Workers' Compensation Board

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News & Case Notes

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New Managing Attorney - Jim Moller

Jim Moller has been selected for the position of WCB's Managing Attorney. Jim is a graduate of Stanford University, as well as Vanderbilt University School of Law. For the past six months he has been a WCB staff attorney. Before assuming those duties, Jim was in private practice for twenty years as an appellate lawyer, specializing in workers' compensation (representing injured workers, employers, and insurers) and social security disability appeals at the federal court level. Prior to that, Jim was an appellate lawyer for the SAIF Corporation, a WCB Board Member, and a WCB staff attorney (review and senior). Jim will begin his duties February 3, 2020.

Board Meeting: December 17, 2019 - Discussion of "Attorney Fee" Rule Concepts - Consideration of Approving Rule Amendments to Initiate "Rule Making" Process

The Board has scheduled a public meeting for the Members to further discuss concepts/proposed rule amendments arising from the "Attorney Fee Advisory Committee" report and public comments/Members' discussions at the October 29 Board meeting. The Members' next public meeting is scheduled for Tuesday, December 17, 2019, at 1 p.m. in the Board's Salem office. Public testimony will be welcomed at the meeting as the Members proceed with their deliberations. Arrangements are also being made at each permanently staffed Board office to allow attendees to view the Board's Salem meeting and participate remotely.

The agenda for the December 17 meeting is as follows:

- Discussion of draft "attorney fee-related" rule language prepared in response to the Members' directions at their October 29, 2019, Board meeting.
- Discussion of additional draft "attorney fee-related" rule language submitted by Member Lanning since the October 29, 2019, Board meeting.
- Discussion of additional draft "attorney fee-related" rule language submitted by Member Curey since the October 29, 2019, Board meeting.

- Consideration of approving proposed "attorney fee-related" rule amendments and scheduling a public "rulemaking" hearing to receive written/oral comments from parties, practitioners, and the public concerning any proposed rule amendments.

As described above, at their December 17 meeting, the Members will consider the approval of proposed rule amendments. Should the Members take such action and initiate rulemaking, a public hearing will be scheduled for a future date, which will allow interested parties, practitioners, and the general public an opportunity to present written/oral comments regarding the proposed rule amendments. Following that public hearing, another Board meeting will be scheduled for the Members to consider those written/oral comments and discuss whether to adopt permanent rule amendments.

In Camera Review - Relevant Medical Records to Be Provided to Parties On Disc

In September 2019, the Board promulgated rule changes regarding subpoenas. For more information regarding these changes, please see the September 24, 2019, Order of Adoption. As part of this process, the Advisory Committee considered whether the Hearings Division should adopt, as an option, sending medical records via disc. This was in response to the growing number of medical providers submitting voluminous medical records to the Hearings Division via disc when there is an objection to a subpoena. The committee recommended an option of utilizing discs be adopted.

Accordingly, beginning January 2020, in cases where there is an objection to a subpoena, and records are received on disc from a medical provider, or the medical records to be reviewed are voluminous, the Hearings Division will transmit the relevant medical records via disc.

Consistent with other procedures where discs are provided by WCB, a service charge of $5.00 will be billed to the party receiving the disc from the Hearings Division.

Mediation Evaluation Pilot Project

The Workers' Compensation Board will begin conducting a mediation evaluation pilot project from January 1, 2020, through March 31, 2020. WCB will be sending evaluations to attendees of all held mediations conducted during that period. The purpose of the project is to increase feedback to WCB from mediation participants about their mediation experience. Evaluations will be mailed out and will include a postage-paid return envelope for your convenience. We would appreciate your participation in providing us with feedback during the 3-month project period.

Adoption of Permanent Amendments to "Subpoena" Rule ("007-0020(6)(b)") - Effective January 1, 2020

At their September 19, 2019 public meeting, the Members adopted permanent amendments to OAR 438-007-0020(6)(B), which concerns

"subpoena duces tecum" for individually identifiable health information. The Members took these actions after considering a report from their Advisory Committee, as well as written/verbal comments received at the Board's August 23, 2019, rulemaking hearing.

OAR 438-007-0020(6)(b) is designed to prescribe the procedures to follow when serving such a subpoena, as well as for medical providers to follow after receiving a subpoena for a worker's individually identifiable health information. Under the amended rule, the time period in which a party may object to the subpoena has been extended to 10 days (from 7 days under the prior version of the rule). In addition, the rule amendment also requires that: (1) a subpoena explain a recipient's obligations if a timely objection is received; and (2) require a subpoena to include language describing the manner in which to comply with the subpoena (i.e., provide the record no sooner than 14 days after the issuance of the subpoena, but not later than 21 days after issuance of the subpoena).

The effective date for the rule amendment is January 1, 2020, and applies to all subpoenas issued on and after January 1, 2020.

The Board's Order of Adoption can be found here: https://www.oregon.gov/wcb/Documents/wcbrule/rule-filings/2-2019/ooa2-2019a.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.

CASE NOTES

Course & Scope: Injury While Walking During "Rest Break" - Tripped on Public Sidewalk After Talking on Cell Phone Regarding "Work-Related" Matter - Not a "Social/Recreational" Activity "Primarily for Personal Pleasure" - "Arose Out Of" & Occurred "In The Course Of" Employment

Claimant routinely used phone for "work-related" purposes on breaks and before/after work hours.

Tripped/fell on public sidewalk while walking with coworkers during rest break; had just completed "work-related" call.

Priscilla V. Lowells, 71 Van Natta 1340 (November 27, 2019). The Board held that claimant's injury, which occurred when she tripped on a public sidewalk, arose out of and in the course of her employment because she was on a scheduled rest break walking with her coworkers and had been talking on a cell phone regarding a "work-related" matter before she tripped and fell. Claimant, a compliance worker for a state agency concerning child care, routinely made and received work-related calls on her "employer-provided" cell phone before/after her scheduled work hours and during breaks. On the day of her injury, she was expecting a "work-related" call when she joined her coworkers for a walk on a public sidewalk during their scheduled rest break. When she received the anticipated call during the walk, claimant increased her walking pace to ensure privacy because of the sensitive nature of the call. After the call was completed, while continuing to think about the call, claimant tripped on an uneven portion of the sidewalk and fell, injuring herself. The carrier

denied the claim, contending that it occurred during a recreational/social activity primarily for her personal pleasure (and thereby was excluded from compensability under ORS 656.005(7)(b)(B)) or her injury did not arise out of and in the course of her employment.

The Board disagreed with the carrier's contentions. Citing *Roberts v. SAIF*, 341 Or 48, 52 (2006), the Board stated that ORS 656.005(7)(b)(B) raises three questions: (1) whether the worker was engaged in or performing a "recreational or social activity"; (2) whether the worker incurred the injury "while engaging in or performing, or as a result of engaging or performing," that activity; and (3) whether the worker engaged in or performed the activity "primarily for the worker's personal pleasure." Relying on *Washington Group Int'l v. Barela*, 218 Or App 541 (2008), the Board reiterated that, because the statute provided a limitation on compensable injuries, it constituted an affirmative defense for which the carrier bore the burden of establishing the aforementioned statutory requirements. Referring to *U.S. Bank v. Pohrman*, 272 Or App 31, 38 (2015), *Legacy Health Systems v. Noble*, 232 Or App 93, 98 (2009), and *Liberty Northwest Ins. Corp. v. Nichols*, 186 Or App 664, 666-71 (2003), the Board noted that examples of the "type" of activity that the legislature intended to exclude from compensability are "picnics, office parties, or organized or spontaneous sports or games" that are "incidental to employment activity."

Carrier bears burden of proving "social/recreational activity" statutory exclusion from compensability.

Turning to the case at hand, the Board found that claimant was injured during a mandatory, paid rest break, while she was actively engaged in work activities; *i.e.*, receiving a "work-related" call, which she was required to take, even during her scheduled breaks. Further reasoning that, when she was injured, claimant was not participating in the type of recreational/social activity described in *Noble*, and that any social activity was incidental to the work-related reason for her break, the Board determined that her injury was not excluded from compensability under ORS 656.005(7)(b)(B).

"Social activity" was incidental to the work-related reason for the break; injury not excluded from compensability under "005(7)(b)(B)."

Addressing whether claimant's injury occurred "in the course of" her employment, the Board stated that the requirement depends on the "time, place, and circumstances" of the injury. *See Robinson v. Nabisco, Inc.*, 331 Or 178, 186 (2000). Referring to *Pohrman*, and *Katherine Mandes*, 71 Van Natta 240, 245 (2019), the Board reiterated that an injury while engaged in a "personal comfort" activity such as walking during a paid work break has been determined to be sufficiently connected to work to establish that an injury occurred during the course of a worker's employment.

Walking during rest break; "personal comfort" activity.

Applying those principles (and after analyzing the seven "*Jordan*" factors described in *Jordan v. Western Electric*, 1 Or App 441, 443-44 (1970)), the Board disagreed with the carrier's contention that claimant was on a personal mission when she sustained her injury, but rather was engaged in a "personal comfort" activity that was sufficiently connected to her work. In reaching this conclusion, the Board noted that claimant was on a mandatory, paid rest break (which her supervisor was aware of, had approved, and acquiesced to such an activity), and had conducted an urgent work-related call during the walk which had provided substantial benefit to her employer.

Urgent work-related phone call provided benefit to employer.

Finally, the Board analyzed whether claimant's injury had "arose out of" her employment, which concerns whether the risk of injury results from the nature of her work or originated from some risk to which the work environment

exposed her. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997). Relying on *Phil A. Livesley Co. v. Russ*, 246 Or 25 (1983), the Board reiterated that risks are generally categorized as employment-related risks (which are compensable), personal risks (which are not compensable), or neutral risks (which are compensable only if employment conditions put the worker in a position to be injured). Referring to *Legacy Health Systems v. Noble*, 250 Or App 597, 601 (2012), the Board noted that the "arising out of" prong of the unitary work connection test is not satisfied unless the cause of claimant's injury was either "a risk connected with the nature of the work" (*i.e.*, an employment related risk) or "a risk to which the work environment exposed claimant."

Injury resulted from "nature of work," which required claimant to answer "work-related" calls on breaks.

After considering those principles and applying them to the record, the Board found that claimant's injury both resulted from a risk associated with the nature of her work, as well as from a risk to which she was exposed by her work environment. Concerning the nature of her work, the Board reasoned that claimant's employment required that her to answer work-related calls on her "employer-provided" cell phone whenever possible (including while on her rest breaks) and that, at the time of her injury, she was still thinking about a "work-related" call. Under such circumstances, the Board concluded that the nature of claimant's employment exposed her to the risk of inadvertently tripping on an uneven public sidewalk.

Alternatively, claimant remained on duty at the time of injury; thus, injury resulted from risk to which she was exposed by work environment.

Alternatively, the Board was also persuaded that claimant's injury resulted from a risk to which she was exposed by her work environment. Rather than being merely "on call" during her rest break, the Board determined that claimant remained on duty at the time of her injury. *See City of Eugene v. McDermond*, 250 Or App 572, 582 (2012), *rev den*, 353 Or 208 (2013).

In reaching this conclusion, the Board distinguished *Lori C. Watt*, 70 Van Natta 755, 760-61 (2018), where a claimant's "rest break" walking injury from tripping on an uneven sidewalk had been determined not to have "arisen out of" her employment. In contrast to *Watt* (where the record did not establish that the claimant's injury resulted from a risk connected to the nature of her work or result from a risk to which her work environment exposed her), the Board reasoned that, in the present case, claimant was required to answer cell phone calls while on her mandatory, paid rest break (which was both a risk connected to the nature of her work, as well as a risk to which her work environment exposed her).

Course & Scope: "Social/Recreational Activity/ Primarily for Personal Pleasure" - "Traveling Employee" Injury While Walking to Convenience Store - Statutory "Exclusion" Applied - "005(7)(b)(B)"

After returning to hotel room after "employer-sponsored" dinner and drinks, claimant walked to a nearby store; injured when fell on a bark dust "island" while smoking.

W. Leigh Castleton, 71 Van Natta 1261 (November 5, 2019). Applying ORS 656.005(7)(b)(B), the Board held that claimant's injury, which occurred during her walk from her hotel to a convenience store while she was at an out-of-town work-related conference, was not compensable because she was engaged in social/recreational activity primarily for her personal pleasure when she was injured. Claimant attended an out-of-town work conference that included an employer-sponsored dinner after the conference activities.

Following the dinner and after going to a few drinking establishments with coworkers, claimant returned to her hotel room. Thereafter, she and a coworker walked to a nearby convenience store to buy cigarettes. After obtaining the cigarettes, claimant was injured when she fell from a bark dust "island" while smoking. Relying on ORS 656.005(7)(b)(B), the carrier denied claimant's injury claim. Claimant requested a hearing, contending that the statutory exclusion did not apply because she was travelling at her employer's request to the work-related conference and that going to get cigarettes with her coworker advanced the "team building" purpose of the conference travel, and was, therefore, not primarily a social or recreational activity.

"Social/recreational activity" exclusion from compensability applies to "travelling employee."

The Board disagreed with claimant's contentions. Citing ORS 656.005(7)(b)(B), the Board stated that the statutory "compensability" exclusion raises three questions: (1) whether the worker was engaging in or performing a "social or recreational activity"; (2) whether the worker was injured "while engaging in or performing, or as a result of engaging in or performing," that activity; and (3) whether the worker engaged in or performed the activity "primarily for the worker's personal pleasure." *See Roberts v. SAIF*, 341 Or 48, 52 (2006). Relying on *Roberts*, the Board observed that the pertinent inquiry was whether the injury-causing activity was properly described as a "recreational or social activity." Finally, referring to *Summer Cook*, 69 Van Natta 1227, 1229 (2017), the Board reiterated that the statutory "social/recreational activities" exclusion is applicable even when a worker is in a "travelling employee" status.

Board examined the more proximately defined activity at the time of injury; i.e., falling while smoking cigarette purchased at store.

Turning to the case at hand, the Board first declined to examine whether the broadly defined activity of travelling for a work-related conference would meet the statutory definition under ORS 656.005(7)(b)(B). Instead, the Board examined the more proximately defined activity in which claimant was engaged; *i.e.*, falling off a bark dust island while smoking a cigarette that was purchased at a nearby convenience store.

Claimant's "injury-producing" activity too attenuated from employer-sponsored conference/dinner to be a "work-related" activity.

Considering the specific activity which precipitated claimant's injury, the Board reasoned that the outing to purchase cigarettes was too far attenuated from the employer-sponsored conference activities and dinner to constitute a work-related activity. Furthermore, the Board noted that a coworker's testimony indicated that the purpose of the outing was claimant's desire to smoke. Under such circumstances, the Board concluded that claimant was engaged in a social/recreational activity primarily for her personal pleasure when she sustained her injury.

In reaching its conclusion, the Board found support for its decision in *Harry Cruz*, 66 Van Natta 2064, 2065 (2014), where a claimant was injured after going out with a group of coworkers for drinks following an employer-sponsored meal and activity. As in the present case, the Board noted that, in *Cruz*, it had found that the claimant was engaged in a "social or recreational" activity primarily for personal pleasure that was attenuated from the employer's sponsored event.

Extent: Permanent Impairment - No Apportionment - No "Pre-Closure" Denial of Combined Condition - *Caren* Applied

Attending physician stated 15 percent of claimant's permanent impairment was due to preexisting conditions.

Alicia Bermejo-Flores, 71 Van Natta 1264 (November 5, 2019). In evaluating the extent of permanent impairment for claimant's knee condition, the Board held that apportionment of her impairment between accepted and preexisting conditions was not appropriate because the carrier had not issued a "pre-closure" denial of a combined condition under ORS 656.262(7)(b) and ORS 656.268(1)(b). Before closure of claimant's accepted claim for a medial collateral ligament tear and posterior horn tear of her knee, her attending physician agreed with the findings from a work capacity evaluation that 85 percent of her knee impairment was due to the accepted conditions and 15 percent was due to preexisting conditions (prior knee injuries and surgeries). After an Order on Reconsideration apportioned claimant's permanent impairment, claimant requested a hearing, seeking an increased permanent impairment award that was based on her entire impairment findings.

Because carrier did not issue "pre-closure" denial of combined condition, and record established that impairment as a whole was due in material part to compensable injury, claimant's PPD award was based on entire impairment.

The Board granted claimant's request. Citing *Caren v. Providence Health Sys. Or.*, 365 Or 466 (2019), the Board reiterated that the "combined condition" statutes of ORS 656.262(7)(b) and ORS 656.268(1)(b) (among others) provide a limited exception to the general rule that a carrier is obligated to pay compensation for the full measure of the worker's disability (including permanent partial disability under ORS 656.214) that is caused in material part by the compensable injury. Consistent with the *Caren* rationale, the Board stated that, unless the carrier reduces a claimant's compensation by issuing a "pre-closure" denial of the previously accepted "combined condition" in accordance with ORS 656.268(1)(b), the entirety of a claimant's permanent impairment must be compensated.

Turning to the case at hand, the Board noted that the carrier had neither accepted, nor denied, a combined knee condition before closing the claim. The Board further observed that the attending physician had opined that claimant's range of motion loss was "due to the injury."

Under such circumstances, the Board determined that claimant's permanent impairment as a whole was due in material part to the compensable injury and, as such, should be compensated. Consequently, the Board increased claimant's permanent impairment award based on her entire impairment.

Extent: Permanent Impairment - "Chronic Condition" - "Significant Limitation/Repetitive Use" - "035-0019(1)(b)"

Kristopher K. Norton, 71 Van Natta 1273 (November 6, 2019). Analyzing OAR 436-035-0019(1)(b), the Board held that claimant was entitled to a "chronic condition" impairment value for his knee condition because the medical arbiter's impairment findings supported a "significant limitation," even though the arbiter had subsequently indicated that claimant was able to repetitively use his knee

Medical arbiter initially found claimant was significantly limited in repetitive use of knee.

more than two-thirds of a period of time. After claimant requested reconsideration of a Notice of Closure that did not award a "chronic condition" impairment value for his knee condition, a medical arbiter panel found that he was significantly limited in the repetitive use of his knee based on the Workers' Compensation Division's (WCD's) "Industry Notice," which provides that the relevant inquiry under OAR 436-035-0019(1) is whether the worker is "unable to repetitively use the body party for more than two-thirds of a period of time." In doing so, the arbiter reported that, due to claimant's pain: (1) his squatting was limited to about 30 percent; (2) he was unable to perform repetitive squatting, kneeling, crawling, or impact to the patellar tendon; and (3) he was unable to repetitively use his knee for more than two-thirds of a period of time. Thereafter, the Appellate Review Unit again provided the arbiter with WCD's "Industry Notice," stating that a worker's limitations with squatting, kneeling and crawling does not necessarily mean that the knee itself is significantly limited in repetitive use. In response, the arbiter indicated that claimant was able to repetitively use his knee more than two-thirds of a period of time. After an Order on Reconsideration did not award a chronic condition impairment value, claimant requested a hearing.

In response to ARU inquiry, arbiter later indicated claimant was able to repetitively use his knee.

Board must determine whether record contained persuasive medical opinion that included findings establishing significant limitation in repetitive use due to a chronic/permanent condition, not whether a physician describes limitation as "significant."

The Board found that claimant was entitled to a chronic condition impairment value under OAR 436-035-0019(1)(b). Citing *Spurger v. SAIF*, 266 Or App 183, 192 (2014) (*Spurger I*), and *William E. Hannah*, 68 Van Natta 55, 62-63 (2016), the Board stated that its task was to determine whether the record contained a persuasive medical opinion that included findings which established that claimant was significantly limited in the repetitive use of his knee due to a chronic and permanent medical condition, not whether a physician had described the limitation as "significant" according to the physician's understanding of that term. The Board reiterated that "magic words" might provide assistance in reaching such a determination, but that the existence or absence of such words would not be dispositive.

Based on findings in arbiter report, Board was persuaded claimant was "significantly limited," i.e., "meaningful or important" limitation on repetitive use of knee due to chronic/permanent condition.

Based on the history and findings detailed in the arbiter's report, the Board was persuaded that the arbiter's report included limitations that established a "meaningful or important" limitation on claimant's repetitive use of his knee that was due to a chronic and permanent medical condition. *See Broeke v. SAIF*, 300 Or App 91 (2019) (Board's order not supported by substantial reason where medical evidence supported findings of great difficulties standing and walking, but Board found without explanation that difficulties did not rise to the level of a significant limitation of use of under OAR 436-035-0019); *Jennifer Kunzman*, 68 Van Natta 384, 387 (2016) (despite physician's express opinion that the claimant was "somewhat limited" in the repetitive use of her left shoulder, reviewing that physician's opinion as a whole, without regard to "magic words," Board found that the claimant was found to be "significantly limited" in the repetitive use of her shoulder and, thus, entitled to a "chronic condition" permanent impairment value). Consequently, the Board determined that claimant's ability to repetitively use his knee was "significantly limited." OAR 436-035-0019(1)(b).

Under such circumstances, the Board concluded that claimant had established error in the reconsideration process that had not granted a "chronic condition" impairment value. *Marvin Wood Products v. Callow*, 171 Or App 175,

183-84 (2000); OAR 436-035-0019(1)(b). Thus, the Board modified the Order on Reconsideration to award a 5 percent "chronic condition" permanent impairment value.

Dissent argued there were insufficient objective findings to support "significant limitation"/impairment and claimant had been released to work without restriction.

Member Woodford dissented. Based on her review of the arbiter's report, Woodford disagreed with the majority's determination that there were sufficient objective findings from which to conclude that claimant was significantly limited in the repetitive use of his knee. Noting that the arbiter's only "findings" that arguably supported a "chronic condition" impairment value was a statement about "no repetitive squatting, kneeling, crawling or impact to the knee patellar tendon," Woodford observed that claimant had been released to his "at-injury" job without restrictions. Under such circumstances, Member Woodford considered such evidence insufficiently precise to establish an error in the Order on Reconsideration's decision not to grant a "chronic condition" impairment value.

"Non-Cooperation" Denial: "Reasonable Cooperation" W/I 30 Days of WCD "Suspension" Order - Carrier's Denial Procedurally Invalid - "262(15)"

Basil D. Yauger, 71 Van Natta 1255 (November 1, 2019). On reconsideration of its prior Order on Remand, *Basil D. Yauger*, 71 Van Natta 882 (2019), the Board continued to set aside the carrier's "noncooperation" denial as procedurally invalid under ORS 656.262(15), finding that claimant's "email" contact with the carrier, which was within 30 days of the Workers' Compensation Division's (WCD) suspension order, constituted "reasonable cooperation" in the carrier's investigation. The carrier challenged the Board's initial order (on remand from the court, *Hilton Hotels Corp. v. Yauger*, 295 Or App 330 (2018)), which had applied the court's "reasonable cooperation" standard in determining that claimant's contacts had met that requirement. Specifically, the carrier contended that, in reaching its "reasonable cooperation" determination, the Board had improperly relied on claimant's contacts outside the applicable 30-day period.

Board focused on claimant's communication in the 30-day period following WCD's "suspension" order.

On reconsideration, the Board disagreed with the carrier's assertion. Emphasizing that it had relied only on claimant's contact/communication with the carrier within the applicable 30-day period from WCD's "suspension" order, the Board found that claimant's two emails to the carrier asking for direction on how to move forward with his claim (which the carrier did not dispute receiving within the 30-day period) constituted "reasonable cooperation" with the carrier's investigation.

Claimant's emails to the employer were not immediately forwarded to the claim examiner; delay attributed to employer's/carrier's transmission of emails, not to claimant.

In reaching its decision, the Board acknowledged the carrier's contention that claimant's email did not reach the claim examiner until more than 30 days after WCD's "suspension" order. Nonetheless, noting that the employer itself had received the emails within the 30-day period, the Board attributed the delay in the employer's/carrier's internal transmission of claimant's emails to its claim adjuster to the carrier, not claimant. The Board also rejected the carrier's assertion that claimant's statement that he "*was* very willing to cooperate," (emphasis added) did not mean that he was "no longer" willing to cooperate as the carrier alleged. While recognizing that some of claimant's comments might

Carrier did not respond to claimant's emails; rather than attempting to schedule interview/deposition, carrier issued "procedurally invalid" denial.

have reflected some sarcasm, the Board reasoned that he had made contact with the carrier to arrange his deposition/interview (as directed by WCD's order) within the requisite 30-day period. Moreover, because the carrier did not respond to any of claimant's emails (but rather issued its "noncooperation" denial), the Board declined to assume from the emails that claimant was unwilling to cooperate in the carrier's claim investigation.

Under such circumstances, the Board found that claimant's contact/communication with the carrier (*i.e.*, his two emails asking what he needed to do to move his claim forward) had been received within the required 30-day period from WCD's order and constituted "reasonable cooperation" in the carrier's claim investigation. Because the carrier had not responded to claimant's emails, or otherwise contacted him, but instead had issued a "noncooperation" denial, the Board set aside the carrier's denial as procedurally invalid.

Standards: Work Disability - "AP" Release to "Regular Work" ("At-Injury" Job) - No Entitlement to "Work Disability" - "214(2)," "726(4)(f)(E)"

Penalties: Unreasonable "NOC" - "Insufficient Information" to Close Claim - Carrier Did Not Seek Clarification of "AP" Inconsistent "Work Release" Statements - "268(5)(f)"

Marshall E. Shaw, 71 Van Natta 1328 (November 26, 2019). Applying ORS 656.214(2) and ORS 656.726(4)(f)(E), the Board held that claimant was not entitled to a work disability award because, in response to an inquiry from the Appellate Review Unit (ARU), his attending physician had unequivocally stated that he was released to his regular work, but that because the carrier had not sought clarification of the attending physician's "release to regular work" statements before closing the claim, there had been insufficient information to close the claim and, as such, a penalty under ORS 656.268(5)(f) was justified. Following a Notice of Closure (NOC) (which did not award work disability), claimant requested reconsideration. Thereafter, ARU asked the attending physician to clarify a discrepancy between a chart note (which restricted claimant from walking up steep terrain) and a "work status" form (that issued on the same day and indicated that claimant was released to regular work, which would necessarily require working on steep terrain). After the attending physician clarified that claimant was released to all aspects of his "at-injury" job (including working on steep terrain), an Order on Reconsideration did not award work disability. Claimant then requested a hearing, seeking a work disability award, as well as a penalty and attorney fee for the carrier's unreasonable claim processing.

ARU asked "AP" to clarify a "work status" discrepancy that was present when carrier closed the claim.

The Board disagreed with claimant's contention regarding work disability. Citing ORS 656.214(2) and ORS 656.726(4)(f)(E), the Board stated that a claimant is not entitled to work disability if he/she returned to regular work or was released to regular work by the attending physician. Referring to ORS 656.283(6), *SAIF v. Hernandez*, 155 Or App 401, 406, and *Jeffery L. Frost*,

63 Van Natta 1641, *recons*, 63 Van Natta 1890, 1892 n 1 (2011), the Board noted that the determinative time to evaluate a worker's disability is as of the date of issuance of the reconsideration order.

"AP" unequivocally released claimant to regular work; therefore, no error in reconsideration order's decision not to award work disability.

Turning to the case at hand, the Board found that, in response to ARU's request for clarification, the attending physician had unequivocally stated that claimant was released to his regular work as of the date of the reconsideration order. Consequently, the Board found no error in the reconsideration record to support claimant's request for a work disability award. *See Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000).

However, the Board granted claimant's request for penalties and attorney fees under ORS 656.268(5)(f) and ORS 656.382(1). Citing *David J. Morley*, 66 Van Natta 2052, 2056 (2014), the Board reiterated that the reasonableness of a NOC must be evaluated based on the information available to the carrier at the time of the closure. Referring to *Red Robin Int'l v. Dombrosky*, 207 Or App 476, 481 (2006) and *Kevin S. Tucker*, 68 Van Natta 1930, 1934 (2016), the Board noted that whether a Notice of Closure is unreasonable is determined on a "case-by-case" basis.

Carrier's claim closure without seeking clarification of "AP's" work release was unreasonable. Without clarification of discrepancy in work release there was "insufficient information" to close claim.

After conducting its review, the Board noted that, when the carrier issued its NOC, there was a discrepancy between the attending physician's "work status" form (which released claimant to regular work) and the physician's chart note that same day (which had restricted claimant from working on steep terrain). Because claimant's regular work involved walking on steep terrain, the Board reasoned that clarification of this apparent discrepancy regarding the attending physician's work release was necessary before there would be sufficient information to close the claim. *See Humzah Al-Rawas*, 71 Van Natta 1133 (2019); *Juan M. Orta-Carrizales*, 71 Van Natta 794, 803-04 (2019). Because the carrier had not sought clarification, the Board concluded that the carrier had unreasonably closed the claim and, as such, penalties and attorney fees under ORS 656.268(5)(f) and ORS 656.382(1) were warranted.

Standards: Work Disability - Release to "Modified" Job Claimant Was Performing at Time of Injury - Not Release to "Regular Work" (Recurring, Customary Job) - "214(1)," "035-0005(15)"

Pedro Perez-Hernandez, 71 Van Natta 1298 (November 15, 2019). Analyzing ORS 656.214(1)(d) and OAR 436-035-0005, the Board held that claimant was entitled to a work disability award because, even though his attending physician had released him to return to the job he was performing when he sustained his compensable ankle injury (a modified job as a "chaser" that he was performing as a result of an earlier compensable arm injury), he had not been released to his customary "at-injury" job (choker setter) that he was performing at the time of his earlier injury. At the time of his compensable ankle injury, claimant was working in a modified job (chaser) due to restrictions from his earlier arm injury. Ultimately, his attending physician released him to

Claimant was in a modified job due to prior arm injury when he sustained his current compensable ankle injury.

the modified job (chaser), but not to his "choker setter" position. After an Order on Reconsideration did not grant work disability, claimant requested a hearing, contending that, because he had not been released to his original "choker setter" position, he was entitled to a work disability award.

"Regular work" consists of labor/tasks worker performs on a steady, recurring, or customary basis.

The Board agreed with claimant's assertion. Citing ORS 656.214(1)(d) and OAR 436-035-0005(15) the Board stated that "regular work" means the job that the claimant "held" at the time of the injury. Further, citing *Thrifty Payless, Inc. v. Cole*, 247 Or App 232, 239 (2011), the Board reiterated that "regular work" consists of the paid labor, tasks, duty, role, or function that the worker performs for an employer on a steady, recurring, or customary basis. Finally, again referring to *Cole*, the Board added that the plain, natural meaning of "job" was a person's "regular remunerative employment," that he/she "customarily perform[s]." *Id.* at 237.

"Modified job" was not claimant's steady, customary, or recurring position; original job was "regular work."

Turning to the case at hand, the Board determined that claimant's modified job (choker), which he had only been assigned for a number of months as a result of his earlier injury while performing his "choker setter" duties, had not been performed on a steady, customary or recurring basis. The Board also noted that, after claimant's earlier injury, his occupation had been described as a "logger" or "choker setter," rather than as a "chaser." Finally, the Board observed that claimant held provisional reinstatement rights to the "choker setter" position under ORS 659A.043.

"AP" release to "modified job" did not constitute release to "regular work"; claimant entitled to work disability award.

Reasoning that a characterization of the modified duty position as claimant's "regular remunerative employment" that he "customarily perform[ed]" would conflict with the plain natural language and ordinary meaning of "regular work" and the "job" that claimant "held" at the time of the injury, the Board found that claimant's regular, customary job was as a choker setter. Under such circumstances, the Board was not persuaded that claimant had been released to his regular work and, therefore, was entitled to a work disability award.

Third Party Dispute: Projected Future Expenses/ Present Value - "Reasonably Certain" to Be Incurred - "593(1)(c)"

"593(1)(c)" authorizes paying agency to receive reimbursement from third party recovery for present value of "reasonably certain" future medical expenses.

Zeferino Vasquez-Sanchez, 71 Van Natta 1310 (November 20, 2019). Applying ORS 656.593(1)(c), the Board held that a carrier had established its "third party" lien concerning claimant's future claim costs, finding that an expert who had testified at claimant's civil trial against a third party (which had resulted in a judgment for claimant) and the carrier's representatives' estimates had persuasively proven that such projected expenses were reasonably certain to be incurred and the present value for such expenses. After claimant obtained a judgment following his trial against a third party, the carrier sought reimbursement for its actual claim costs, as well as the present value of its projected claim expenditures. Claimant contested the carrier's projected future medical costs, asserting that they were not reasonably certain to be incurred and that the carrier had not reduced its projected lien to its present value. *See* ORS 656.593(1)(c).

The Board disagreed with claimant's contentions. Citing ORS 656.593(1)(c), the Board stated that a paying agency is entitled to reimbursement for "the present value of its reasonably to be expected future expenditures for compensation" related to the compensable injury. Relying on *Denton v. EBI Cos*., 67 Or App 339 (1984), the Board noted that ORS 656.593(1)(c), requires the reserve for future expenses to reflect a reduction to actuarial present value. Referring to *Kenneth D. Yohe*, 63 Van Natta 1697, 1700 (2011), the Board concluded that, to support a lien for anticipated future medical expenses, the paying agency must establish that it is reasonably certain to incur such expenditures.

Life care planner's testimony at claimant's "third party" trial established that future medical expenses were "reasonably certain" to be incurred.

Turning to the case at hand, the Board was persuaded by the testimony of a life care planner (who had testified at the "third party" trial) that the carrier's projected future medical expenditures were "reasonably certain" to be incurred. Moreover, the Board found that the opinion of a registered nurse (who had estimated the present value of claimant's future medical costs at the carrier's request) also supported a conclusion that the projected expenses were "reasonably certain" to be incurred.

Attending surgeon neither addressed "reasonably certain" standard nor sufficiently responded to detailed explanation from life care planner.

In reaching its conclusion, the Board acknowledged claimant's assertion that his attending surgeon's opinion (which indicated the possibility of less future medical services) was in a better position to assess claimant's future medical needs. Nonetheless, the Board determined that the attending surgeon had neither addressed the "reasonably certain" standard, nor sufficiently responded to the well-explained and detailed opinions of the life care planner or the carrier's registered nurse. Under such circumstances, the Board discounted the attending surgeon's opinion. *See Moe v. Ceiling Sys*., 44 Or App 429, 433 (1980); *Janet Benedict*, 59 Van Natta 2406, 2409 (2007), ***aff'd without opinion***, 227 Or App 289 (2010).

Registered nurse/carrier's claim examiner provided reasonable estimate of present value of projected future medical expenses.

Finally, the Board found that the carrier's third party claim adjuster's affidavit provided a thorough explanation for its calculations of the present value of future reasonably certain medical expenses. Noting that the adjuster had supported the lowest projected value (which was the basis for the carrier's projected lien), the Board was persuaded that the opinions from the carrier's nurse and adjuster had persuasively explained the manner in which the present value for the future reasonably certain medical expenses had been determined. Accordingly, the Board concluded that the carrier had established its entitlement to recover its third party lien for its projected claim costs.

APPELLATE DECISIONS

There were no "Board-related" textual decisions from the appellate courts this month.

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