



# News & Case Notes

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## BOARD NEWS

### Board Meeting: Biennial Review/Attorney Fees/"388(4)"

The Board has scheduled a public meeting for the Members to review and discuss written responses received in reply to the Board's request for comments regarding its biennial review of its schedule of attorney fees under ORS 656.388(4). These comments have been posted on WCB's website since the Board began requesting them in earlier August 2018.

The initial Board meeting has been scheduled for December 11, 2018, at the Board's Salem office (2601 25<sup>th</sup> St. SE), at 10 a.m. In addition to reviewing the submitted comments, the Members will consider testimony and other written comments presented at, or in advance of, the meeting. Those written comments should be directed to Kayleen Atkins, WCB's Executive Assistant, at 2601 25<sup>th</sup> St. SE, Ste. 150, Salem, OR 97302, [kayleen.r.atkins@oregon.gov](mailto:kayleen.r.atkins@oregon.gov), or via fax at (503)373-1684. Arrangements are also being made at each permanently staffed Board office (Durham, Eugene, and Medford) to allow attendees to view the Board's Salem meeting and participate remotely.

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). Consistent with this statutory directive, the Members welcome submissions from parties, practitioners, organizations, governmental bodies, and the general public, which address these mandated considerations.

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

### 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

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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 18-0239), found on the Department of Consumer and Business Services (DCBS) website at <http://www.oregon.gov/DCBS/jobs/Pages/jobs.aspx>, contains additional 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 January 9, 2019. DCBS is an equal opportunity, affirmative action employer committed to workforce diversity.

## ALJ Anonymous Survey - Coming Soon!

WCB’s 2018 ALJ Anonymous Survey will be sent electronically to practitioners next month. Your participation in WCB’s annual ALJ survey is greatly appreciated.

## Rulemaking Hearing: February 1, 2019 – Proposed Rule Regarding “Translation of Written Documents” (OAR 438-007-0045); Proposed Amendments Concerning “Notices” of Denials/Acceptances (OAR 438-005-0050, -0053, -0055, - 0060)

At their November 27 meeting, the Members proposed an administrative rule regarding the “Translation of Written Documents” (OAR 438-007-0045) and amendments to its existing rules concerning “Notices” of Acceptances/Denials (OAR 438-005-0050, -0053, -0055, -0060). The Members took these actions after considering a report from their Advisory Committee. The committee had been appointed to consider concepts submitted by the Oregon State Bar’s Access to Justice Committee. The Members wish to extend their grateful appreciation to the Advisory Committee (Jennifer Flood, ombudsman for injured workers, Krishna Balasubramani, attorney at law, Bin Chen, attorney at law, Katherine Krametbauer, attorney at law, Matthew U’Ren, attorney at law, Ana Maria Meneses-Henry, interpreter, and ALJ Bruce Smith (facilitator)).

Proposed OAR 438-007-0045 is designed to prescribe the procedures concerning the admission of documents at hearing that contain language other than English. Specifically, the proposed rule requires that any non-English language must be translated. In addition, the proposed rule prescribes the manner in which such translations may be accomplished, as well as procedures for assigning costs for obtaining the translations or resolving any disputes regarding the translations. The proposed further provides that translation costs incurred by a claimant are subject to reimbursement under ORS 656.386(2).

The proposed amendments to OAR 438-005-0050, -0053, -0055, and -0060 are designed to require that all acceptance/denial notices comply with

proposed OAR 436-001-0600 (Bulletin 379), which the Workers' Compensation Division will be proposing to mandate that important claim processing documents such as these notices (as well as others) include a "multi-language help-page" informational insert that notifies non-English speaking workers of the importance of such documents, including access to the Ombudsman for Injured Workers.

Notice of this rulemaking action has been filed with the Secretary of State's office. Electronic copies of these rulemaking materials are available on WCB's website at [www.wcb.oregon.gov](http://www.wcb.oregon.gov) (under the category "Laws and rules"). Copies will also be distributed to parties and practitioners on WCB's mailing list.

A rulemaking hearing for these proposed rule amendments has been scheduled for February 1, 2019, at 10 a.m. at the Board's Salem office (2601 25th St. SE, Ste. 150, Salem, OR 97302-1280). Any written comments submitted in advance of the hearing may be directed to Trisha Fleischman, the rulemaking hearing officer. Those comments may be mailed to the above address, faxed to 503-373-1684, e-mailed to [RuleComments.WCB@oregon.gov](mailto:RuleComments.WCB@oregon.gov) or hand-delivered to a permanently staffed Board office (Salem, Portland, Eugene, Medford).

## Advisory Committee Meeting: December 17, 2018 - "Subpoena" Concerning "Individual Identifiable Health Information" – "Notice to Recipient/Timely Objection" - "007-0020(6)(b)"

A Board advisory committee has scheduled a meeting to consider a rule concept regarding OAR 438-007-0020(6), which concerns obtaining "individual identifiable health information" through a subpoena. Members of the advisory committee are: Marcia Alvey, Stan Fields, Jennifer Flood, Georgia Green, Vincci Lam, Jenny Ogawa, Steve Schoenfeld, Larry Schucht, and Joy Dougherty (facilitator).

The rule concept (which was submitted by Marcia Alvey, attorney at law) suggests including in OAR 438-007-0020(6)(b) the language prescribed in OAR 438-007-0020(6)(f) (which requires including in the subpoena a notice to the recipient that, if it receives a timely objection from the individual whose information is being subpoenaed, the information being sought shall be mailed to the Board's Salem office). The committee's meeting will be held at 9 a.m. on Monday, December 17, 2018, in Hearing Room G, at 16760 SW Upper Boones Ferry Rd., Ste. 220, Portland, OR 97224.

## CDA: Reconsideration – “10-Day” Period Expired on Saturday – Next Business Day, Monday, Final Day for Filing “Recon” Request/Addendum

*Board is authorized to reconsider a CDA if a motion is filed within 10 days of approval.*

*Michael York*, 70 Van Natta 1274 (November 26, 2018). Applying OAR 438-009-0035(1), and (2), the Board held that it was authorized to reconsider its prior approval of a Claim Disposition Agreement (CDA) and consider the parties’ proposed addendum because, although the 10-day “reconsideration” period from the CDA had expired on a Saturday, the addendum had been filed on the next business day, Monday.

Citing OAR 438-009-0035(1), (2), and *Josue Castillo*, 69 Van Natta 304 (2017), the Board stated that it was authorized to reconsider its approval of a CDA if a motion for reconsideration was filed within 10 days from the CDA’s approval. Relying on *Bunny G. Johnson*, 54 Van Natta 198, 199 n 1 (2002), the Board reiterated that, when the last day of an appeal period falls on a weekend or legal holiday, the appeal period runs until the end of the next business day.

*Because 10th day from Board CDA approval was a Saturday, addendum (which was filed on Monday) was timely and could be considered.*

Turning to the case at hand, the Board found that the parties’ proposed addendum to their approved CDA was filed on a Monday, which was the first business day after the expiration of the 10-day “reconsideration” period (which had been on the preceding Saturday). Interpreting the parties’ submission of the addendum as a motion for reconsideration of the previously approved CDA, the Board concluded that it was authorized to reconsider the CDA and approve the addendum because the reconsideration motion had been timely filed.

## Combined Condition: “Preexisting Condition” Includes Treatment/Disability for Previous “Out-of-State” Injury for Claimed Condition – “005(24)”, “005(7)(a)(B)”, “266(2)(a)”

*Bruce H. Wooley*, 70 Van Natta 1283 (November 30, 2018). Applying ORS 656.266(2)(a), ORS 656.005(7)(a)(B), and ORS 656.005(24), the Board held that a carrier’s denial of claimant’s knee injury claim (based on a contention that his otherwise compensable injury was not the major contributing cause of his disability/need for treatment for a combined condition) was not procedurally invalid because, although claimant’s “preexisting condition” was partially attributable to disability/treatment from a prior “out-of-state” work injury, the carrier had successfully met its burden of proving that claimant’s need for treatment/disability was due to combined condition that was not compensable. Prior to his work injury, claimant had received treatment for his knee as a result of an “out-of-state” injury. When the carrier denied claimant’s knee injury claim (contending that he sustained a “combined condition” for which the recent work injury was not the major contributing cause of his disability/need for treatment), claimant requested a

*“Out-of-State” work injuries/ resulting treatment qualify as “preexisting conditions.”*

*Compensability is threshold issue in resolving compensability/ responsibility dispute.*

*Physician with detailed, thorough, well- explained opinion more persuasive than attending physician’s opinion.*

*Because carrier met its burden of proof under “266(2)(a),” it was unnecessary to address responsibility.*

*Dissent found attending physician’s opinion persuasive based on advantageous position.*

hearing. Among other assertions, claimant asserted that the carrier’s denial was invalid because it had not issued a responsibility denial.

The Board disagreed with claimant’s assertion. Citing *Kirby v. SAIF*, 214 Or App 123, 128, *rev den*, 343 Or 363 (2007), the Board stated that “out-of-state” work injuries and resulting treatment qualify as preexisting conditions under ORS 656.005(24). Relying on *Jacalyn A. Mathews*, 52 Van Natta 1500 (2000), the Board reiterated that compensability is a threshold issue in resolving disputes regarding the compensability of, and responsibility for, denied conditions).

Turning to the case at hand, the Board found that, despite the attending physician’s opportunity to treat claimant over time, the physician’s conclusory and inadequately explained opinion was unpersuasive when compared when compared with the detailed, thorough, and well explained opinion from another physician, who had attributed the major contributing cause of claimant’s disability/need for medical treatment to a preexisting degenerative arthritic knee condition. See *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Weiland v. SAIF*, 63 Or App 810, 814 (1983); *Moe v. Ceiling Sys. Inc.*, 44 Or App 429, 433 (1980); *Abdennaim Bougzim*, 69 Van Natta 949, 954 (2017). Under such circumstances, the Board concluded that the carrier had persuasively established that claimant’s work injury was not the major contributing cause of his disability/need for treatment for his combined knee condition and, as such, the claimed condition was not compensable. ORS 656.005(7)(a)(B); ORS 656.266(2)(a).

In reaching its conclusion, the Board rejected claimant’s contention that the carrier was responsible for claimant’s preexisting injury to his knee because it had failed to disclaim responsibility. Noting that the carrier had denied the compensability of claimant’s knee injury and had successfully proven that the otherwise compensable injury had combined with a preexisting condition and that the injury was not the major contributing cause of claimant’s need for treatment/ disability for that combined condition, the Board reasoned that it was unnecessary to address a “responsibility” issue because the claimed condition was not compensable. *Kirby*, 214 Or App at 128; *Mathews*, 52 Van Natta at 1500.

Member Lanning dissented. Considering the attending physician’s focus on the cause of claimant’s current need for treatment, as well as the physician’s advantageous position as claimant’s treating physician, Lanning found the attending physician’s opinion more persuasive than the other physician’s opinion (which had appeared to focus on the cause of claimant’s condition, rather than the cause of his disability/need for treatment). *Dillon*, 172 Or App at 489; *SAIF v. Nehl*, 148 Or App 106, *recons*, 149 Or App 309 (1997); *Jaymin Nowland*, 63 Van Natta 1377, 1382 n 3 (2011); *Lowell P. Hubbell*, 62 Van Natta 2446, 2449-50 (2010). Under such circumstances, Member Lanning was not persuaded that the carrier had established that the work injury was not the major contributing cause of claimant’s disability/need for treatment for his combined knee condition.

## Medical Services: Denial of “Current” Medical Treatment – Not Invalid “Prospective” Denial

**Randy W. Collins**, 70 Van Natta 1224 (November 7, 2018). The Board held that a carrier’s denial of claimant’s “current need for treatment” did not constitute an invalid “prospective” denial of medical services because the denial did not deny an unclaimed “current condition” and did not purport to deny his future need for medical treatment. In response to claimant’s L5-S1 surgical procedure, the carrier issued a denial of his “current need for treatment” as unrelated to his accepted L5-S1 disc herniation. Claimant requested a hearing, contending that the denial was an invalid prospective denial or, alternatively, the surgery was caused (either in material or major part) by his accepted L5-S1 disc herniation.

The Board did not consider the denial to be invalid. Citing *Michael A. Norris*, 70 Van Natta 65, 69 (2018), and *Barbara J. Ferguson*, 63 Van Natta 2253, 2256 (2011), the Board reiterated that, in the absence of a claim, a carrier’s denial of a claimant’s “current condition” is invalid as a prospective denial of a potential future need for medical treatment.

Turning to the case at hand, the Board noted that the carrier had expressly denied claimant’s “current need for treatment.” Reasoning that the carrier had neither denied claimant’s “current condition” nor any potential future need for medical treatment, the Board concluded that the denial was not impermissible.

However, based on its review of the record, the Board found that, whether analyzed under a “material” or “major” contributing cause standard, a physician’s opinion had persuasively established the compensability of the disputed surgery. Consequently, the Board set aside the carrier’s denial of claimant’s medical services claim.

## Own Motion: Hearing Referral – Carrier Did Not Provide Reviewable Record – ALJ Directed to Issue Recommendation, Consider Imposition of Penalties/Attorney Fees for Carrier Rule Violations – “012-0017(1)”, “012-0110(1)”

**Brian L. Dugger**, 70 Van Natta 1275 (November 27, 2018). In an Own Motion order under ORS 656.278, the Board held that, because a carrier had not responded to several Board reminders to submit a written record in response to claimant’s request for Own Motion relief, it was appropriate to refer the matter to the Hearings Division for the development of the record and an ALJ recommendation (which would include consideration of the imposition of penalties/attorney fees for possible rule violations). Claimant filed a request

*In the absence of a claim, a “current condition” denial is invalid as prospectively denying potential future treatments.*

*Because denial neither denied “current condition” nor “future” treatment, it was not invalid.*

*Because carrier did not comply with obligation to submit materials, the “Own Motion” record was insufficiently developed.*

*Claimant's "Own Motion" request referred to ALJ for development of record and a recommended to consider penalties/fees for carrier's rule violations.*

for temporary disability benefits, penalties, and attorney fees regarding his Own Motion claim. Thereafter, the Board directed the carrier to submit relevant materials regarding claimant's request. The Board repeated this directive on two additional occasions, each without a response from the carrier.

The Board found that the carrier had not complied with its obligation to submit relevant written materials in response to claimant's request for Own Motion relief. Under such circumstances, the Board determined that the record was insufficiently developed to address claimant's request.

Consequently, the Board referred the Own Motion matter to the Hearings Division for an evidentiary hearing, at which time the parties could present any relevant information addressing any issues arising from claimant's request for relief. Following that hearing, the Board stated that the assigned ALJ would provide an unappealed recommendation regarding the issues raised at that hearing, including the consideration of penalties/attorney fees for any violations of Board Own Motion rules (OAR 438-012-0017(1); OAR 438-012-0110(1)).

## Own Motion: Permanent Disability – “278(2)(d)” Limitation – “Redetermination” of Current Disability, Before Application of “Limitation” for Prior Award to Same Body Part

*James D. Miley*, 70 Van Natta 1268 (November 19, 2018). Applying ORS 656.278(2)(d), on closure of claimant's Own Motion claim for a “post-aggravation rights” new/omitted medical condition (left knee osteoarthritis), the Board held that, despite an ALJ's (then-Referee's) statement in a prior litigation order (which stated that any anticipated future problems had not been considered in granting a 40 percent scheduled PPD award for claimant's leg/knee), the statutory limitation under ORS 656.278(2)(d) applied to the redetermination of his current permanent disability because his new/omitted medical condition (left knee osteoarthritis) involved the same “injured body part” (left leg/knee) that was the basis of his 1981 scheduled PPD award for his leg fracture. Noting that the ALJ's order had acknowledged that his disability might increase as the need for further surgery becomes necessary or the prediction of traumatic arthritis becomes a reality, claimant contended that any permanent impairment for his new/omitted medical condition (left knee osteoarthritis), including his knee replacement surgery, should be awarded in addition to his previous PPD award.

*Despite statement in prior order that future arthritis/surgery was not considered in PPD award, “278(2)(d)” limitation applied to PPD determination for new/omitted medical condition.*

Citing *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003), the Board held that the limitation in ORS 656.278(2)(d) was mandated whenever the following requirements prescribed in that statute were satisfied: (1) “additional impairment” to (2) “an injured body part” that has (3) “previously been the basis of a [PPD] award.” Furthermore, relying on *Myrtle L. Alexander*, 57 Van Natta 2617, *recons*, 57 Van Natta 2970 (2005), *recons*, 58 Van Natta 82, 87-88 (2006), the Board reiterated that, in redetermining claimant's PPD, his current permanent disability is rated under the Director's disability standards, entitling him

*Because new/omitted medical condition involved “same body part” as prior PPD award, “278 (2)(d)” limitation applied to “redetermination” of current PPD rating.*

*Because arbiter findings did not identify any unrelated condition, claimant’s ROM findings were not apportioned.*

to additional PPD only to the extent his current disability exceeds his previous PPD award for the same injured body part.

Turning to the case at hand, the Board noted that claimant had undergone left knee replacement surgery and that the medical arbiter had found decreased range of motion in his left knee. Finding that claimant’s new/omitted medical condition (left knee osteoarthritis) involved the same “injured body part” (left leg/knee) that was the basis of his previous 40 percent scheduled PPD award, the Board concluded that the limitation under ORS 656.278(2)(d) applied to claimant’s current scheduled PPD award. Before application of the statutory limitation, the Board proceeded to a “redetermination” of claimant’s current permanent disability pursuant to the Director’s disability standards. *Nielsen*, 55 Van Natta at 3207.

Based on the arbiter’s range of motion (ROM) findings, the Board calculated 15 percent. In doing so, the Board acknowledged that the arbiter had apportioned these ROM findings between the accepted osteoarthritis and a “preexisting constitutional factor of osteoarthritis.” Nonetheless, noting that the carrier had expressly accepted osteoarthritis and reasoning that the arbiter’s reference to a “preexisting constitutional factor” did not identify any “superimposed or unrelated condition” other than the accepted osteoarthritis, the Board declined to apportion claimant’s ROM findings. *Curtis R. Wilhelm*, 67 Van Natta 2076, 2081 (2015); *Randy L. Meyer*, 64 Van Natta 133, 138 (2012).

Addressing claimant’s total knee replacement, the Board awarded a 20 percent impairment value. OAR 436-035-0230(5)(d). In addition, the Board granted a 5 percent impairment value for claimant’s one-half inch left leg length discrepancy as an “irreversible finding.” OAR 436-035-0005(7)(f)(B); OAR 436-035-0230(2).

Combining the aforementioned impairment values, the Board reached a current scheduled PPD award of 35 percent for loss of use or function of the left leg. Because claimant’s prior scheduled PPD award had been 40 percent, the Board determined that an additional PPD award was not warranted. *Dina A. Ganieany*, 62 Van Natta 2616, *recons*, 62 Van Natta 3043, 3045 (2010); *Alexander*, 58 Van Natta at 87-88.

## Own Motion: PTD – Entitlement Based On “Pre-Injury” Disability, Last PPD Award Before Expiration of “Agg Rights,” & Disability Due to “Post-Agg Rights” New/Omitted Medical Condition

*Timothy C. Guild*, 70 Van Natta 1207 (November 2, 2018). Applying ORS 656.206, on remand from the court (*Guild v. SAIF*, 291 Or App 793 (2018)), the Board held that claimant was not entitled to permanent total disability (PTD) benefits arising from an Own Motion Notice of Closure concerning a new/omitted medical condition under his 2004 right shoulder injury claim because his attending physician did not distinguish between claimant’s disability related to his 2004

*Physician did not distinguish disability from a later compensable shoulder injury from disability due to shoulder injury for which Own Motion claim was being evaluated.*

*PTD entitlement in an Own Motion claim is based on: (1) PPD for previously accepted condition as of last claim closure before "Agg Rights" expired; (2) "preexisting" disability before work injury; and (3) "post – Agg rights"/ "new/ omitted medical condition" disability.*

*Because it was unclear whether physician attributed total disability to the only shoulder claim that could be considered (new/ omitted medical condition under Own Motion claim), PTD for that claim not established.*

claim and disability from a later right shoulder injury claim. Following the carrier's 2004 acceptance of claimant's right shoulder glenoid tear, his claim was closed without a permanent disability (PPD) award. In 2010, claimant sustained another compensable right shoulder injury, which was accepted for a strain and SLAP lesion, that resulted in surgery and a PPD award. Thereafter, the carrier accepted a new/omitted medical condition (right shoulder posttraumatic arthritis) and voluntarily reopened claimant's Own Motion claim under the 2004 claim. After an Own Motion Notice of Closure did not award any PPD or PTD benefits, claimant requested Board review, seeking PTD benefits related to his 2004 injury.

The Board held that claimant was not entitled to PTD benefits. Citing ORS 656.206(1)(d), the Board observed that PTD means the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. Referring to ORS 656.278 and *James S. Daly*, 58 Van Natta 2355 (2006), the Board reiterated that the following factors are considered in determining a claimant's entitlement to PTD on closure of an Own Motion claim regarding a new/omitted medical condition: (1) disability for a previously accepted condition is considered as it existed at the last claim closure that preceded the expiration of the claimant's 5-year aggravation rights; (2) any disability that predates the initial compensable injury is also considered; and, (3) when such disabilities exist, they are considered with any disability from the "post-aggravation rights" new/omitted medical condition to determine whether the claimant has established entitlement to PTD. Relying on *Elsea v. Liberty Mutual Ins.*, 277 Or App 475 (2016), and *Clark v. Boise Cascade*, 72 Or App 397 (1985), the Board stated that, considering the *Daly* factors, a claimant may establish entitlement to PTD by proving that: (1) he was completely physically disabled and therefore precluded from gainful employment; or (2) his physical impairment, combined with various social and vocational factors, effectively precluded gainful employment under the "odd lot" doctrine.

Turning to the case at hand, the Board noted that it was undisputed that claimant did not have any disability from his previously accepted conditions (under the 2004 claim) when his claim was last closed before the expiration of his aggravation rights. Likewise, the Board observed that claimant did not have any disability preexisting his 2004 shoulder injury. Consequently, the Board identified the determinative issue regarding claimant's entitlement to PTD benefits was confined to any disability from his "post-aggravation rights" new/omitted medical condition (right shoulder posttraumatic arthritis).

After conducting its review, the Board acknowledged that the attending physician had considered claimant to be completely disabled regarding his right shoulder and had ultimately agreed that he was totally permanently disabled due to his new/omitted medical condition. Nonetheless, the Board noted that the attending physician had repeatedly referred to both claimant's 2004 injury and his subsequent injury/surgeries in addressing the cause of his "complete disability." Under such circumstances, the Board concluded that it was unclear whether the attending physician's opinion had been solely confined to claimant's new/omitted medical condition (right shoulder posttraumatic arthritis) under his 2004 injury

claim. Because disability from that condition was the only disability that could be considered, the Board was not persuaded that claimant was totally disabled due

to his new/omitted medical condition. See *Shakur Shabazz*, 65 Van Natta 1551 (2013).

## Subject Worker: “Non-Subject Worker” (“027(15)”) – Trucker Had “Ownership Interest” in Truck Furnished, Maintained, Operated for a Motor-Carrier – Transfer of Title Not Determinative

*Vladmir V. Ghelan*, 70 Van Natta 1277 (November 27, 2018).

Applying ORS 656.027(15), the Board held that claimant (a truck driver) was not a subject worker because, although the title of the truck he operated had not been transferred to him from the alleged employer and he had not fully paid for the truck, he had an ownership in the motor vehicle used in transportation of property by a for-hire carrier, which he furnished, maintained, and operated. Before his injury while operating a truck for the alleged employer, claimant signed a “bill of sale” with the alleged employer for a truck and trailer, which provided for monthly installment payments. In addition, claimant and the alleged employer also entered into an “independent contractor lease agreement,” which provided that claimant would furnish the motor vehicle equipment and personnel to drive, load, and unload property from such equipment, as well as, at his own expense, provide the necessary repairs to maintain the equipment. Finally, claimant signed an “owner-operator insurance application,” which identified him as the “owner-operator.” After Sedgwick (as the statutory claim agent under ORS 656.054) accepted claimant’s injury claim, the alleged employer contested the acceptance, asserting that claimant was a “nonsubject worker” under ORS 656.027(15).

The Board agreed. Citing ORS 656.027(15), the Board stated that all workers are subject to ORS Chapter 656 except “nonsubject workers” such as “[a] person who has an ownership or leasehold interest in equipment and who furnishes, maintains and operates the equipment.” Relying on ORS 656.027(15)(c), the Board added that “equipment” means “[a] motor vehicle used in the transportation of property by a for-hire motor carrier that is required under ORS 825.100 or 825.104 to possess a certificate or permit or to be registered.”

Turning to the case at hand, the Board found that, based on claimant’s and the alleged employer’s testimony, as well as the bill of sale and lease agreement, the record established that claimant had an “ownership interest” that he furnished, maintained, and operated in the transportation of property by a for-hire carrier. Under such circumstances, the Board concluded that claimant was a “nonsubject worker” under ORS 656.027(15). Consequently, the Board set aside Sedgwick’s claim acceptance.

In reaching its conclusion, the Board acknowledged claimant’s assertion that he did not have an ownership interest because the “sale” of the truck was not complete until all installment payments had been completed and because the title

*A person who has ownership or leasehold interest in a vehicle for hire is a non-subject worker.*

*Even if claimant did not have complete ownership of the vehicle, record supported ownership “interest.”*

*Transfer of title of vehicle not determinative for “ownership interest.”*

of the truck had not been transferred to him. The Board rejected both arguments, reasoning that, even if claimant did not have complete “ownership” of the truck, the record (based on the parties’ course of conduct, agreements, and claimant’s payments) was consistent with the establishment of an “ownership interest” by claimant in the truck. See *Weber v. State Farm Mut. Auto. Ins. Co.*, 216 Or App 253, 258, 60 (2007); *State v. Dollar*, 181 Or App 354, 358 (2002); *Michael R. Dunham*, 60 Van Natta 3466, 3479 (2008).

## APPELLATE DECISIONS UPDATE

### Reconsideration Proceeding: Arbiter Report Based on Review of Surveillance Video – Could Not Be Considered Because Entire Video Had Not Been Submitted/Reviewed by “AP” (Or Examiner Ratified by “AP”) Before Claim Closure – “030-0155(4)(a)”

*Pena v. Travelers Insurance Company*, 294 Or App 740 (November 7, 2018). Analyzing OAR 436-030-0155(4)(a), the court reversed the Board’s order in *Jesus Pena*, 69 Van Natta 772 (2017), previously noted 36 NCN 4:5, that had affirmed an Order on Reconsideration (which had reduced a Notice of Closure’s permanent impairment award for claimant’s thoracic and lumbar spine conditions) based on a report from a medical arbiter panel that had considered a surveillance video submitted by the carrier to the Appellate Review Unit (ARU) (some of which had not been reviewed by claimant’s attending physician prior to claim closure). Although acknowledging the carrier’s violation of OAR 436-030-0155(4)(a) (in presenting a surveillance video to ARU for submission to the arbiter panel, which included portions that had not been previously reviewed by claimant’s attending physician before claim closure), the Board reasoned that the administrative rules did not preclude consideration of the panel’s report. On appeal, claimant contended that the Board had erred in relying on evidence that violated administrative rules prescribed for arbiter examinations.

*ARU reduced impairment awarded based on surveillance video seen by arbiter panel, portions of which had not been provided to “AP.”*

The court agreed with claimant’s contention. Citing *Don’t Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994), the court stated that, when interpreting an administrative rule, it ordinarily must determine whether an agency has interpreted one of its own rules, such that the interpretation is entitled to deference. Referring to *Godinez v. SAIF*, 269 Or App 578, 582-83 (2015), the court reiterated that such deference only extends to a *plausible* interpretation of an agency’s rule.

Turning to the case at hand, the court concluded that there was no plausible interpretation of OAR 436-030-0155(4)(a) that would allow ARU to rely on findings from a medical arbiter panel that were based on a surveillance considered to be in violation of that rule. Based on the text of the rule, viewed in context, the court reasoned that, by stating that, “[s]urveillance video provided for arbiter review *must*

*Only plausible interpretation of WCD rules was that only videos that have been submitted/reviewed by treating/evaluating physician may be considered by arbiter.*

*ARU precluded from relying on arbiter's findings that were based on a video that violated WCD rule.*

*have been reviewed prior to claim closure by a physician involved in the evaluation or treatment of the worker” (emphasis added), the rule prescribed a mandatory precondition that must be satisfied for the video to be part of the arbiter review. When read in this context, the court determined that the rule expressed a complete thought that the *only* surveillance video that is part of the medical arbiter review is a video that had been submitted/reviewed prior to closure by a physician treating or evaluating the worker.*

Based on such reasoning, the court concluded that the only plausible interpretation of OAR 436-030-0155(4)(a) was that it precluded ARU from relying on findings in an arbiter's report that was based on consideration of a surveillance video that never should have been part of the arbiter review. Consequently, the court held that the Board had erred in determining that the arbiter report could be considered in rating claimant's permanent disability. Accordingly, the court remanded for further proceedings.