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BOARD NEWS

New ALJ - Halah Ilias

WCB is pleased to announce the appointment of a new Salem Administrative Law Judge Halah Ilias. Halah, a native Oregonian, obtained her J.D. from Lewis & Clark Law School. While in law school, she was selected to be a member of the Cornelius Law Society, was a member of the Ninth Circuit Review and Environmental Law Review, and served as a Legal Writing Fellow for Legal Analysis & Writing and Advanced Legal Writing. She began working in Oregon workers' compensation while interning at the State Accident Insurance Fund (SAIF) Corporation. After graduation, she continued to work for the SAIF Corporation as a trial attorney. Please join WCB in welcoming Halah Ilias to the Hearings Division.

Biennial Review/Attorney Fees/"388(4)"

As the Board begins its biennial review of its schedule of attorney fees under ORS 656.388(4), it is seeking written comments from parties, practitioners, and the general public. Those written comments should be directed to Kayleen Atkins, WCB's Executive Assistant at 2601 25th St. SE, Ste. 150, Salem, OR 97302, kayleen.r.atkins@oregon.gov, or via fax at (503)373-1684. The deadline for these comments is October 31, 2018.

These written comments will be posted on WCB's website. The comments will be compiled and presented for discussion at Board meetings, where the Members will also consider public testimony. In establishing its attorney fee schedules, the Members shall also consult with the Board of Governors of the Oregon State Bar, as well as consider the contingent nature of the practice of workers' compensation law, the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees earned by attorneys for insurers and self-insured employers. See ORS 656.388(4), (5).

Announcements regarding Board meetings will be electronically distributed to anyone who has registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>.

Own Motion: Practice Tips

To assist practitioners and carriers in processing/addressing Own Motion-related claims/issues, the Own Motion Unit has compiled the following practice tips.

APPELLATE DECISIONS**Court of Appeals (Cont.)**

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1. To begin, if the dispute concerns a denial (express or *de facto*) regarding the compensability of, or responsibility for, a claim, it is premature to seek Own Motion relief from a carrier or the Board's Own Motion Unit. Instead, a request for hearing may be filed with the Hearings Division.
2. When a claimant is seeking compensation (other than medical services) on an Own Motion claim and there is no compensability/responsibility dispute, a request for Own Motion relief may be directed to the Own Motion Unit. No hearing request with the Hearings Division should be filed. The request for Own Motion relief can be made in a letter to the Board's Own Motion Unit.
3. When a claimant requests reopening of an Own Motion claim, the carrier is required to either voluntarily reopen the claim using <https://wcd.oregon.gov/forms/Pages/forms.aspx> or provide a recommendation to the Board using: <https://www.oregon.gov/wcb/Documents/wcbform/omrecommedation2006b.pdf>. See OAR 438-012-0030. When submitting a reopening recommendation to the Board, the carrier is required to provide the following relevant documentation:
 - All acceptance notices.
 - All prior claim closure documents (Determination Orders, Notices of Closure, Reconsideration Orders).
 - Current medical reports addressing the reopening request.
 - Any information regarding claimant's status in the workforce.
4. When a claimant requests review of an Own Motion Notice of Closure, the carrier is required to provide to the Board all documents regarding the closure and prior PPD awards. These include (but are not limited to):
 - All acceptance notices, and reopening documents (voluntary and by the Board).
 - The current Own Motion Notice of Closure.
 - Prior Determination Orders, Notices of Closure, and Reconsideration orders.
 - All prior evaluator's worksheets regarding calculation of PPD.
 - Prior litigation orders and settlement documents.
 - All physician reports and chart notes addressing the current claim closure and permanent impairment.
5. Other types of requests regarding an Own Motion claim should be addressed to the Board's Own Motion Unit. Examples include:
 - A carrier's refusal to voluntarily reopen an Own Motion claim or submit an Own Motion Recommendation following a compensability determination.
 - A carrier's refusal to pay temporary disability benefits on a reopened claim, or a dispute regarding the temporary disability rate calculation.
 - A carrier's refusal to close an Own Motion claim.

If you have any questions regarding Own Motion claim processing matters, you may contact the Own Motion Unit at 503-934-0113.

CASE NOTES

Extent: Impairment Findings - “Surgery-Related” Impairment Due to “Combined Condition” - Denied Condition as of Claim Closure - Not Ratable Impairment - “268(1)(b)”/“035-0014(4)”

Fred D. Harris, 70 Van Natta 1105 (September 24, 2018). Applying ORS 656.268(1)(b), and OAR 436-035-0014(4), the Board held that, in rating claimant’s permanent impairment for an accepted wrist sprain and carpal tunnel syndrome (CTS), his surgery for a previously accepted combined arthritic wrist condition could not be considered because, before closure of his claim, the carrier had denied the combined condition. After claimant fell at work, the carrier accepted multiple conditions, which included a wrist sprain and CTS, along with a combined condition (comprised of the accepted wrist sprain/CTS and a preexisting arthritic wrist condition). Claimant also underwent a wrist fusion and carpal tunnel release surgery. Before closure of the claim, the carrier denied claimant’s combined wrist condition, asserting that his preexisting conditions were the major contributing cause of his current wrist condition. When a Notice of Closure awarded no permanent impairment, claimant requested reconsideration (and a medical arbiter exam), which resulted in an Order on Reconsideration that awarded 3 percent permanent impairment for sensory loss due to his accepted CTS. Claimant requested a hearing, contending that he was also entitled to a permanent impairment award for his range of motion (ROM) findings and surgery because they were attributable to his combined condition (which was accepted at the time of his surgery).

The Board disagreed with claimant’s contention. Citing ORS 656.268(1)(b), the Board stated that, when a claim is closed because the accepted injury is no longer the major contributing cause of the worker’s combined condition, and there is sufficient information to determine permanent disability, the likely permanent disability that would have been due to the current accepted condition shall be estimated. Relying on *Jonathan E. Ayers*, 56 Van Natta 1103, 1104, *recons*, 56 Van Natta 1470 (2004), the Board reiterated that when a combined condition has been accepted and denied before claim closure, any impairment related to the combined condition is not considered. Instead, referring to OAR 436-035-0014(4), the Board noted that the current accepted condition is the component of the otherwise denied combined condition that remains related to the compensable injury.

Turning to the case at hand, the Board acknowledged that claimant’s wrist surgery was performed while his combined wrist condition was accepted. Nonetheless, reasoning that claimant’s combined condition had been denied before claim closure and observing that the arbiter’s findings (with the exception of sensory loss) had not attributed claimant’s surgery-related impairment to his accepted wrist sprain/CTS, the Board concluded that he was not entitled to permanent impairment for his surgery or any other findings attributable to his

Combined condition was accepted at time of surgery, but denied prior to claim closure.

Any permanent impairment related to denied combined condition is not considered.

Arbiter did not attribute any surgery-related impairment to accepted sprain/CTS.

denied combined condition. See *Ronald R. Steineckert*, 65 Van Natta 1386 (2013); *Lonny D. Clark*, 58 Van Natta 1536, 1541, *recons*, 58 Van Natta 2341 (2006).

New/Omitted Medical Conditions: Separate Psychological Conditions - Analyzed Under Different “Compensability” Standards - “PTSD” as a “Mental Disorder” Under “802(3)” - “Adjustment Disorder” as a “Consequential Condition” Under “005(7)(a)(A)”

Timothy L. Ogden, 70 Van Natta 1039 (September 5, 2018). Applying ORS 656.005(7)(a)(A) and ORS 656.802(3), the Board set aside a carrier’s denials of claimant’s new/omitted medical condition claims for post-traumatic stress disorder (PTSD) and an adjustment disorder, analyzing each claimed condition under a separate compensability standard (“mental disorder” and “consequential condition”). After claimant suffered multiple work-related injuries when his tractor-trailer flipped over, he filed new/omitted medical condition claims for an adjustment disorder and PTSD. His psychologist attributed the major cause of claimant’s adjustment disorder to chronic pain from his multiple accepted conditions. Regarding the PTSD, the psychologist related the claimed condition to the traumatic work event itself.

The Board found both claimed conditions compensable. Citing ORS 656.005(7)(a)(A), *Boeing Co. v. Young*, 122 Or App 591, 596 (1993), and *Andrew J. Winsor*, 64 Van Natta 892, 892 n 2 (2012), the Board stated that a mental disorder caused by a compensable injury is analyzed as a consequential condition. Relying on ORS 656.005(7)(a)(A), and *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992), the Board noted that a consequential condition is compensable if the compensable injury is the major contributing cause of the condition. On the other hand, referring to ORS 656.802(3), *Fuls v. SAIF*, 321 Or 151 (1995), *Boeing Co. v. Viltrakis*, 112 Or App 396 (1992), and *Lisa Kirkelie*, 70 Van Natta 136 (2018), the Board reiterated that, if the record establishes that a claimed mental disorder is directly related to the work event, the claim must be analyzed as an occupational disease claim under ORS 656.802(3).

Adjustment disorder due to chronic pain from accepted condition subject to “consequential condition” analysis.

“PTSD” due to work-related MVA – subject to “mental disorder” analysis.

Turning to the case at hand, the Board found that, based on the persuasive opinion from the psychologist, the adjustment disorder was the result of pain symptoms from claimant’s accepted conditions. Consequently, the Board analyzed the compensability of that claimed condition under the “consequential condition” standard set forth in ORS 656.005(7)(a)(A). Regarding the claimed PTSD, the Board reasoned that the psychologist had persuasively related the cause of that condition to the “traumatic event” itself. Therefore, the Board determined that the PTSD condition was subject to the “mental disorder” standard prescribed in ORS 656.802(3).

Applying those separate standards to the present case, the Board concluded that the opinion from claimant's psychologist persuasively established that the major contributing cause of claimant's adjustment disorder was his accepted conditions and that his claimed PTSD condition satisfied all of the statutorily prescribed requirements for a "mental disorder" under ORS 656.802(3). Accordingly, the Board held that the claimed conditions were compensable as analyzed under their separate statutory standard.

Own Motion: PPD - "278(2)(d)" Limitation - Must Be Applied, Even if Carrier Untimely Submits "Prior PPD Award" Information - Penalty/Attorney Fee For "Rule Violations" Assessed - "012-0017(1)" / "012-0110(1)"

Doug R. Cooley, 70 Van Natta 1072 (September 18, 2018). In an Own Motion Order, applying ORS 656.262(11)(a), OAR 438-012-0017(1), OAR 438-012-0060(3), and OAR 438-012-0110(1), the Board assessed a penalty and attorney fee for a carrier's unreasonable failure to timely provide discovery in response to claimant's request for review of an Own Motion Notice of Closure (NOC). In response to claimant's request of the NOC, the Board had notified the carrier of its responsibility to submit, within 14 days, copies of all relevant materials pertaining to claimant's condition(s) at the time of the closure notice (which necessarily included all prior closures, worksheets and litigation orders). The carrier's initial submission did not include all prior Notices of Acceptance or prior NOCs or orders regarding permanent disability evaluations concerning the claim. Instead, the carrier submitted these previous "permanent disability-related" materials with its respondent's brief. Objecting to the carrier's submissions as untimely, the claimant asserted that the limitation in ORS 656.278(2)(d) did not apply because the record did not establish that there had been a prior permanent disability award concerning the claim.

The Board considered the carrier's untimely submissions and applied the permanent disability limitation under ORS 656.278(2)(d). Referring to the aforementioned statute, the Board reasoned that it was statutorily required to apply the limitation when evaluating a claimant's permanent disability attributable to a "post-aggravation rights" new/omitted medical condition involving the same body part as a prior permanent disability award on the claim. In any event, relying on *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985), and *Toby J. Vance, Sr.*, 68 Van Natta 1635 (2016), the Board observed that it may take administrative notice of agency orders, such as Determination Orders and Orders on Reconsideration, as well as Board and Own Motion orders.

Turning to the case at hand, the Board noted that the untimely submitted documents related to claimant's permanent disability and previous awards. Under such circumstances, the Board concluded that the documents were necessary to apply the limitation under ORS 656.278(2)(d) concerning prior permanent disability awards to the same body part.

Carrier's initial submission of record did not include all prior closure notices/awards.

Claimant asserted "278(2)(d)" limitation should not apply.

Board required to apply the limitation despite carrier's untimely submissions.

The Board next addressed the carrier's untimely submission of the aforementioned documents. Referring to OAR 438-012-0017(1) and OAR 438-012-0060(3), the Board noted that a carrier is obligated to fully and timely comply with the Board's Own Motion rules and requests, and submit all evidence pertaining to a claimant's condition at the time of claim closure, including any evidence relating to permanent disability. Citing OAR 438-012-0110(1), the Board stated that a carrier's failure to comply with these responsibilities, if found unreasonable or unjustified, may result in the imposition of penalties and attorney fees pursuant to ORS 656.262(11) and OAR 438-015-0110.

Carrier penalized for discovery rule violations.

Turning to the present case, the Board noted that the carrier conceded that it failed to timely comply with the Board's Own Motion rules, but explained that it had made a "clerical error." Considering the carrier's responsibility to submit such materials consistent with the Board's Own Motion rules, as well as to timely respond to the Board's letter reminding the carrier of its discovery obligations, the Board found that the carrier had no legitimate doubt as to its responsibilities. Consequently, the Board concluded that the carrier had unreasonably failed to comply with the Board's Own Motion rules and, as such, awarded a penalty (based on the increased permanent disability granted in its order), as well as a carrier-paid attorney fee. See ORS 656.262(11)(a); OAR 438-012-0110(1); OAR 438-015-0110; *Shelley A. McDaniel*, 65 Van Natta 1699, 1703 (2013).

In reaching its conclusion, the Board acknowledged the parties' reference to a "civil penalty" under ORS 656.745(2)(b) for the carrier's rule violations. However, referring to *Tina M. Nattell*, 60 Van Natta 1050, 1056 n 5 (2008), the Board noted any "civil penalty" rested with the Director.

Subject Worker: "Right to Control"/
"Nature of Work" Tests - Intermittent
Maintenance Work for Trucking Business -
Not "Sole Proprietor"/"Independent
Contractor" - "005(30)"/"027(7)(a)"/
"670.600(2)"

Claimant intermittently performed specific tasks for lump sum payments.

Warren Nordland, 70 Van Natta 1028 (September 4, 2018). Applying ORS 656.005(30), ORS 656.027(7)(a), and ORS 670.600(2), the Board held that claimant was a "subject worker" for a trucking business because he performed several truck-related maintenance tasks that were subject to the business's right to direct and control, as well as a regular part of the business, even though he performed such duties on an intermittent basis for a specific payment. Claimant performed truck-related tasks (maintenance, repair, and tarping) in return for separate lump sum payments. Although he knew how to perform some of the tasks, the owner also informed/demonstrated them to him, as well as furnished the tools. After suffering a leg injury while performing these tasks, claimant filed a claim, which was denied on the basis that he was not a "subject worker."

The Board set aside the denial. Citing ORS 656.005(30), the Board stated that a “worker” is a person who engages to furnish services for remuneration, subject to the direction and control of an employer. Referring to *S-W Floor Cover Shop v. Nat’l Council on Comp. Ins.*, 318 Or 614, 630-31 (1994), and *Michael R. Dunham*, 60 Van Natta 3466, 3470 (2008), the Board identified the following factors under the judicially created “right to control” test to establish an employment relationship: (1) the right to control the details of the method of performance; (2) the employer’s control over work schedules; (3) the right to terminate employment; (4) the furnishing of equipment; and (5) the method of payment.

Trucking business controlled work performance and schedule, and furnished equipment – most “right to control” factors satisfied..

Turning to the case at hand, the Board found that the trucking business controlled the method of claimant’s performance, his work schedule, and furnished the equipment. Considering that he was paid for each task, the Board acknowledged that the “method of payment” factor weighed against an employment relationship. Also, the Board considered the “right to fire” factor to be neutral. Although finding that the trucking business had a right to control claimant’s performance in most respects, the Board turned to the “nature of the work” test.

Citing *Robert A. Medina*, 62 Van Natta 2734, 2738-39 (2010), the Board reiterated that the “nature of the work” test involves consideration of: (1) the character of the claimant’s work; *i.e.*, how skilled it is, how much of a separate calling it is, and the extent to which it may be expected to carry its own accident burden; and (2) the relationship of the claimant’s work to the employer’s business; *i.e.*, how much of it is a part of the employer’s regular business, whether it is continuous or intermittent, and whether the duration is sufficient to be hiring of continuous services, rather than contracting for a particular job.

Claimant’s truck maintenance work (albeit intermittent) was essential and regular part of the trucking business – “nature of the work” test met.

Applying the “nature of the work” test to the present case, the Board acknowledged that claimant’s work for the trucking business was intermittent and involved a few distinct tasks for which he was paid a specific sum. Nonetheless, the Board reasoned that such work concerned an essential and regular part of the business, which required the services claimant had performed. Likewise, the Board considered it reasonable to expect that claimant would not carry his own accident insurance. Consequently, the Board concluded that claimant’s services for the trucking business supported an “employer-employee” relationship.

Claimant not a “sole proprietor/independent contractor.”

Under such circumstances, applying both the “right to control” and “nature of the work” tests, the Board was persuaded that claimant was a “worker” under ORS 656.005(30). Furthermore, because claimant was not free from the trucking business’s direction and control, the Board determined that he was not a “sole proprietor/independent contractor” and, as such, was not a “non-subject worker” under ORS 656.027(7)(a). See ORS 670.600(2)(a). Alternatively, the Board noted that the record did not establish that claimant was customarily engaged in an independently established business and, likewise, did not qualify as an “independent contractor” under ORS 670.600(2)(b).

**APPELLATE DECISIONS
COURT OF APPEALS**

Attorney Fee: Board Review - Claimant's
Respondent's/Cross-Appellant's Brief
Stricken - Board Affirms ALJ's
Compensability Decisions - Lack of Brief
Relevant to *Amount* of, Not Entitlement to,
Attorney Fee - "386(1)" / "382(2)"

Schommer v. Liberty Northwest Ins. Corp., 294 Or App 147 (September 19, 2018). Analyzing ORS 656.386(1) and ORS 656.382(2), the court reversed that portion of the Board's order in *Craig Schommer*, 68 Van Natta 1856 (2016), *on recons*, 69 Van Natta 352 (2017), which declined to award a carrier-paid attorney fee when, in response to a carrier's request and claimant's cross-request regarding an ALJ's compensability decisions, the Board affirmed the ALJ's decision, but did not award a carrier-paid attorney fee because his respondent's/cross-appellant's brief had been stricken and not considered. On appeal, claimant contended that, under the plain terms of ORS 656.382(2) and ORS 656.386(1), as construed by the Supreme Court, his *entitlement* to attorney fees did not depend on his filing a brief.

The court held that the Board had erred in reaching such a conclusion. Referring to *Shearer's Foods v. Hoffnagle*, 363 Or 147, 154 (2018), the court summarized the Supreme Court's reasoning that, under ORS 656.386(1), a claimant was entitled to a carrier-paid attorney fee when it was undisputed that the underlying case involved a denied claim and the claimant had "finally prevailed" against that denial when the Supreme Court denied the carrier's petition for review of a Court of Appeals compensability decision. (The court also observed that the Supreme Court's decision in *Hoffnagle* had ruled that legislative amendments to ORS 656.386(1) had superseded its holding in *Shoulders v. SAIF*, 300 Or 606 (1986), on which the Board had relied in denying claimant's attorney fee request.) The court further noted the Supreme Court's conclusion that the claimant's lack of a written response to the carrier's petition for Supreme Court review bore on the *amount* of a reasonable fee, but not on the claimant's *entitlement* to such a fee. *Id.*, 363 Or at 155-56. Similarly, citing *SAIF v. DeLeon*, 352 Or 130, 143 (2012), the court stated that the Supreme Court had determined that a claimant was entitled to a carrier-paid attorney fee when a carrier initiates one of the listed forms of request for review of a claimant's award under ORS 656.382(2) and the final tribunal to consider the issue determines that the award should not be disallowed or reduced.

Turning to the case at hand, the court reasoned that a claimant's entitlement to attorney fees under either ORS 656.382(2) or ORS 656.386(1) did not turn on what particular services the claimant's counsel performed and, in particular, did not depend on whether claimant's counsel had filed a brief in a particular tribunal. Rather, the court explained that what matters is that the case involved the sort of claim or issue identified in those statutes, and whether

Lack of response bore on amount of reasonable fee, not entitlement to a fee.

Entitlement to an attorney fee did not depend on the filing of claimant's brief.

Untimely filed brief (or no brief) was a factor in considering reasonable attorney fee award.

the claimant ultimately prevailed. As illustrated by the *Hoffnagle* rationale, the court determined that whether a claimant's counsel untimely filed a brief (or did not file a brief at all) was a factor for consideration in assessing the appropriate amount of an attorney fee award.

Based on such reasoning, the court held that the Board had erred in concluding that claimant's failure to timely file a brief meant that he was not entitled to a carrier-paid attorney fee under either ORS 656.382(2) or ORS 656.386(1). Consequently, the court remanded for reconsideration of claimant's attorney fee request.

Medical Service: Injury During Medical Treatment for Compensable Injury

SAIF v. Rolen, 294 Or App 258 (September 26, 2018). The court, *per curiam*, affirmed a Board order that affirmed and adopted an ALJ's order that had set aside a carrier's medical services denial of claimant's gastroscopy. The court cited *Barrett Business Services v. Hames*, 130 Or App 190, 193, *rev den*, 320 Or 492 (1994) (when a new injury is the direct result of reasonable and necessary treatment of a compensable injury, the compensable injury is the major contributing cause of the new injury, which is compensable as a consequential condition).

Substantial Evidence/Reasoning: "Law of Case" Doctrine - Only Pertains to Prior Ruling/Decision From Appellate Court, Not Administrative Body

SAIF v. Maldonado, 294 Or App 252 (September 26, 2018). The court reversed the Board's order in *Ramon M. Maldonado*, 68 Van Natta 1024 (2016), that had set aside a carrier's denial of claimant's new/omitted medical condition claim for low back spondylosis conditions. In reaching its conclusion, the Board had discounted physicians' opinions advanced by the carrier, reasoning that the analysis contained in those opinions were "contrary to issues decided as a matter of law" in the parties' previous stipulation (in which the carrier had agreed to accept claimant's lumbar strain/sprain, L3-4 disc protrusion, and L5-S1 disc protrusion) and, as such, were "inconsistent with the 'law of the case.'" On appeal, the carrier contended that the Board had erred in applying the "law of the case" doctrine to the present case.

The court agreed. Citing *Reynolds v. USF Reddaway, Inc.*, 283 Or App 21, 24, *rev den*, 361 Or 311 (2017), the court reiterated that the "law of the case" doctrine "is preclusive only with respect to a prior ruling or decision of an appellate court as opposed to a trial court or administrative body. Referring to *ILWU, Local 8 v. Port of Portland*, 279 Or App 157, 164, *rev den*, 360 Or 422 (2016), the court explained that the doctrine does not apply in the context of two separate administrative proceedings where the administrative body is not barred from overruling its previous rulings in separate cases.

Board had discounted physicians' opinions that were contrary to the parties' previous stipulation.

"Law of case" doctrine pertains to prior ruling/decision of appellate court, not administrative body.

Because parties' prior stipulation was not an appellate court ruling/decision, "law of case" doctrine had no application.

Turning to the case at hand, the court noted that the Board had relied on the "law of the case" doctrine to reject the physicians' opinions as being inconsistent with the parties' previous stipulation. Because the stipulation was not an appellate court ruling or decision, the court held that the Board had erred in applying the "law of the case" doctrine. Consequently, the court remanded for the Board to consider whether the physicians' opinions were persuasive without application of the "law of the case" doctrine.

Substantial Evidence/Reasoning: WCD's "Good Cause" Finding - Untimely Hearing Request From "Medical Bill" Dispute - Lacked Substantial Evidence That No "Responsible" Person For Medical Service Provider Received Timely Notice of "Administrative Decision" Before Expiration of Appeal Rights - "183.482(8)(c)"

WCD found medical service provider officials established that provider had good cause for untimely filed hearing request from WCD's "medical fee dispute" decision.

Angel Medflight Worldwide Air Ambulance Service v. SAIF, 293 Or App 710 (September 6, 2018). Analyzing OAR 436-001-0019(7)(b), the court reversed a Workers' Compensation Division (WCD) order that had found that a medical service provider had established "good cause" for its untimely request for hearing from a WCD administrative order which had resolved a medical fee dispute between the provider and the carrier. In reaching its conclusion (which had reversed an ALJ's proposed order finding that the provider had not established "good cause"), WCD's final order determined that representations from officials of the medical service provider persuasively established that they had not received a copy of WCD's administrative order until after the 30-day appeal period from that order had expired and, as such, excusable neglect for the provider's untimely hearing request had been proven.

On appeal, the carrier contended that the record was insufficient, as a matter of law, to support WCD's "good cause" decision because a reasonable person could not find that the provider had demonstrated by a preponderance of evidence that the missed deadline was the fault of "someone who was not responsible for deciding whether a request for hearing should be filed." The court agreed with the carrier's contention.

Reviewing for substantial evidence and substantial reasoning under ORS 183.482(8)(c), the court stated that the medical service provider had the burden to present evidence sufficient to support findings from which WCD (on behalf of the Director) could determine that good cause existed. See *Cogswell v. SAIF*, 74 Or App 234, 237 (1985). Referring to *Brown v. EBI Companies*, 289 Or 455, 460 (1980), the court observed that "it is * * * within the range of discretion to relieve a claimant from a default caused by the mistake or neglect of an employee who is *not* charged with the responsibility for recognizing and correctly handling the message that constitutes the legally crucial notice which the time

WCD's finding that two representatives of medical provider had not received decision did not resolve whether some other responsible person had received it.

Record did not support WCD's conclusion that no "responsible" official for the provider had received notice of administrative decision.

to respond is measured." Relying on *Campbell v. Employment Dept.*, 256 Or App 682, 683 (2013), the court reiterated that a factual finding is supported by substantial evidence so long as "the record, [when] viewed as a whole, would permit a reasonable person to make that finding."

Turning to the case at hand, the court acknowledged WCD's finding that two "responsible" representatives of the medical service provider had not received a copy of WCD's administrative decision before the 30-day appeal had expired. Nonetheless, the court explained that such a finding had not resolved the dispositive question, which was whether some other "responsible" person employed by the medical service provider *had* received WCD's decision before expiration of the appeal period.

Based on its review of the record, the court noted the absence of an indication that the two officials from the provider were the only such "responsible" representatives, nor that whomever might have handled and "lost" the order was not also such a person. (It was undisputed that WCD's administrative decision had been mailed to the correct address for the medical service provider and that the mailing had not been returned to WCD as undeliverable or unclaimed.) Moreover, the court noted that the record referred to another person working for the provider during the relevant time in question (who had "just" been assigned to the case), which naturally raised the question of the identity of the representative's predecessor and whether that person had received the order before the appeal period had expired.

Reasoning that the provider had not submitted evidence to explain the aforementioned gaps in the chronological record, the court determined that no reasonable person could conclude that the provider had carried its burden to demonstrate a probability that WCD's administrative decision was misplaced by someone who "was not responsible for deciding whether a request for hearing should be filed." See *Brown*, 289 Or at 460. Accordingly, holding that substantial evidence did not support WCD's "good cause" finding (on behalf of the Director), the court remanded.