Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Biennial Review/Attorney Fees/"388(4)" Referral to Advisory Committee/First Meeting (March 1)

At its December 11 meeting, the Board Members discussed written/oral responses received in reply to their invitation for comments regarding their biennial review of the Board's schedule of attorney fees under ORS 656.388(4). Those responses concerned a number of subjects, such as the amount of ALJ/Board attorney fee awards and the total attorney fees/legal costs secured by attorneys representing insurers/employers and those representing workers, as well as a number of rule concepts concerning methods for determining a reasonable carrier-paid attorney fee (including obtaining information regarding the attorney fees earned by carriers' attorneys, establishing a reasonable hourly rate for a worker's attorney's services, and calculating a "contingency multiplier" to account for the contingent nature of a workers' compensation practice), as well as implementing a voluntary procedure for "bifurcating" the attorney fee determination from the other disputed issues.

After considering the testimony and written comments, the Members decided to refer the rule concepts to an advisory committee. That committee is composed of the following individuals: Theodore Heus, Attorney at Law; Elaine Schooler, SAIF Trial Counsel; William Replogle, Attorney at Law; Art Stevens, Attorney at Law; Jennifer Flood, Ombudsman for Injured Workers. Mark Mills, ALJ, will serve as the committee's facilitator. The Members extend their grateful appreciation to the committee for their willingness to participate in this important endeavor.

The committee's first meeting will be held on Friday, March 1st at 2:00 p.m. at WCB's Portland office, 16760 SW Upper Boones Ferry Road, Suite 220, Portland, OR 97224.

Once the committee completes its review of the concepts and issues an advisory report, the Members will schedule another Board meeting, where they will discuss the report, as well as consider further comments from the public.

The Members have also requested further statistical data from the Department of Consumer & Business Services (DCBS) regarding the amount/type of issues litigated before the Hearings Division and on Board review, as well as the amount/type of attorney fees awarded by orders issued and settlements approved by ALJs/Board, and the amount of attorney fees/legal expenses incurred by insurers/employers. This data will be considered by the Members when they discuss the advisory committee's eventual report.

After the Members complete their deliberations regarding the committee's report and the data from DCBS, they will decide whether to propose amendments to the Board's attorney fee rules.

"Five-Year" Review: OAR 438-011-0055 - "Third Party Election Letter" - Public Comment

In accordance with ORS 183.405, the Board is conducting its "five-year" review of OAR 438-011-0055, which prescribes the procedures to be followed by a "paying agency" in issuing a "third party election" letter. The Board has already requested/received written comments from members of the advisory committee regarding this rule, as well as parties/practitioners who offered comments during the rulemaking process. (Copies of those responses have been posted on the Board's website https://www.oregon.gov/wcb/legal/Pages/5-yr-review.aspx.)

To further assist the Members in conducting their review of this rule, they are seeking written comments from the public. (Notice of this request for public comment has also been electronically distributed to those individuals/entities who have registered for "rule-related" notifications at https://service.govdelivery.com/accounts/ORDCBS/subscriber/new.) Any such 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 written comments is February 28, 2019.

Those written comments, which will also be posted on the Board's website, should address the following questions:

1. Did the rule achieve its intended effect?

2. Was the anticipated fiscal impact of the rule underestimated or overestimated? (See Board's "Statement of Need and Fiscal Impact" dated June 28, 2013.)

3. Have any subsequent changes in the law required that the rule be repealed or amended?

4. Is there a continued need for the rule?

5. What impacts has the rule had on small business?

Updated Report On Oregon Workers' Compensation Now Available Online

The Department of Consumer and Business Services (DCBS) has recently published its report on the Oregon workers' compensation system. This report, which had been commonly referred to as the "biennial report," is now available on the following web page: https://www.oregon.gov/dcbs/reports/compensation/Pages/index.aspx

The report is divided into several components, including the history of Oregon workers' compensation, safety and health, claims, medical care and benefits, disputes, insurance, and rate comparisons with other states.

The statistical tables within each section are prepared by the DCBS Information Technology and Research Section. This is the first year that the report and statistics have been made available online.

Readers can navigate to various reports from the web page, including information on workers' compensation disputes. This includes information about disputes at the Workers' Compensation Board (WCB), Workers' Compensation Division (WCD), and at the Oregon appellate courts. There is also a page devoted to attorney fees.

The statistical tables can be printed and downloaded into data files or .PDF documents.

CASE NOTES

Compensability: Claimant's "Hearsay" Statements in Physician's Reports (If Consistent) - *Prima Facie* Evidence for Purposes of "Diagnosis/Treatment" - "310(2)"

Juan F. Figueroa-Guzman, 71 Van Natta 1 (January 4, 2019). Applying ORS 656.310(2), the Board found that, notwithstanding claimant's failure to attend a hearing regarding a carrier's new/omitted medical condition denial, his consistent statements in examining physicians' reports were given *prima facie* weight to establish medical causation for his claimed hernia condition and, because the carrier had accepted his initial leg injury claim stemming from the same work incident, his new/omitted medical condition claim was compensable. Following his compensable left leg injury, claimant requested that the carrier accept a hernia condition. After the carrier denied his new/omitted medical condition claim, he requested a hearing. Although claimant's counsel appeared at the hearing, claimant did not personally appear. The carrier argued that the physicians' opinions supporting the compensability of the claim were unpersuasive, because they were based on unreliable hearsay in the absence of claimant's supporting testimony.

Claimant's counsel appeared at hearing, but claimant did not.

Carrier argued that physicians' opinions were based on unreliable hearsay.

The Board disagreed with the carrier's assertion. Citing *Zurita v. Canby Nursery*, 115 Or App 330 (1992), *rev den*, 315 Or 443 (1993), the Board stated that, under ORS 656.310(2), hearsay statements in medical reports regarding medical matters (made for purposes of diagnosis or treatment) are distinguishable from hearsay statements in medical reports that concern other circumstances of an injury. The Board further acknowledged that it had previously found claimants' statements to their medical providers insufficient to establish that a potentially causal work event occurred; *i.e*., "legal causation" concerning their claimed condition had not been established. *E.g.*, *Lawrence E. Phillips*, 56 Van Natta 3344 (2004); *Janette Valles-Key*, 55 Van Natta 2280 (2003).

Relying on *Camacho v. SAIF*, 263 Or App 647 (2014), the Board noted that the court had further clarified that statements in medical reports concerning how an injury occurred, the nature of the pain resulting from the injury, and the medical history are considered statements "reasonably pertinent" to a physician's ability to diagnose and treat an injury and, as such, constitute *prima facie* evidence under ORS 656.310(2). *See State v. Moen*, 309 Or 45 (1990). The Board further observed that the *Camacho* court had concluded that such statements to physicians receive *prima facie* weight to the extent that they do not contradict each other. *Camacho*, 263 Or App at 654.

Turning to the case at hand, the Board found that claimant's statements in the medical reports (*e.g*., following his work incident, he experienced hernia pain, swelling, and bulging) were all "reasonably pertinent" to his physicians' ability to diagnose and treat his injury. Moreover, although acknowledging that claimant did not regularly report hernia pain to medical providers while treating for other body parts, the Board reasoned that those statements were not inconsistent (*i.e*., the statements were reliable) with claimant's occasional reiteration of ongoing hernia symptoms. Consequently, in accordance with ORS 656.310(2), *Camacho*, and *Zurita*, the Board determined that it was required to afford claimant's statements *prima facie* weight.

Claimant's statements (which were consistent) to physicians regarding diagnosis and treatment were given prima facie evidentiary weight.

Finally, noting that the carrier had accepted several conditions in claimant's initial injury claim, the Board was persuaded that a potentially causal work event had occurred and, as such, "legal causation" regarding the claimed his new/omitted medical condition had been established. *See Jerry B. Eads*, 64 Van Natta 451, 454 (2012). Under such circumstances, the Board set aside the carrier's new/omitted medical condition denial

Course & Scope: "Parking Lot" Fall - No "Employer Control" Over Leased Lot - "Parking Lot" Exception to "Going/Coming" Rule N/A

Sherrie A. Miles, 71 Van Natta 40 (January 16, 2019). Analyzing the "parking lot" exception to the "going and coming" rule, the Board held that claimant's injury, which occurred when she fell in a parking lot while coming to work at her employer's leased retail premises, did not occur in the course

Claimant fell in parking lot while coming to work.

of her employment because the employer had no right to control the parking lot under the "parking lot" exception because maintenance of the parking lot was solely the responsibility of the landlord according to the employer's lease. Asserting that her employer's use of the parking lot (including placing shopping cart racks, stands for plants and other merchandise, as well as "vehicle towing" signs) constituted an exercise of partial control over the parking lot, claimant argued that her injury occurred in the course of her employment as a pharmacy technician under the "parking lot" exception to the "going and coming" rule.

The Board disagreed with claimant's conclusion. Citing *Norpac Foods, Inc. v. Gilmore,* 318 Or 363, 367 (1994), the Board stated that the "parking lot" exception to the "going and coming" rule provides that the "in the course of" prong of the "work-connection" test may be satisfied if the employer exercises some "control" over the place where the injury is sustained. Relying on *Cope v. West Am. Ins. Co.*, 309 Or 232, 239 (1990), the Board noted that such "control may arise from the employer's property rights to the area. Referring to *Montgomery Ward v. Cutter*, 64 Or App 759, 763 (1983), the Board observed that the employer's obligation to pay for maintenance, together with the right to require maintenance, has also been found to be sufficient "control" under the "parking lot" exception. Conversely, the Board clarified that where the employer does not have the right or obligation to require maintenance, the "parking lot" exception has not been applied. *See Ashley Bruntz-Ferguson,* 69 Van Natta 1531, 1535 (2017).

Employer obligation to pay for maintenance (or right to require maintenance) can be sufficient "control" for "parking lot" exception.

Turning to the case at hand, the Board found that the employer's lease specifically designated that maintenance and repairs of the parking lot would be performed by the lessor (landlord), while maintenance and repairs to the interior of the premises would be performed by the lessee (claimant's employer). The Board also noted that, pursuant to the lease, the employer was not authorized to require maintenance of the parking lot where claimant was injured.

Lease provided that landlord, not employer, was to maintain the parking lot.

In reaching its conclusion, the Board distinguished *Willis v. SAIF*, 3 Or App 565, 572 (1970), where the claimant's injury while walking from a designated parking spot (owned/maintained by his employer) through an adjoining public park block on the way to his office had been found to have occurred in the course of employment. In contrast to *Willis*, the Board noted that, in the present case, claimant had not arrived at her employer's premises at the time of the injury.

Furthermore, the Board did not consider the employer's periodic removal of trash and other hazards to constitute a right to require maintenance of the parking lot sufficient to establish employer "control" over the parking lot.

Employer's periodic removal of trash did not constitute "control."

Finally, addressing the "arising out of" prong of the "work connection" test, the Board determined that her risk of injury from falling in a parking lot did not result from the nature of her employment as pharmacy technician nor did it originate from some risk to which her work environment exposed her. *See Fred Meyer Inc. v. Hayes*, 325 Or 592, 601 (1997). Consequently, the Board held that claimant's injury did not arise out of her employment.

Medical Service: "Hardware Removal" Surgery - Directed to "Combined Condition" - "Effective Date" of "Ceases" Denial Was After Surgery Requested - "245(1)(a)"

Surgeon requested approval for "hardware removal" surgery eight months before effective date of carrier's "ceases" denial of accepted combined condition.

Fred D. Harris, 71 Van Natta 46 (January 16, 2019). Analyzing ORS 656.245(1)(a) and ORS 656.262(6)(c), the Board held that a carrier was responsible for claimant's hardware removal surgery because the procedure was for his accepted combined right wrist condition and the effective date of the carrier's subsequent "ceases" denial of the accepted combined condition was a date after the surgery had been proposed. After claimant's compensable injury, the carrier accepted numerous conditions, including a combined right wrist condition (effective from the date of his injury). Thereafter, claimant had a compensable wrist fusion surgery, which included the placement of orthopedic hardware. Subsequently, claimant's surgeon requested approval for hardware removal surgery. Some eight months later, the carrier issued a "ceases" denial of the combined wrist condition, effective as of the date of its denial. Contending that the surgery was not due in major part to the accepted combined condition, but rather solely to claimant's preexisting condition, the carrier asserted that it was not responsible.

The Board disagreed with the carrier's contention. Citing ORS 656.245(1)(a), the Board stated that the medical service must be for, or directed to, conditions caused in material part, or major part, by the work injury. Relying on *Slater v. SAIF*, 287 Or App 84, 95 (2017), the Board noted that the compensability of the medical service is governed by the causation standard that applies to the condition that it was "for" or "directed to."

Combined condition was in accepted status at time of surgery request; effective date of "ceases" denial was subsequent to surgery request. As a matter of law, carrier was responsible for surgery for accepted combined condition.

Turning to the case at hand, the Board found that the medical service was directed to claimant's compensable combined right wrist condition. The Board further determined that the proposed surgery was directed to claimant's right wrist pain that was related to the orthopedic hardware retained from the prior compensable fusion procedure, which had been directed to the accepted combined condition (including the preexisting component of that combined condition). Reasoning that claimant's combined condition remained in its accepted status when the hardware removal surgery was proposed, the Board concluded that, as a matter of law, the carrier was responsible for the surgery. *See* ORS 656.245(1)(a); ORS 656.005(7)(a)(B).

Own Motion: Deferral of Review of "NOC" - Carrier Must First Close Previous "Vocational Assistance" Claim Following "ATP" - "268(10)"

Adele H. Tom, 71 Van Natta 68 (January 29, 2019). On review of Own Motion Notices of Closure under ORS 656.278, the Board held it was appropriate to defer its review because, before the expiration of claimant's 5-year "aggravation rights," the carrier had previously reopened the claim for vocational assistance and, following claimant's "authorized training program" (ATP), had not closed the claim pursuant to ORS 656.268(10). Before her five-year aggravation rights had expired, claimant had been found eligible for vocational assistance and her claim was reopened. After completing a portion of her ATP, and after the expiration of her aggravation rights, the carrier ended her vocational assistance. Thereafter, the carrier reopened claimant's Own Motion claim for a worsened condition and, eventually, for a new/omitted medical condition. While those claims were being processed, in response to claimant's request for Director review of the carrier's termination of vocational assistance, a Workers' Compensation Division (WCD) order had set aside the carrier's vocational assistance termination, ruling that she remained entitled to vocational training because her vocational assistance claim had been filed before the expiration of her aggravation rights. After claimant completed her ATP and her attending physician declared her accepted conditions medically stationary, the carrier issued Own Motion Notices of Closure. In addition, the carrier offset claimant's permanent disability award (granted by the closure notices) by an alleged overpayment of temporary disability benefits. Thereafter, claimant requested Board review of the closure notice, and challenged the carrier's alleged overpayment.

WCD order set aside carrier's "pre-aggravation rights" vocational assistance termination.

The Board deferred its review of the Notices of Closure, as well as the overpayment issue. Citing ORS 656.268(10), the Board stated that, after a Notice of Closure issued under ORS 656.268, when a worker ceases to be enrolled and actively engaged in vocational training, the carrier "shall again close the claim pursuant to this section" if the worker is medically stationary, has returned to work, or has been released to return to regular or modified work. Relying on *Talley v. BCI Coca Cola Bottling*, 184 Or App 129, 136-37, *recons*, 185 Or App 521 (2002), the Board reiterated that a claim that was reopened for vocational assistance, rather than under the Board's Own Motion authority, must be processed under ORS 656.268.

Claim reopened for vocational assistance cannot be closed under Own Motion authority; claim must be closed under "268(10)."

Turning to the case at hand, the Board found that it was undisputed that claimant's claim had been reopened for vocational assistance before her aggravation rights expired. Under such circumstances, the Board held that the carrier was required to close claimant's claim pursuant to ORS 656.268(10).

In addition, the Board observed that, at that eventual claim closure, the duration of claimant's temporary disability benefits (including any alleged overpayments) would be decided and her permanent disability would be redetermined. *See* ORS 656.268(2), (5), (10), (14). Once that claim closure had been completed, the Board stated that it would commence its review of the issues arising from the Own Motion Notices of Closure.

Own Motion: PPD - No Prior Award - No "Redetermination" - "278(2)(d)" N/A - Impairment Finding Related to Prior Accepted Condition Not Ratable For New/Omitted Medical Condition

Eddie M. Querner, 71 Van Natta 63 (January 29, 2019). Analyzing ORS 656.278(1)(b), ORS 656.278(2)(d), OAR 436-035-0006(2), and OAR 436-035-0005(13) (WCD Admin. Order 17-057, eff. October 8, 2017), the Board held that, in rating permanent disability for claimant's "post-aggravation rights" new/omitted medical conditions (right knee tibial bone bruise; right knee tibial fracture), he was not entitled to a "redetermination" of his permanent disability because he had not received a prior permanent disability award related to his previously accepted right knee conditions (right knee strain and right knee ACL tear) and any impairment findings attributable to those previously rated conditions could not be considered because no impairment findings had been reported for his new/omitted medical conditions. After an Own Motion Notice of Closure did not award any permanent disability for claimant's "post-aggravation rights" new/omitted medical conditions (based on his attending physician's opinion that those conditions had completely resolved and did not cause any additional impairment or work restrictions), claimant requested Board review. Thereafter, a medical arbiter reported reduced ranges of motion (ROM) in claimant's right knee, attributing the findings to "osteoarthritis/degenerative changes and previous [right knee ACL] surgical repair." However, the arbiter did not relate the impairment findings to claimant's newly accepted right knee conditions.

Arbiter did not relate impairment findings to newly accepted conditions; rather, referred to "ROM" from previous surgery (for which no PPD award had been granted).

Citing *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003), the Board explained that the limitation in ORS 656.278(2)(d) applies where there is (1) "additional impairment" to (2) "an injured body part" that has (3) "previously been the basis of a [permanent disability] award." Referring to *Randy D. Boydson*, 59 Van Natta 2360 (2007), and *Terry L. Rasmussen*, 56 Van Natta 1136 (2004), the Board noted that, if the limitation in ORS 656.278(2)(d) does not apply, the permanent disability for the "post-aggravation rights" new/omitted medical condition is rated under the Director's standards without "redetermination" (defined as a "reevaluation of disability" under OAR 436-035-0005(13)) of disability. Finally, relying on *Robert A. Boehm, Jr.,* 68 Van Natta 310 (2016), and *Paul N. Bennett*, 63 Van Natta 10 (2011), the Board

When "278(2)(d)" limitation does not apply, no PPD is awarded for impairment due to previously accepted/rated conditions.

reiterated that, when the ORS 656.278(2)(d) limitation does not apply, permanent disability is not awarded for impairment due to previously accepted conditions, rather than to "post-aggravation rights" new/omitted medical conditions.

Turning to the case at hand, the Board concluded that the limitation in ORS 656.278(2)(d) did not apply because claimant had not received a prior permanent disability award for the right knee. Thus, the Board rated claimant's permanent disability for his new/omitted medical conditions (right knee tibial bone bruise; right knee tibial fracture) without a "redetermination."

Because no "redetermination" appropriate (due to no prior PPD award), claimant not entitled to PPD for new/omitted medical conditions because those conditions had not resulted in permanent impairment.

Addressing claimant's impairment findings, the Board acknowledged that the medical arbiter had attributed his right knee ROM findings to "osteoarthritis/degenerative changes and previous surgical repair." The Board further recognized that claimant's previous ACL repair surgery had concerned his accepted right knee ACL tear. Nonetheless, the Board noted that the arbiter (as well as the attending physician) had not found any permanent impairment due to claimant's newly accepted right knee conditions. Under such circumstances, when no "redetermination" was appropriate (because claimant had not previously received a permanent disability award), the Board concluded that he was also not entitled to a permanent disability award for new/omitted medical conditions because those conditions had not resulted in any permanent impairment. *See* OAR 436-035-0006(2); OAR 436-035-0013(2)(b); *Boehm, Jr.,* 68 Van Natta at 313-14; *Bennett*, 63 Van Natta at 11-12.

APPELLATE DECISIONS
COURT OF APPEALS

Responsibility: "LIER" - "Sole Cause" Defense Proven by "Last" Carrier

Liberty Metal Fabricators v. Lynch Co., 295 Or App 809 (January 30, 2019). Applying the "last injurious exposure rule" (LIER), the court affirmed the Board's order in *Darrell Alcorn*, 69 Van Natta 1068 (2017), which had held that the "presumptively responsible" employer had proven that it was "impossible" for claimant's exposure to noise during its employment to have caused or contributed to his hearing loss and, as such, responsibility for claimant's occupational disease claim for hearing loss shifted to a prior employer. On appeal, the prior employer asserted that the Board had erred in two respects: (1) by finding that the last employer had proven *to a reasonable degree of medical probability* that it was impossible for claimant's latter period of employment to have contributed to his hearing loss; and (2) by reaching its "impossibility" finding when a physician had acknowledged that there was a *possibility* of a contribution (albeit non-measurable or insignificant) to claimant's hearing loss by his employment with the last employer.

Presumptive responsibility assigned to most recent potentially causative employer.

The court disagreed with the prior carrier's assertions. Relying on *Waste Management v. Pruitt*, 224 Or App 280, 286 (2008), *rev den*, 346 Or 66 (2009), the court reiterated that, under the LIER, "presumptive responsibility" for an occupational disease claim is assigned to the most recent potentially causal

"Presumptive" employer may shift responsibility by proving "impossible" for it to have caused claimed condition or that disease was solely caused by previous employment(s)

employer for whom the claimant worked or was working at the time that he/she first sought or received treatment. Citing *Beneficiaries of Strametz v. Spectrum Motorwerks*, 325 Or 439, 444-45 (1997), and *Roseburg Forest Products v. Long*, 325 Or 305, 308 (1997), the court stated that a presumptively responsible employer may shift responsibility to a prior employer by establishing that: (1) it was impossible for conditions at its workplace to have caused or worsened the disease; or (2) the disease was caused or worsened by conditions at one or more previous employments.

Turning to the case at hand, the court acknowledged the prior employer's contention that "impossibility" cannot be established by medical evidence stated in terms of "probability." Nonetheless, the court reasoned that "reasonable medical probability" describes the level of proof required to establish medical causation by a preponderance of the evidence and that such a standard applies in determining medical causation in the responsibility context. *Port of Portland OCIP v. Cierniak*, 207 Or App 571, 576 (2006); *Robinson v. SAIF*, 147 Or App 157, 160 (1996).

"Reasonable medical probability" standard is sufficient to establish "impossibility" defense.

Based on such reasoning, the court determined that just as evidence, offered in terms of reasonable medical probability, would suffice to establish that claimant's hearing loss was caused by his employment, evidence offered in terms of reasonable medical probability would suffice to establish that it was not possible for claimant's employment with the last employer to have caused his hearing loss. Consequently, the court rejected the prior employer's first contention.

Addressing the prior employer's second argument, the court noted that, although the physician had acknowledged that it was possible for a hearing loss of one decibel to have occurred at claimant's last employer, the physician had further explained that a change of one decibel in hearing was not measurable, would not be significant, and would be disregarded as falling within the range of "test-retest variability." Moreover, the court observed that the physician had ultimately opined that, based on two hearing tests (one before claimant's employment with the last employer and the other after such employment), there had been no change in claimant's hearing loss and that his employment with the last employer had not contributed to his hearing loss.

Record supportable, to a reasonable medical probability, that hearing loss caused solely by prior employments.

Under such circumstances, the court concluded that the Board could reasonably interpret the physician's opinion, read as a whole, to support its finding that, to a reasonable medical probability, claimant's hearing loss was caused solely by employment conditions other than his employment with the later employer. Consequently, the court found no error in the Board's assignment of responsibility for claimant's hearing loss claim to the prior employer.