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BOARD NEWS

Rulemaking Hearing - August 23, 2019 - Proposed Amendments/OAR 438-007-0020(6) - "Subpoena Rule"

The Board has scheduled a public rulemaking hearing for August 23, 2019 to receive public comments regarding proposed amendments to the "subpoena rule" (OAR 438-007-0020(6)). The proposed amendments concern the information/notice to be contained in a subpoena for "individually identifiable health information," as well as where/when to send the information, including when there has been an objection to the subpoena.

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 (under the category "Laws and rules"). Copies will also be distributed to parties and practitioners on WCB's mailing list.

A rulemaking hearing for this proposed amended rule has been scheduled for August 23, 2019, at 10 a.m., at the Board's Salem office (2601 25th St. SE, Ste. 150, Salem, OR 97302-1280). Any written comments can be submitted for admission into the record by mail, FAX (503-373-1684), email rulecomments.wcb@oregon.gov, or hand delivery to any permanently staffed Board office. Those written comments may be directed to Trish Fleischman, the rulemaking hearing officer. The last day for public comment is August 23, 2019 at 5 p.m.

A formal announcement regarding this Board meeting has been electronically distributed to any who have registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>.

Annual Adjustment To Maximum Attorney Fee Effective July 1, 2019

The maximum attorney fee awarded under ORS 656.262(11)(a) and ORS 656.382(2)(d), which is tied to the increase in the state's average weekly wage (SAWW), will rise by 3.709 percent on July 1, 2019. On June 3, 2019, the Board published Bulletin No. 1 (Revised), which sets forth the new maximum attorney fees. The Bulletin can be found on the Board's website at: <https://www.oregon.gov/wcb/legal/Pages/bulletins.aspx>

An attorney fee awarded under ORS 656.262(11) shall not exceed \$4,582, absent a showing of extraordinary circumstances. OAR 438-015-0110(3).

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An attorney fee awarded under ORS 656.308(2)(d) shall not exceed \$3,304, absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5).

These adjusted maximum fees apply to all attorney fee awards under statutes granted by orders issued on July 1, 2019 through June 30, 2020.

Permanent Rule/Amendments: "Translation of Written Documents" (OAR 438-007-0045); Amendments Concerning "Notices" of Denials/Acceptances (OAR 438-005-0050, -0053, -0055, -0060) - Effective June 1, 2019

At their March 28, 2019 public meeting, the Members adopted OAR 438-007-0045 ("Translation of Written Documents") and permanent amendments to OAR 438-005-0050, -0053, -0055, -0060 ("Notices" concerning Acceptances/Denials). The Members took these actions after considering a report from their Advisory Committee, as well as written/verbal comments received at the Board's February 1, 2019 rulemaking hearing.

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 document 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 rule further provides that translation costs incurred by a claimant are subject to reimbursement under ORS 656.386(2).

OAR 438-005-0050, -0053, -0055, and -0060 are designed to require that all acceptance/denial notices comply with OAR 436-001-0600 (Bulletin 379), in which the Workers' Compensation Division (WCD) mandates 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.

The effective date for these rules is June 1, 2019. OAR 438-007-0045 is applicable to all cases pending before the Hearings Division in which the initial hearing is convened on and after June 1, 2019. The amendments to OAR 438-005-0050, -0053, -0055, and -0060 are applicable to all notices of acceptance/denial issued on and after June 1, 2019. (Consistent with WCD's adoption of its rules, the Members encourage carriers to begin complying with these OAR 438 Division 005 rules as soon as possible.)

The Board's Order of Adoption can be found here: <https://www.oregon.gov/wcb/Documents/wcbrule/rule-filings/1-2019/ooa1-2019.pdf>. A copy of the order has also been posted on the Board's website. In addition, copies of the adoption order are being distributed to all parties/practitioners on WCB's mailing list.

Assignment of Counsel - Process Change Coming This Fall

The Board will be modifying its process for identifying counsel on litigated cases. Beginning this fall, the Board will require attorney firms to file written notice when they are representing a party. An "Appearance" by a firm can be accomplished with a letter of representation, a hearing request, or an attorney retainer agreement. WCB Portal users can file their "Appearance" electronically using the "File an Appearance" tab. A "Response to Issues" can also be filed through the WCB Portal. In addition, formal letters can be filed by mail or fax.

Currently, the Board identifies an attorney firm as the party representative when that firm is copied or named on a "Request for Hearing." However, there has been a notable increase in attorney firm announcements that they have not been retained on a case, despite being named on or receiving a copy of a hearing request. In an effort to reduce the number of these erroneous "Notices of Hearing," attorney firms must file (whether by portal, email, mail, or fax) written notice of their representation.

CASE NOTES

Course & Scope: "Mixed Risk" Doctrine - Fainting While Snow Shoveling At Work - "Personal/Work-Related" Reasons For Fainting - Injury "Arose Out Of" Employment

Torrey F. Wolbert, 71 Van Natta 645 (June 24, 2019). The Board held that claimant's injury, which occurred when he fainted while shoveling snow at work, arose out of his employment under the "mixed risk" doctrine because, although there were some personal reasons for his fainting (e.g., lack of sleep, lack of food, dehydration), the physical exertion of his work activities (i.e., snow shoveling) had also contributed to his fainting episode. After being unexpectedly called into work, claimant arrived after an evening of drinking, with limited sleep, and without eating breakfast. After shoveling snow from his employer's work site, claimant lost consciousness and fell, sustaining a head injury. Following the carrier's denial, claimant requested a hearing, contending that the syncope episode was caused by his work activities. In response, the carrier asserted that a physician's opinion persuasively explained that personal factors specific to claimant (e.g., lack of sleep, lack of food, and dehydration) were the major contributing cause of the syncope.

Claimant came to work with limited sleep/ no breakfast, and shoveled snow, before fainting.

Injury "arises out of" employment when it results from the nature of the work or originates from some risk to which the work environment exposes worker.

The Board found that claimant's injury arose out of his employment. Citing *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997), the Board noted that an injury is deemed to "arise out of" employment when an injury results from the nature of the work, or originates from some risk to which the work environment exposes the worker. Relying on *Phil A. Livesley Co. v. Russ*, 296 Or 25, 29-30 (1983), the Board reiterated that risks are generally categorized as either employment-related risks (which are compensable), personal risks (which are noncompensable), and neutral risks (which may or may not be compensable, depending on the situation). Referring to *Janet G. Cavalliere*, 66 Van Natta 228, 234 (2014), and *Theresa A. Graham*, 63 Van Natta 740, 744 *recons*, 63 Van

A fall due to both personal and employment reasons is considered to have arisen out of employment under “mixed risk” doctrine.

Both physicians opined that “snow shoveling” work activity contributed to syncope episode.

Coworker asked claimant (when not scheduled to work) to deliver money to supervisor to pay for pizza for holiday party.

Although not scheduled to work and supervisor did not direct claimant’s activity, she was acting within reasonable bounds of employment.

Natta 970 (2011), the Board commented that, under the “mixed risk” doctrine, an injury that results from a fall that is due to both personal and employment reasons arises out of employment. The Board further observed that, under the “mixed risk” doctrine, if employment is a contributing factor to the fall, the injury is considered to have arisen out of employment. See *Graham*, 63 Van Natta at 744.

Turning to the case at hand, the Board noted that the two physicians offering opinions differed as to whether personal, or employment-related, factors were the major contributing cause of claimant’s syncope episode. Nonetheless, the Board reasoned that both physicians supported the proposition that claimant’s snow shoveling work was at least one of several risks (including his personal risks) which contributed to his syncope event. Thus, based on the contribution of claimant’s work-related snow shoveling activities, the Board concluded that his injury arose out of his employment under the “mixed risk” doctrine and, as such, his injury claim was compensable.

Course & Scope: “Off-Day” MVA - Delivering Cash To Employer For Office Holiday Pizza Party - “Special Errand”/Within “Reasonable Bounds” of Employment/For Employer’s Benefit - Injury Occurred W/I Course & Arose Out of Employment

Cassandra Sumner, 71 Van Natta 624 (June 14, 2019). The Board held that claimant’s back injury, which occurred while she was driving to deliver cash to her supervisor at her coworker’s request, arose out of and in the course of her employment because she was acting within the reasonable bounds of her employment (as an administrator for residential homes for disabled individuals) and for the benefit of her employer. On a day that claimant was not scheduled to work, her coworker asked her to deliver funds to her supervisor to purchase pizzas for the employer’s holiday party. While driving to meet the supervisor, claimant was injured in a motor vehicle accident. The carrier denied her claim, contending that her injury had neither occurred in nor arose out of her employment.

The Board disagreed with the carrier’s contentions. Citing *Robinson v. Nabisco, Inc.*, 331 Or 178, 186 (2000), the Board stated that the requirement that an injury occur “in the course of” employment depends on the “time, place, and circumstances” of the injury. Concerning the “arising out of” prong of the unitary “work-connection” inquiry, the Board noted that such a requirement depended on the causal link between the injury and the worker’s employment. See *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996).

Addressing the “course of” prong, the Board noted that an injury can occur in the course of employment where, although the claimant was not scheduled to work on the day of the injury and the supervisor did not direct the claimant to engage in work activities, the claimant was acting within the reasonable bounds of her employment. See *Micah Dugan*, 67 Van Natta 236, 238 (2015).

Assisting coworker was acting for employer's benefit.

Turning to the case at hand, the Board acknowledged that claimant was not scheduled to work on the day of the injury and that her coworker (rather than the supervisor) had directed her to deliver the funds. However, the Board reasoned that, in delivering the funds to the supervisor, claimant was acting for the employer's benefit and was assisting her coworker in accordance with the employer's training concerning being a "team player." Moreover, the Board noted that the record demonstrated that claimant's work duties were not limited to her work hours and included completing special tasks/errands for the employer. Under such circumstances, the Board concluded that the injury occurred "in the course of" claimant's employment.

Claimant's work duties involved special tasks/projects outside of normal shifts; risk of being injured while completing a task resulting from nature of employment.

Concerning the "arising out of" prong, the Board reiterated that an injury is deemed to "arise out of" employment "if the risk of injury results from the nature of the [employee's] work or when it originates from a risk to which the work environment exposes the worker." *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 601 (1997).

After conducting its review, the Board reasoned that, because claimant's work duties involved performing special tasks/projects for the employer outside of her normal shifts, the risk of being injured while completing such a task was a risk resulting from the nature of her employment. Accordingly, the Board held that claimant's injury (which occurred while delivering funds to her supervisor) "arose out of" her employment.

Medically Stationary: "030-0035(4)" Did Not Apply - No "Conflict" In "Med Stat" Date; Even If "Conflict," Conditions "Med Stat" On Earlier Exam Date

Johanna L. Southard, 71 Van Natta 660 (June 25, 2019). Analyzing ORS 656.005(17), and OAR 436-030-0035(1)(a), (4), in finding that claimant's accepted conditions were medically stationary on a specific date based on her attending physician's opinion, the Board reasoned that it was unnecessary to apply OAR 436-030-0035(4) (which provides that a "medically stationary" date is the date of examination) because there was no "conflict" regarding claimant's "medically stationary" date. An Order on Reconsideration had found claimant's accepted conditions medically stationary on a specific date, determining that there was no reasonable expectation that her conditions would materially improve after that date. Claimant requested a hearing, contending that her attending physician's later concurrence with the opinion of another physician (who noted improvement in a denied condition, which claimant asserted was a "direct medical sequelae" of an accepted condition) established that she had not become medically stationary until a later date. In support of her position, claimant relied on OAR 436-030-0035(4), which provides that, when there is a conflict regarding a medically stationary date, the date is the earliest date that a preponderance of the evidence establishes the "medically stationary" date and that the date of examination, rather than the report, controls such a date.

Claimant contended that her AP's concurrence report established a later "med stat" date.

The Board disagreed with claimant's assertions. Citing ORS 656.005(17), and OAR 436-030-0035(1)(a), the Board stated that a claimant's condition is medically stationary when the attending physician, authorized nurse practitioner, or a preponderance of medical opinion declares that all accepted conditions and

AP expressly declared claimant was medically stationary as of a specific date.

Because there was no "conflict" regarding "med stat" date, "030-0035(1)(a)" did not apply.

Concurring opinion noted concern with retroactive declaration of "med stat" determination; noted that "262(4)(g)" has 2-week "retroactive" limitation for TTD authorization.

direct medical sequela of accepted conditions are medically stationary. Referring to *Jon V. Michaels*, 58 Van Natta 1321, 1324 n 3 (2006), the Board noted that it had found a claimant's condition medically stationary on the specific date of his physician's letter, which had expressly stated that his condition was medically stationary "at this point in time." Finally, relying on *Maarefi v. SAIF*, 69 Or App 527, 531 (1984), the Board reiterated that a claimant's fluctuating symptoms, a need for palliative care, or a need for diagnostic services did not necessarily lead to a determination that a worker's condition is not medically stationary.

Turning to the case at hand, the Board observed that, after reviewing medical records, surveillance film, and concurring with the opinions of examining physicians, the attending physician had expressly declared claimant's conditions to be medically stationary as of a specific date. Reasoning that there was no "conflict" regarding claimant's "medically stationary" date, the Board determined that the rule did not apply. In any event, assuming the existence of a "conflict" and the application of the rule, the Board found that the earliest examination date upon which the worker was considered medically stationary was the same date that the attending physician had previously identified. Finally, the Board was not persuaded that the record supported a reasonable expectation of a material improvement in claimant's accepted conditions or direct medical sequela beyond that date.

Member Ousey concurred. Although agreeing with the lead opinion's "medically stationary" determination, Member Ousey expressed concern regarding a physician's ability to declare a worker's condition medically stationary several months after the fact. Noting that physicians are restricted from retroactively authorizing temporary disability benefits more than two weeks under ORS 656.262(4)(g), Ousey reasoned that it would only seem fair that physicians likewise be limited to authorize "medically stationary" status for a similar period. Noting that such a limitation was not currently available, Member Ousey urged the Management-Labor Advisory Committee and the legislature to consider the issue.

Own Motion: Attorney Fee - Voluntary Claim Reopening - Attorney's Services Did Not "Result In Increased TTD" - "015-0080(2)"; Penalties/ Attorney Fees - Untimely Voluntary Reopening, Unreasonable Refusal To Close Claim, Untimely First Installment of PPD Award - "262(11)(a)," "012-0110(1)," "012-0036(3)(a)," "015-0110"

Rigoberto Gonzalez-Hernandez, 71 Van Natta 596 (June 6, 2019). In an Own Motion Order, analyzing OAR 438-015-0080(2), the Board held that a claimant's counsel was not entitled to an "out-of-compensation" attorney fee arising from a carrier's voluntary reopening of an Own Motion claim for new/omitted medical conditions because the reopening had not resulted in increased temporary disability compensation. After the carrier accepted claimant's "post-aggravation rights" new/omitted medical claim for several

Carrier accepted “new/omitted medical condition,” but initially reopened Own Motion claim for a “worsening” and did not issue proper voluntary reopening until more than one year after claim acceptance.

low back conditions, the carrier issued a form 3501 that voluntarily reopened claimant’s Own Motion claim for “post-aggravation rights” “worsened conditions” (rather than the accepted new/omitted medical conditions). After the attending physician eventually declared claimant’s conditions medically stationary and provided permanent impairment findings, claimant’s counsel requested that the carrier close the claim. After the carrier refused the request (explaining that it had not voluntarily reopened the Own Motion claim for the new/omitted medical conditions), claimant requested Own Motion relief. When the carrier subsequently voluntarily reopened and closed claimant’s Own Motion claim for the accepted “post-aggravation rights” new/omitted medical conditions, claimant filed additional requests for Own Motion relief. Among other issues, claimant sought an “out-of-compensation” attorney fee for his counsel’s services in obtaining the voluntary reopening of his Own Motion claim, as well as penalties and penalty-related attorney fees for the carrier’s claim processing (i.e., its untimely voluntary claim reopening, its refusal to close the claim, and an untimely first installment of the permanent disability award granted by the Notice of Closure (NOC)).

The Board declined claimant’s request for an attorney fee regarding the issuance of the carrier’s voluntary claim reopening. Citing OAR 438-015-0080(2), the Board stated that, if an attorney is instrumental in obtaining a voluntary reopening of an Own Motion claim that results in increased temporary disability compensation, the attorney is entitled to an attorney fee to be paid out of the increased temporary disability compensation resulting from the voluntary reopening.

Even if claimant’s attorney was “instrumental” in obtaining voluntary reopening of Own Motion claim for “new/omitted medical condition”, there was no increase in claimant’s TTD benefits because carrier had already paid those benefits under “worsening” claim. Therefore, no attorney fee awarded under “015-0080(2).”

Turning to the case at hand, the Board noted that, after accepting claimant’s new/omitted medical conditions, the carrier had not voluntarily reopened that Own Motion claim for those conditions until after it had received claimant’s attorney’s request for claim closure. However, the Board observed that, by the time of claimant’s counsel’s “claim closure” request, the carrier had already paid all temporary disability compensation that was due from the time of its claim acceptance through its eventual voluntary claim reopening for the new/omitted medical conditions.

Under such circumstances, even assuming that claimant’s counsel had been instrumental in obtaining the voluntary reopening of claimant’s Own Motion claim for the new/omitted medical conditions through the “claim closure” request, the Board concluded that claimant’s attorney’s actions had not resulted “in increased temporary disability compensation.” See OAR 438-015-0080(2). Consequently, the Board held that an “out-of-compensation” attorney fee pursuant to the aforementioned rule was not warranted.

Within 30 days of acceptance of new/omitted medical condition, carrier must either voluntarily reopen Own Motion claim or file an Own Motion recommendation.

The Board turned to claimant’s requests for penalties/attorney fees for the carrier’s unreasonable claim processing. Citing OAR 438-012-0110(1) and *William L. Shipman*, 66 Van Natta 722 (2014), the Board reiterated that a penalty and attorney fee under ORS 656.262(11)(a) may be imposed for a carrier’s unreasonable or unjustified failure to comply with the Board’s Own Motion rules. Relying on ORS 656.278(5) and OAR 438-012-0030(1), the Board stated that, within 30 days after issuing a notice of acceptance of a “post-aggravation rights” new/omitted medical condition claim, a carrier must either voluntarily reopen the claim or submit a recommendation to the Board for or against reopening.

Carrier's one-year delay in voluntary reopening Own Motion claim for new/omitted medical condition was unreasonable.

Although "268(5)(f)" penalty not applicable to closure of Own Motion claim, "262(11)(a)" penalty/fee for unreasonable delay/refusal is available.

Delay in closing claim and late payment of PPD installment considered unreasonable.

Claimant did not object at hearing to characterization of issue as new/omitted medical condition from the accepted injury.

Applying those principles to the case at hand, the Board found that the carrier did not issue a form 3501 voluntarily reopening the Own Motion claim for the new/omitted medical conditions until more than one year after it had issued its acceptance notice of those conditions. Reasoning that the carrier had no legitimate doubt concerning its obligations to timely process the Own Motion claim for those accepted conditions, the Board found the carrier's conduct to be unreasonable. Consequently, the Board awarded a penalty and attorney fee under ORS 656.262(11)(a).

Regarding the carrier's claim closure, the Board reiterated that, although the penalty provision of ORS 656.268(5)(f) is not applicable to the closure of an Own Motion claim, penalties and attorney fees under ORS 656.262(11)(a) were awardable when a carrier unreasonably delayed or unreasonably refused payment of compensation under relevant Own Motion law. See ORS 656.278(6); OAR 438-012-0055; *Scott V. Morelli*, 67 Van Natta 715 (2015); *Billy J. Arms*, 59 Van Natta 2927 (2007).

After conducting its review, the Board found that, approximately one month before claimant's counsel's request for claim closure, and nearly two months before the issuance of the NOC, the carrier had received the attending physician's medical reports indicating that claimant's conditions were medically stationary with unrebutted permanent impairment findings. Under such circumstances, the Board found the carrier's delay in closing the claim to be unreasonable. Consequently, the Board awarded a penalty and attorney fee. See ORS 656.262(11)(a); OAR 438-012-0110(1); OAR 438-015-0110; *Morelli*, 67 Van Natta at 721.

Finally, addressing the carrier's payment of claimant's first installment of his permanent disability award from the NOC, the Board stated that, under OAR 438-012-0036(3)(a) and OAR 436-060-0150(5)(a)(A), the first installment of such an award must be paid no later than the 30th day after the date of the NOC. Noting that it was undisputed that the carrier's payment had been paid 8 days late, the Board awarded a 10 percent penalty and related attorney fee under ORS 656.262(11)(a). See *Nataliya Vaughan*, 65 Van Natta 1059 (2016); *Sheila R. Hedrick*, 56 Van Natta 1670 (2004).

Scope of Issues: "O.D." Claim Not Raised At Hearing (Which Concerned "New/Omitted Medical Condition" As Related To Accepted "Injury") - "O.D." Raised During Closing Arguments - Untimely

Socorro Martinez-Munoz, 71 Van Natta 665 (June 25, 2019). The Board declined to consider claimant's occupational disease claim for an arm condition because, at hearing, she had not objected to the ALJ's characterization of the issue as a new/omitted medical condition resulting from claimant's work injury (which had previously been accepted as a nondisabling injury) and had not raised an occupational disease theory until closing arguments. Asserting that the record supported the existence of an occupational disease at the time of her initial claim, claimant argued that the ALJ had erred in limiting the issue at hearing to the causal relationship between her claimed arm condition and her work injury.

The Board disagreed with claimant's contention. Citing *William Cline, Sr.*, 60 Van Natta 1210 (2008), *Daniel Morfin-Munoz*, 55 Van Natta 236, 237 n 1 (2003), and *Leah M. Fritz*, 54 Van Natta 632 (2002), the Board stated that, when parties agree to litigate a claim as an injury and do not identify an occupational disease as an issue for litigation at hearing, an occupational disease will not be considered on review.

Turning to the case at hand, the Board noted that claimant's initial claim was accepted as a nondisabling injury and that the carrier had denied the claimed arm condition as unrelated to her work injury. Moreover, the Board observed that claimant had not objected to the ALJ's description of the issue at hearing to concern the claimed condition's relationship to claimant's work injury.

Under such circumstances, the Board determined that, when claimant did not identify the occupational disease until the closing arguments, the ALJ was authorized to decline to consider the issue and that the issue would not be considered on review. See *Morfin-Munoz*, 55 Van Natta at 237.

"O.D." theory not raised until closing argument; ALJ/Board not required to consider issue.

TTD: "Termination" of Employment - "325(5)(b)" - Record Did Not Support Termination For "Work Rule" Violation - Claimant Provided Written Notification of Work Release

Ronald D. McAllister, 71 Van Natta 590 (June 5, 2019). Applying ORS 656.325(5)(b), the Board held that a carrier was not entitled to convert claimant's temporary total disability (TTD) benefits to temporary partial disability (TPD) benefits because the record did not establish that his termination of employment had been for a violation of work rules or other disciplinary reasons. Although the employer's "return to work" policy required an injured worker to provide a treating physician's medical release/work status to the supervisor within 24 hours following a medical appointment and that a violation of the policy could result in disciplinary action (including termination), there was no written "no call/no show" policy. After the compensable injury, the attending physician had released claimant to begin a "modified" job on a specific date. However, on the day the "modified" job was set to begin, the attending physician assistant retracted the work release, pending an examination by the attending physician. Claimant unsuccessfully attempted to call his supervisor that day and, that night, he slipped the work release under his employer's door. Thereafter, claimant was terminated for a violation of the employer's "return to work" policy and its "no call/no show" policy for failing to work for three consecutive days. When the attending physician subsequently approved another "modified" job that would have been offered to claimant had he not been terminated, the carrier converted claimant's TTD benefits to TPD benefits. Claimant then requested a hearing, seeking reinstatement of his TTD benefits, as well as penalties and attorney fees.

Employer did not have a written "no call/no show" policy.

The Board granted claimant's requests. Citing *Robert P. Krise*, 54 Van Natta 911 (2002), *aff'd on other grounds*, *SAIF v. Krise*, 196 Or App 609 (2004), and *Dustin E. Hall*, 68 Van Natta 1465, 1473 (2016), the Board stated that termination of employment for violation of work rules or other disciplinary

Although the Board will not review propriety of termination, it will examine whether claimant was terminated for work-rule violation.

Record established that claimant timely reported his work release to employer; thus, Board found he had not been terminated for work violation.

Employer's job offer was based on a rescinded "AP" work release; therefore, termination of TTD benefits based on rescinded "release" found unreasonable.

reasons is a condition precedent to conversion of TTD to TPD benefits under ORS 656.325(5)(b). Again, referring to *Krise* and *Hall*, the Board reiterated that, although it was not authorized to resolve the propriety of a termination, it was required to examine the factual reasons for the termination to determine whether claimant was, in fact, terminated for a work-rule violation or other disciplinary reason.

Turning to the case at hand, the Board acknowledged that the reason for claimant's termination was expressed in the employer's personnel action form; *i.e.*, violations of a "no call/no show" policy for not reporting to work for three consecutive days, and of the "return to work" policy. Nonetheless, finding that claimant had provided his release to the employer within 24 hours of his appointment, the Board determined that claimant had acted consistent with the written policy. Moreover, noting the absence of a written "no call/no show" policy, the Board was not persuaded that such a policy existed. In any event, even assuming that such a policy was present, the Board reasoned that the record established that claimant had timely reported his work release to the employer.

Under such circumstances, the Board was not persuaded that claimant's employment had been terminated for violation of a work rule or other disciplinary reason. Consequently, the Board reinstated his TTD benefits. *See also Vicki L. Danforth*, 50 Van Natta 2168, 2170 (where the record did not explain why the claimant's absences due to illness were "unauthorized absences" pursuant to the employer's work rules, the claimant's TTD benefits were reinstated).

Addressing claimant's request for a penalty and attorney fee under ORS 656.262(11)(a), the Board noted that, before the carrier issued its "modified" job offer under ORS 656.325(5)(b), a prior ALJ's order had found that the attending physician's "modified" work release had been rescinded. *See Ronald D. McAllister*, 70 Van Natta 912, 914 (2018). Despite this determination, the Board observed that, while its appeal of the prior ALJ's order was on appeal, the carrier still sent claimant the "modified" job offer, stating that he would have been offered the modified position (pursuant to his attending physician's work release, which the appealed ALJ's order had found had been retracted), but for his termination.

Under such circumstances, the Board reasoned that the employer's subsequent "modified" job offer had effectively relied on the rescinded work release for purposes of converting claimant's TTD benefits to TPD benefits. Identifying no other basis for authorizing the carrier's conversion of claimant's TTD benefits to TPD benefits, the Board was not persuaded that the carrier had a legitimate doubt concerning its continuing liability to pay TTD benefits. *See Hall*, 68 Van Natta at 1474-75, *on recons*, 68 Van Natta 1615, 1616-17 (2016); *see also Ricky J. Morin*, 68 Van Natta 1067 (2016); *Peggy J. Baker*, 49 Van Natta 40 (1995). Consequently, finding the carrier's claim processing to have been unreasonable, the Board assessed a penalty and attorney fee under ORS 656.262(11)(a).

APPELLATE DECISIONS UPDATE

Claim Filing: “Good Cause” For Untimely Filed Claim - “265(4)(c)” - “Objective” Standard In Determining “Good Cause”

Estrada v. Federal Express Corp., 298 Or App 111 (June 12, 2019). Analyzing ORS 656.265(1), and (4), the court affirmed the Board’s order in *Juan Estrada*, 69 Van Natta 71 (2017), previously noted 36 NCN 1:2, that found that claimant had not established good cause for not reporting to his employer his work accident that caused his hernia injury within 90 days of the accident. In reaching its conclusion, the Board acknowledged claimant’s testimony that he “originally” had not been aware that he had been injured and believed that his symptoms were “just soreness from working harder during that period of time.” Nevertheless, reasoning that claimant had noted a particular lifting incident that resulted in a “weird pull” and had further identified that incident as the beginning of his symptoms, which continued, increased, and were particularly associated with lifting and pushing heavy items, and made his work increasingly difficult, the Board determined that, even if claimant initially believed that the work accident did not result in an injury, he had not established that he was not aware of the injury within the statutory 90-day period and that a “reasonable worker” in claimant’s position would conclude that workers’ compensation liability was reasonably possible and that it was appropriate to report the accident to his employer within the 90-day period allowed by ORS 656.265(1)(a).

On appeal, claimant contended that: (1) the Board violated the “law of the case” doctrine by applying a different “good cause” legal standard than it had applied in its initial decision (which the court had previously reversed and remanded based on a determination that the Board order lacked substantial reasoning); (2) the Board’s “reasonable worker” standard was unlawful because it was inconsistent with ORS 656.265; and (3) the Board violated the “law of the case” doctrine by finding that claimant had not testified that he continued to believe that his symptoms were “just soreness from working harder” during the entire 90-day reporting period or, alternatively, such a finding was not supported by substantial evidence.

The court disagreed with claimant’s contentions. Regarding claimant’s first assignment of error, the court stated that, under the “law of the case” doctrine, an appellate decision is binding and conclusive for purposes of future proceedings in the same case and applies only to “the portions of a prior appellate opinion that were necessary to the disposition of the appeal.” *ILWU, Local 8 v. Port of Portland*, 279 Or App 157, 164, rev den 360 Or 422 (2016); *Hayes Oyster Co., v. Dulcich*, 199 Or App 43, 53, rev den 339 Or 544 (2005).

Turning to the case at hand, the court determined that, in its initial decision (*Federal Express Corp. v. Estrada*, 275 Or App 400, 407 (2016)), it had reversed the Board’s order based on a lack of substantial reason related to seemingly

*Under “law of the case” doctrine, appellate decision binding for future proceedings in same case only to “the portions * * * that were necessary to the disposition of the appeal.”*

Because initial Board decision never addressed correct standard for “good cause,” “law of the case” doctrine not applicable to Board’s “good cause” standard expressed in its subsequent decision on remand.

Court’s prior remanding decision let Board decide “good cause” question.

Court’s review of Board’s “good cause” determination was whether Board order fell within its range of discretion.

Although Board must make an individualized determination regarding “good cause” for a claimant’s untimely notice of a work accident, Board can apply an “objective standard” in making that determination.

inconsistent factual findings. Reasoning that its initial decision had never addressed the correct legal standard for “good cause,” let alone was necessary to its disposition of the initial appeal, the court rejected claimant’s “law of the case” argument.

Similarly, concerning claimant’s third assignment of error, the court disagreed with his assertion that the Board’s finding in its initial decision (*i.e.*, that claimant did not realize he was injured until after the 90-day notice period had passed) became the “law of the case” and, as such, the Board’s subsequent finding that he had become aware of his injury during the 90-day period violated the “law of the case” doctrine. To the contrary, the court explained that, in remanding to the Board, it had left it to the Board to decide how to resolve the apparent tension between its initial findings (*i.e.*, that he did not realize that he was injured until after the 90-day period had passed and that claimant was aware of an incident that caused symptoms and that his symptoms did not improve).

Addressing claimant’s “substantial evidence” argument, the court reviewed his testimony and determined that the Board could reasonably view his testimony as a whole to convey that he originally did not realize that he was injured but became increasingly concerned that he was injured as his symptoms continued to worsen, until he finally went to his physician. Thus, the court held that there was substantial evidence to support the Board’s aforementioned finding. *See Stone v. Employment Dept.*, 274 Or App 555, 556 (2015).

Regarding claimant’s second assignment of error, the court clarified that its inquiry on review of the Board’s “good cause” determination was whether the Board’s order fell within the range of its discretion. *See Lopez v. SAIF*, 281 Or App 679, 684 (2016). Applying that standard, the court concluded that the standard applied by the Board in determining that claimant had not established “good cause” for giving late notice of his work accident had not fallen outside of the statutory limits of ORS 656.265(4)(c).

In reaching its conclusion, the court rejected claimant’s argument that ORS 656.265(4)(c) imposes an individualized and purely subjective standard for determining whether a claimant has established “good cause” for untimely reporting a work accident. Although acknowledging that the Board had to make an individualized determination whether claimant had good cause to give late notice of the work accident, the court reasoned that it did not follow that the Board could not apply an objective standard in determining whether claimant had established good cause for his untimely notice of his work accident.

Consequently, the court concluded that the Board could determine that failure to give timely notice of an accident, despite knowing facts from which a reasonable person would conclude that workers’ compensation liability was a reasonable possibility and that notice to the employer was appropriate, did not constitute good cause under ORS 656.265(4)(c). In doing so, the court understood the Board to have focused on whether a reasonable person in claimant’s situation would have known enough facts to be expected to give notice of the accident to the employer and viewing claimant’s situation broadly, rather than narrowly, in making that assessment did not mean that the standard was secretly subjective or unworkable as claimant asserted.

Board did not act outside of its delegated discretion in determining “good cause” under “265(4)(c)” by relying on an analogy with “employer knowledge” for an untimely filed claim under “265(4)(a).”

In addition, the court conceded that the Board’s “reasonable worker” standard might require an injured worker to “predict” to some degree whether his injury would, for example, necessitate medical services (*i.e.*, whether “workers’ compensation liability” was a reasonable possibility). Nonetheless, reasoning that such a standard was different from requiring a worker to predict the injury itself, the court reiterated that in the present case it was settled that claimant was injured on a specific date.

Finally, the court recognized claimant’s challenge to the appropriateness of the Board’s analogy between employer knowledge under ORS 656.265(4)(a) and employee knowledge for claimant’s type of “good cause” argument pursuant to ORS 656.265(4)(c). Nonetheless, even if such an analogy was imperfect, the court reasoned that it did not follow that the Board had acted outside of its delegated discretion in relying in part on such an analogy in determining, within statutory limits, whether a claimant had “good cause” for the failure to file a timely claim.

APPELLATE DECISIONS COURT OF APPEALS

Statutory Construction: Statute of Limitations - Civil “Negligence” Action - “019(2)(a)” Limit (180 Days From Date of Order Affirming “Major Cause/Injury” Claim Not Compensable Becomes Final) Controls Over “30.275(9)” (Two Years From Alleged Loss/Injury)

Claimant filed “negligence” cause of action against public employer within 180 days of Board order denying “combined condition” claim, but more than 2 years after the injury.

Preble v. Centennial School District No. 287, 298 Or App 357 (June 26, 2019). Analyzing ORS 656.019(2)(a), the court held that a worker’s personal injury/negligence cause of action against a public employer for a knee condition (that occurred when she was struck by a motor scooter at school), which was filed within 180 days from the date a Board order upholding a carrier’s denial of her workers’ compensation injury claim (based on a determination that the work injury was not the major contributing cause of her combined knee condition), was timely filed, even though the cause of action had not been filed within two years after the injury as required by ORS 30.275(9). Acknowledging that the limitations of both statutes purported to apply “notwithstanding” any other statute of limitations, the court framed the dispute as one of statutory construction, which required it to discern the meaning and application of the relevant statutes most likely intended by the legislature that enacted them.

After reviewing ORS 30.275(9) (which provides that, notwithstanding any other provision of ORS Chapter 12 or other statute, a cause of action must be commenced within two years after the alleged loss or injury) and ORS 656.019(2)(a) (which provides that, notwithstanding any other statute of limitations provided in law, a civil negligence action against an employer that arises because a worker’s compensation claim has been determined to be not compensable because the worker has failed to establish that a work-related incident was the major contributing cause of the worker’s injury must

Court determined statutes of limitations were irreconcilably conflicting.

be commenced within the later of two years from the date of injury or 180 days from the date of the order affirming that the claim is not compensable on such grounds becomes final), the court determined that the statutes are irreconcilably conflicting.

More specific statute ("019(2)(a)") took precedence over the more general one (ORS 30.275(9)).

Under such circumstances, the court identified two rules to determine which statute took precedence: (1) the more specific of conflicting statutes takes precedence over a more general one (*Fairbanks v. Bureau of Labor & Industries*, 323 Or 88 (1996)); and (2) the later-enacted statute generally takes precedence (*State v. Vedder*, 206 Or App 424, 430 (2006), *rev den*, 342 Or 417 (2007)).

Concerning the first rule, the court noted that ORS 30.275(9) applied to any claim asserted against any public body, whereas ORS 656.019(2)(a) applies only to a very specific type of workers' compensation claim (*i.e.*, one that was denied because of a worker's inability to satisfy the statutory major contributing cause standard). Reasoning that ORS 656.019(2)(a) was the more specific statute, the court concluded that the statute's longer limitation period must take precedence over the shorter two-year period of ORS 30.275(9).

Later-enacted statute ("019(2)(a)") controlled.

Regarding the second rule, the court explained that the rationale of giving precedence to the later-enacted statute assumes that the legislature presumably was aware of the preexisting statute and must have impliedly repealed it to the extent of the inconsistency. *Buehler v. Rosenblum*, 354 Or 318, 325 (2013). Observing that it was undisputed that ORS 656.019(2)(a) (which was adopted 20 years after ORS 30.275(9)) was the later-enacted statute, the court determined that ORS 656.019(2)(a) controlled and that the worker's cause of action was timely commenced.

Accordingly, the court held that the trial court erred in granting the employer's motion to dismiss the worker's cause of action based on statute of limitations grounds. Thus, the court reversed and remanded.