying on *SAIF v. Kurcin*, 334 Or 399 (2002) and *Brown v. SAIF*, 51 Or App 389, 394 (1981), the Board observed that it gives broad discretion to an ALJ in its review of an ALJ's evidentiary ruling for an abuse of discretion. Referring to *Donald E. Bell*, 64 Van Natta 776, 784 (2012), the Board noted that it had not found an abuse of discretion regarding an ALJ's evidentiary rulings in a situation similar to that addressed in the present case.

Before hearing, carrier had conducted its investigation and obtained medical examinations. Also declined to present reports at hearing and later withdrew "cross-exam" opportunity.

Turning to the case at hand, the Board noted that the carrier had a meaningful opportunity to respond to claimant's submission, because the record established that it had been aware from the outset of the claim and the condition that was being claimed. The Board further observed that the carrier had conducted its claim investigation and obtained evidence, including several employer-requested examinations, but chose not to present that evidence at the scheduled hearing. Under such circumstances, the Board found no violation of the carrier's "due process" rights in the ALJ's evidentiary rulings.

No abuse in ALJ's rulings and no "due process" violation.

In addition, reasoning that claimant's submission of the disputed report was timely disclosed/submitted under the "7-day rule" (*see* OAR 438-007-0015(4)), the Board found no abuse of discretion in the ALJ's admission of the report. Citing *Bell* and *Ramona Andrews*, 48 Van Natta 1652, 1653 (1996), the Board noted that the admission of such a timely disclosed/submitted report was mandated by OAR 438-007-0015(4) and that opposing parties are generally granted the right to cross-examine the report's author (with the opportunity to obtain a "rebuttal" report if they have the burden of proof). *See* OAR 438-006-0091(2), (3); OAR 438-006-0081(2).

Based on such reasoning, the Board the Board concluded that OAR 438-007-0018(5) (and its "material prejudice" provision) were not applicable. Moreover, even assuming that the rule applied, the Board found no abuse of discretion in the ALJ's ruling because the carrier had been provided an opportunity to cross-examine the author of the report (which it had subsequently declined).

Finally, the Board determined that the excluded reports did not cause it to question the reliability/credibility of the author of claimant's physician's report. Consequently, the Board found no abuse of discretion in the ALJ's ruling that the submitted reports/letters did not constitute "impeachment" evidence under OAR 438-007-0017(1)(d) and (f).

Evidence: "Off Record" Discussion/ALJ's Evidentiary Ruling Not Discernible From Record - Insufficiently Developed for "Abuse of Discretion" Review - Remand Warranted

In an "off record" ruling, ALJ admitted a rebuttal report (without summarizing parties' positions or ruling) then excluded the report in the eventual order.

Sharon L. Nelle, 70 Van Natta 463 (April 9, 2018). Applying ORS 656.295(5), the Board held that, because the parties' positions and the ALJ's reasoning regarding an "off-the-record" discussion and initial evidentiary ruling (that admitted a carrier's "rebuttal" report) were not discernible, the record was insufficiently developed to review the ALJ's eventual ruling (that excluded the report in its entirety) for an abuse of discretion. Following a hearing regarding a denied new/omitted medical condition claim, the ALJ left the record open for rebuttal evidence from the carrier concerning a "combined condition" issue. In recorded closing arguments, the ALJ admitted the carrier's "rebuttal" report. On the record, claimant's counsel referred to an "off record" discussion, stating that he had "objected to the report," although acknowledging that it was not an objection "*per se*." Further asserting that several pages of the report concerned claimant's (rather than the carrier's) burden of proof, claimant's attorney requested redaction of those pages. In response, the carrier argued that the report was within the ALJ's previous "combined condition" rebuttal ruling. The closing arguments eventually concluded without a further ruling from the ALJ. However, in the ALJ's eventual order (which found the denied claim compensable), the carrier's report was excluded in its entirety as beyond the scope of the ALJ's initial "rebuttal report" ruling. The carrier requested review, challenging the ALJ's evidentiary ruling and compensability decision.

The Board vacated the ALJ's order. Citing ORS 656.283(6), the Board stated that an ALJ is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct a hearing in any manner that will achieve substantial justice. In addition, citing *SAIF v. Kurcin*, 334 Or 399, 409 (2002), the Board indicated that an ALJ's evidentiary rulings are reviewed for an abuse of discretion. Referring to *Rick Sandeno*, 59 Van Natta 2779, 2782 (2007), the Board reiterated that, if the basis for an ALJ's ruling cannot be discerned, a determination as to whether the ruling was legally permissible cannot be reached and that remand for further development of the record is warranted.

Neither the ALJ's order nor the record established the events surrounding the parties' discussions or basis of ALJ rulings.

Turning to the case at hand, the Board stated that, neither the ALJ's order nor the record established: (1) the events surrounding the parties' "off-the-record" discussion concerning the ALJ's initial evidentiary ruling regarding the "rebuttal" report; (2) the basis of claimant's initial objections to the report (as well as the carrier's specific response); (3) whether the ALJ considered claimant's contention in closing arguments as a motion for redaction of the report, rather than for the report's complete exclusion; or (4) the basis for the ALJ's reconsideration of the initial evidentiary ruling and subsequent exclusion of the report (in its entirety).

Record insufficiently developed for "abuse of discretion" review.

In the absence of such findings, the Board determined that it was unable to conduct its "abuse of discretion" review regarding the ALJ's evidentiary ruling and, therefore, concluded that remand for further development of the record was warranted. *See Lily Decknadel*, 65 Van Natta 2383, 2387 (2013). In reaching its conclusion, the Board expressed concerns when an ALJ renders an evidentiary ruling following the completion of a hearing and the record closure, but subsequently reconsiders that ruling in an eventual order without prior notice to the parties. *See Kenneth H. Baker*, 66 Van Natta 467, 472 (2014).

Jurisdiction: "319(6)" - Hearing Request Untimely Filed - Challenged Carrier's Calculation of "Same Wages" (In Lieu of TTD) Under "262(4)(b)" & "060-0025(2)" More Than Two Years After Alleged Miscalculation

Claimant contended that overtime wages should be included in "same wage" calculation.

Justin A. Swint, 70 Van Natta 451 (April 3, 2018). Applying ORS 656.319(6), the Board held that the Hearings Division lacked jurisdiction to consider claimant's request for recalculation of his "same wage" benefits (for purposes of his wage continuation under ORS 656.262(4)(b) and OAR 436-060-0025(2)), because his request was filed more than two years after the carrier's alleged incorrect "action" (*i.e.*, excluding overtime wages in claimant's "same wage" calculation). More than two years after the carrier began paying claimant his "same wages" (in lieu of TTD benefits) under ORS 656.262(4)(b) and OAR 436-060-0025(2), claimant requested a hearing, contending that overtime wages should have been included in his "same wage" calculation. The carrier, relying on ORS 656.319(6), asserted that claimant's hearing request was untimely because the request was not filed within two years after the alleged action or inaction (*i.e.*, its alleged failure to pay the "same wage" benefits based on the inclusion of overtime wages).

Carrier's first allegedly incorrect payment was the "action" that triggered the two-year limitation.

The Board held that the hearing request was untimely. Reasoning that it was required by ORS 656.319(6) to determine the date of the alleged "action" that triggered the two-year period under ORS 656.319(6), the Board concluded that the "action" occurred more than two years before claimant's hearing request when the carrier allegedly did not correctly include overtime wages in his "same wage" calculation. Under such circumstances, the Board determined that claimant's hearing request was time-barred under ORS 656.319(6).

In reaching its conclusion, the Board distinguished *French-Davis v. Grand Central Bowl*, 186 Or App 280, 284 (2003), where the court held that the triggering date for the two-year limitation under ORS 656.319(6) began with the carrier's "inaction" in response to the claimant's request for claim closure under ORS 656.268(5). In contrast to *French-Davis*, the Board reasoned that claimant was not alleging a *failure* to process the claim as in *French-Davis*, but rather was asserting that the carrier had *incorrectly* processed his claim by not including overtime in his "same wage" calculation.

Consequently, the Board determined that it was required to determine the date of the alleged "action" (as opposed to "inaction," which was the case in *French-Davis*) that triggered the two-year period under ORS 656.319(6). Applying that analysis, the Board concluded that the "action" that triggered the two-year limitation was the date of the carrier's first wage-continuation payment. Because that date was more than two years before the filing of claimant's hearing request, the Board held that claimant's request for relief could not be considered.

Own Motion: Claim Closure - Claimant Did Not Respond to Carrier's "30-Day No Treatment" Letter ("030-0034(1)") - Valid Basis for Closure

Attending physician reported symptoms had resolved and released claimant to regular work.

Claimant did not respond to carrier's "no treatment in 30 days" warning letter.

Joseph O. Tompkins, 70 Van Natta 508 (April 24, 2018). In an Own Motion Order, the Board held that a Notice of Closure (NOC) was not premature because claimant had not responded to a carrier's "30-Day No Treatment" warning letter under OAR 436-030-0034(1). After the reopening of claimant's Own Motion claim for a "worsened condition," the attending physician reported that claimant's symptoms had resolved and returned to work, without restrictions. Thereafter, the carrier sent claimant a "warning" letter, advising him that if he did not advise the carrier of his current status within 14 days, his claim would be closed because he had not sought treatment for more than 30 days. When claimant did not respond to its letter, the carrier closed his claim. Claimant requested Board review, challenging (among other things), the validity of the NOC.

The Board affirmed the NOC. Referring to ORS 656.005(17) and OAR 438-012-0055(1), the Board stated that the propriety of the claim closure turned on whether claimant's condition was medically stationary at the time closure issued. The Board further noted that ORS 656.268(1)(c) and OAR 436-030-0034(1) provide for claim closure, using 30 days from the last treatment provided as the date the claim qualifies for closure, if the carrier strictly complies with the notification requirements in the applicable administrative rules. *See Paniagua v. Liberty Northwest Ins. Corp.,* 122 Or App 288 (1993).

NOC also valid because claimant did not respond to carrier's "warning" letter.

Turning to the case at hand, the Board found that claimant's compensable condition was medically stationary at claim closure because his attending physician's comments established that no further material improvement in his condition was reasonably expected from medical treatment or the passage of time. Further finding that claimant had not responded to the carrier's "warning" letter (which complied with OAR 436-030-0034(1)), the Board determined that the NOC was valid for that additional reason.

In Own Motion claims, Board attempts to adhere to standard claim processing concepts when possible.

In reaching its conclusion, the Board acknowledged that Own Motion claims are processed under ORS 656.278(6), rather than under ORS 656.268. Nonetheless, citing *Edward Hines Lumber Co. v. Kephart*, 81 Or App 43 (1986); *Drago Tomic*, 69 Van Natta 204 (2017); and *Anthony D. Cayton*, 66 Van Natta 1678 (2014), the Board reiterated its objective to adhere when possible to standard claim processing concepts regarding Own Motion claims.

Own Motion: Request for Rescheduled Arbiter Exam Denied - ARU Scheduled "Record Review" After Claimant Did Not Attend First Arbiter Exam W/O Providing Explanation

Claimant did not respond to ARU's notice that a record review would be performed.

Susan J. Durrant, 70 Van Natta 485 (April 18, 2018). Applying ORS 656.278(6) and OAR 438-012-0055, the Board held that claimant was not entitled to the rescheduling of a medical arbiter examination because the Appellate Review Unit (ARU) had arranged for a record review when she did not attend a previously-scheduled exam without offering an explanation for her non-appearance. Claimant initially requested review of an Own Motion Notice of Closure, seeking an additional permanent disability (PPD) award and the appointment of a medical arbiter. After the Board referred the claim to the ARU, a written notice was sent by ARU to claimant (at the address she had provided to the Board, and to which the Board's interim order was mailed) and her counsel notifying her of a scheduled medical arbiter examination. After claimant did not attend the scheduled examination, ARU sent her another letter (using the same address as the previous notice) and her counsel, notifying them that a record review would be performed. Some three weeks later (without a response from claimant or her attorney to ARU's notice), the medical arbiter performed a review based on the documentary record. Thereafter, claimant requested that the Board again refer the claim to the Director to reschedule an arbiter examination to determine her medically stationary status and the extent of her PPD. In doing so, she asserted that she did not receive the initial ARU notification letter and that she could not have attended or participated in the scheduled examination because she was recovering from surgery.

In Own Motion claims, good cause for not attending an arbiter exam is for the Director to determine.

In referring Own Motion claims to ARU to appoint arbiter, Board assumes ARU will follow its standard practices.

Interpreting claimant's contentions as an assertion of "good cause" for not attending the scheduled examination, the Board disagreed with her assertion. Referring to ORS 656.268(8) and OAR 436-030-0165, the Board stated that whether a claimant had "good cause" for failure to attend, cooperate with, or fully participate in, a medical arbiter examination, are matters for ARU (on behalf of the Director) to determine. Citing ORS 656.268(8)(e), OAR 438-012-0060(6), and OAR 436-030-0165(8), the Board noted that, when referring the claim to the Director for the appointment of a medical arbiter, it assumes that ARU will follow its standard practices and procedures when processing Own Motion claims, which includes a determination of whether any missed examinations should be rescheduled or whether an arbiter should issue a report based on a record review. *See Joseph D. Hapka*, 60 Van Natta 1872, *recons*, 60 Van Natta 2775 (2008); *Sandra L. Sanchez*, 60 Van Natta 217, *recons*, 60 Van Natta 426 (2008).

Claimant not unequivocally entitled to an arbiter exam, but rather an arbiter report.

Applying those principles to the case at hand, the Board held that claimant was not unequivocally entitled to a medical arbiter *examination* but, rather, an arbiter's *report*. In reaching that conclusion, the Board observed that ARU's initial notification letter (properly sent to claimant's last known address) was also sent to claimant's counsel, and that there was no contention that her attorney did not receive that notice. Further noting that there was no contention that ARU's

second notice (that a record review would be performed) was not received, the Board found that neither claimant nor her attorney objected to a record review before the issuance of the medical arbiter report.

Under such circumstances, the Board determined that ARU's processing of claimant's arbiter request was consistent with its standard practices when a claimant does not attend a scheduled examination and does not object to a "record review" prior to the issuance of an arbiter report. Consequently, the Board denied claimant's request for an arbiter examination.

APPELLATE DECISIONS UPDATE

Course & Scope: Physician's Injury Occurred While "On Call" - "Going & Coming" Rule Not Applicable

Physician fell in hospital parking lot before "rounds" after turning on "page" to begin work day.

SAIF v. Massari, 291 Or App 349 (April 18, 2018). The court affirmed the Board's order in *Christopher M. Massari*, 67 Van Natta 2129 (2016), previously noted 34 NCN 12:3, that held that a physician's leg injury, which he sustained when he fell in the parking lot of the hospital where he was going to make his rounds occurred in the course of his employment because he had already turned on his pager and begun his work day. On appeal, the carrier asserted that the "going and coming" rule precluded the compensability of claimant's injury because he had not performed any work at home after he turned on his pager and was simply going to work when his injury occurred.

The court disagreed with the carrier's assertion. Citing *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 598 (1997), the court stated that an injury occurs in the course of employment if it takes place during a period of employment, at a place where the worker reasonably may be expected to be, and while the worker is fulfilling duties of the employment or doing something reasonably incidental to the employment. Relying on *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 526-27 (1996), the court noted that injuries suffered when a worker is traveling to or from work generally are excluded from the course of employment because, during that time, the worker is not rendering a service to the employer. Referring to *U.S. Bank v. Pohrman*, 272 Or App 31, 44, *rev den*, 358 Or 70 (2015); and *Enterprise Rent-A-Car Co. of Oregon v. Frazer*, 252 Or App 726, 731 (2012), *rev den*, 353 Or 428 (2013), the court reiterated that the "going and coming" rule generally does not apply when the worker, although not engaging in his/her appointed work activity at a specific moment in time, still remains in the course of employment and, therefore, has not left work; *i.e.*, when the worker is "still 'on duty' and otherwise subject to the employer's direction and control."

Injury occurred when going to work is compensable if the worker is within the employer's direction and control.

Turning to the case at hand, the court acknowledged the carrier's contention that claimant had not been working at home and had not been paged at the time of his injury. Nonetheless, citing *Robinson v. Nabisco, Inc.*, 331 Or 178, 189 (2000); *Andrews v. Tektronix, Inc.*, 323 Or 154, 163 (1996); and *Frazer*, 252 Or App at 731, the court reasoned that such circumstances were not determinative because an injury incurred when the worker is going to work is compensable if the worker is within the employer's direction and control at the time of the injury.

Work shift had begun when claimant turned on pager and had responsibility to respond to a page.

Applying those principles to the present case, the court noted that, at the time of his injury, claimant's shift had begun and he had a responsibility to respond to a page within a short period of time. Determining that those facts supported the Board's findings that claimant was on duty and within his employer's direction and control, the court held that such findings were likewise sufficient to support the Board's conclusion that claimant was within the course of his employment at the time of his injury.

Offset: PTD/TTD Benefits Paid During Same Period

Kiltow v. SAIF, 291 Or App 117 (April 4, 2018). Analyzing ORS 656.268(10) and ORS 656.206(2), the court affirmed the Board's order in *Gaylen J. Kiltow*, 67 Van Natta 639 (2015), previously noted 34 NCN 4:9, which held that claimant was not entitled to receive permanent total disability (PTD) benefits for a period in which he had already received temporary total disability (TTD) benefits. Noting that his attending physician had found him PTD as of a date during which claimant had also received TTD benefits, claimant argued that he was entitled to both TTD and PTD benefits until the issuance of a Notice of Closure (which issued after the expiration of an Authorized Training Program).

The court disagreed with claimant's contention. Citing *Gwynn v. SAIF*, 304 Or 345, 351 (1987), and *SAIF v. Grover*, 152 Or App 476, 480 (1998), the court reiterated the long-standing principle that a worker cannot, logically, be both permanently totally disabled and temporarily totally disabled at the same time. In support of that principle, the court noted that under both ORS 656.206(2) and ORS 656.210(1), PTD and TTD benefits are equal to 66-2/3 percent of a worker's wages.

Worker already receiving TTD, cannot also receive PTD for same period.

Applying these points and authorities, the court determined that a worker who is already receiving TTD compensation under ORS 656.268(10) may not receive additional PTD compensation under ORS 656.206(2). Under such circumstances, the court affirmed the Board's determination that, notwithstanding claimant's attending physician's opinion that claimant was PTD as of a date during which he had received TTD benefits, claimant was not entitled to PTD benefits until the claim was closed (and his receipt of TTD benefits had ended).

In reaching its conclusion, the court acknowledged that, pursuant to ORS 656.268(10), workers enrolled and actively engaged in vocational training are allowed to receive TTD compensation and "any permanent disability payments due for impairment." However, relying on ORS 656.214(1)(a), the court noted that permanent disability compensation "due for impairment" is a form of permanent *partial* disability compensation. Reasoning that ORS 656.268(10) is silent regarding permanent *total* disability, the court determined that nothing else in the statute appeared to abrogate the legal (and logical) principle that workers who are PTD cannot also be temporarily disabled.

Penalty: *Former* "268(5)(d)" - Based on Full Award of Compensation Due at Time of Unreasonable "NOC"

Carrier had erroneously calculated impairment findings.

Williams v. SAIF, 291 Or App 328 (April 11, 2018). Analyzing *former* ORS 656.268(5)(d) (now (5)(f)), the court, *per curiam*, remanded that portion of the Board's order in *James L. Williams*, 67 Van Natta 664, *on recon*, 67 Van Natta 1406 (2015), previously noted 34 NCN 4:11, that awarded a penalty for a carrier's unreasonable Notice of Closure (which had erroneously calculated claimant's permanent impairment findings) based only on the additional permanent impairment awarded when the miscalculation of the impairment findings was corrected by an Order on Reconsideration, rather than on the full award granted by the Order on Reconsideration. On appeal, claimant contended that the amount of the penalty under *former* ORS 656.268(5)(d) (now (5)(f)) is based on the correct full award of compensation due at the time of claim closure, and not merely on the additional amount determined to be owed claimant. In response, relying on *Wacker Siltronic Corporation v. Satcher*, 91 Or App 654, 658 (1988), the carrier argued that the penalty should bear a reasonable relationship to the alleged misconduct; *i.e.*, the additional compensation determined to be due as a result of the carrier's unreasonable calculation of the range of motion impairment findings.

Carrier did not dispute applicability of former "268(5)(d)," so court did not reach that issue.

Penalty under former "268(5)(d)" is based on total amount of compensation due at time of unreasonable NOC award.

Noting that the carrier did not dispute the applicability of *former* ORS 656.268(5)(d) or the Board's determination that the Notice of Closure was unreasonable, the court did not reach those issues. Consequently, assuming without deciding that the penalty provided by *former* ORS 656.268(5)(d) was applicable, the court concluded that claimant's interpretation of the statute was correct. Citing *Liberty Northwest Ins. Corp. v. Olvera-Chavez*, 267 Or App 55, 65 (2014), the court reiterated that a penalty under *former* ORS 656.268(5)(d) is based on the total amount of compensation due at the time of the unreasonable Notice of Closure.

Accordingly, the court remanded to the Board for a redetermination of the penalty based on the amount of compensation due as of the date of the Notice of Closure.

Subject Worker: Injury Before "Pre-Orientation/Training Session"

Meyers v. SAIF, 291 Or App 331 (April 18, 2018). Citing ORS 656.005(30), the court reversed the Board's order in *Mary K. Meyers*, 67 Van Natta 1725 (2015), previously noted 34 NCN 9:8, that had held that claimant's hip injury, which occurred when she was struck by a door while entering an office building to attend an orientation session before beginning paid training for her work as a telemarketer, was not compensable because her employment was contingent on her completion of the orientation paperwork and, as such, she had not been hired by the employer at the time of her injury and was not a subject worker. On appeal, claimant argued that the record established that she had accepted an offer to work (*i.e.*, at least to provide temporary services for

remuneration during the paid training) by showing up for the orientation (which simply involved the completion of personnel forms and was a mere formality) and training at the required day and time. Although acknowledging that the employer's manager's testimony that she had not been hired at the time of her injury, claimant asserted that the record required a finding that she was a "worker."

"Worker" requires agreement that employer will provide remuneration for services and employer's right to direct/control services.

The court determined that the Board's conclusion that claimant was not a "worker" at the time of her injury was not supported by substantial evidence or substantial reason. Citing ORS 656.005(30), the court stated that "worker" means any person who engages to furnish services for a remuneration, subject to the direction and control of an employer. Referring to *Hopkins v. Kobos Co.*, 186 Or App 273, 276-77 (2003), the court reiterated that the definition of "worker" contains two elements: an agreement between the claimant and the employer that the employer will provide remuneration for the claimant's services; and the employer's right to direct and control the services the claimant provides.

Undisputed evidence that (following application/ interview) claimant was invited to office to begin the paid training.

Turning to the case at hand, the court acknowledged the Board's finding that consistent with the employer's manager's view of when a person technically became an employee, claimant's employment was contingent on the completion of her orientation paperwork (including agreeing to the rules of the office). Nevertheless, the court reasoned that such a finding could not be squared with the undisputed evidence that (following her completion of a written application and interview) claimant was invited to come to the employer's office on the day of her injury for the orientation and paid training ready, willing, and able to show her identification, sign paperwork, and begin the training.

Manager testified that there would not have been a problem with claimant being hired.

The court reasoned that the Board's findings required the conclusion that claimant had been invited to attend the orientation *and* the paid training and that, but for the injury, she would have completed the orientation and begun the training. Moreover, the court noted that the employer's manager had testified that, "more than likely," most people who come for the orientation are offered a job, and "I wouldn't expect there would have been a problem with [claimant] being hired."

In light of such evidence and the Board's findings, the court determined that the Board's conclusion that claimant was not a "worker" at the time of her injury within the meaning of ORS 656.005(30) was not supported by substantial evidence or substantial reason. Consequently, the court reversed and remanded.

APPELLATE DECISIONS
COURT OF APPEALS

Combined Condition: "Ceases" Denial Under "262(6)(c)" - "Otherwise Compensable Injury" (Accepted Condition)

Zinser-Rankin v. SAIF, 291 Or App 495 (April 25, 2018). The court, *per curiam*, affirmed the Board's order in *Robin M. Zinser-Rankin*, 69 Van Natta 841 (2017), that applied the rationale expressed in *Brown v. SAIF*, 361 Or 241 (2017), in upholding a carrier's denial of claimant's combined cervical spine condition. The court cited *Fillinger v. The Boeing Co.*, 290 Or App 187 (2018).

Robles v. SAIF, 291 Or App 458 (April 25, 2018). On reconsideration of its earlier opinion, 289 Or App 441 (2017), which, on remand from the Supreme Court, 362 Or 38 (2017), had affirmed a Board order that upheld a carrier's denial of claimant's combined low back condition based on a finding that the "otherwise compensable injury" (*i.e.*, an accepted lumbar strain) had ceased to be the major contributing cause of his combined condition. The court allowed reconsideration to consider claimant's argument that the Board had erred in failing to consider L5-S1 radiculopathy and radiculitis conditions as accepted/ compensable conditions in analyzing the issue of whether the compensable injury was no longer the major contributing cause of the combined condition. *See* ORS 656.262(6)(c).

On reconsideration, claimant argued that the Board had incorrectly looked at the Notice of Acceptance instead of an earlier stipulation, which demonstrated that the carrier had accepted his radiculopathy as part of the accepted injury. The court disagreed with claimant's contentions.

First, the court noted that, in his briefing to the Board, claimant had relied on both the stipulation and acceptance notice, which did not differ materially in their wording. Observing that claimant had not argued to the Board that it should focus on the stipulation (as distinct from the acceptance notice), the court was not persuaded that the Board had erred in the manner asserted by claimant.

Board's reading of the acceptance notice and earlier stipulation was the most plausible interpretation.

Secondly, to the extent that claimant was asserting that the Board had erroneously interpreted the words of the acceptance notice (which largely tracked the words of the stipulation), the court considered both documents to be ambiguous. Noting that neither party had presented evidence to assist the Board in resolving the ambiguity, the court reasoned that the Board's reading of the documents was the most plausible of the interpretations advanced by the parties.

Consequently, subject to the aforementioned modification, the court adhered to its earlier opinion.

Extent: Impairment Findings - "Apportionment"

Eaken v. SAIF, 291 Or App 447 (April 18, 2018). The court, *per curiam*, affirmed a Board order that had affirmed an Order on Reconsideration, which in rating claimant's permanent impairment due to his compensable injury, had applied the "apportionment" rule under OAR 436-035-0013. The court cited *McDermott v. SAIF*, 286 Or App 406 (2017).