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**BOARD NEWS**

## Board Meeting - February 27, 2020 - Proposed Rules/Amendments (Attorney Fees - OAR 438 Division 015)

The Board has scheduled a public meeting for the Members to discuss written/oral comments presented at its January 31, 2020, rulemaking hearing, which concerned proposed rules/amendments relating to attorney fees (OAR 438 Division 015). (The written comments are posted on WCB's website <https://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>.) The proposed rules include (among other proposals):

- Adding a definition ("client paid fee") to describe fees paid by an insurer or self-insured employer to its attorney. OAR 438-015-0005.
- Adding ORS 656.262(11) to the list of statutes in which attorney fees are not paid out of the claimant's compensation award. OAR 438-015-0010.
- Adding language from ORS 656.388(5) to the "rule-based factors" in determination of an assessed fee: "The necessity of allowing the broadest access to attorneys by injured workers," and "The fees earned by attorneys representing the insurer/self-insured employer." OAR 438-015-0100(4).
- Increasing the hourly rate for an attorney's time spent during an interview or deposition under ORS 656.262(14)(a) from \$275 to \$350, plus an annual adjustment commensurate with changes in the state average weekly wage. OAR 438-015-0033.
- Establishing a schedule of attorney fees for attorneys representing insurers and self-insure employers, requiring that such fees be reasonable and do not exceed any applicable retainer agreement. OAR 438-015-0115.
- Establishing a process for bifurcation of the attorney fee award from the merits of the case when a claimant's attorney requests bifurcation at Board Review. OAR 438-015-0125.

The Board meeting has been scheduled for February 27, 2020, at the Board's Salem office (2601 25<sup>th</sup> St. SE, Ste. 150) at 1:00 p.m. Any further written comments for consideration at the meeting should be directed to Kayleen Swift, WCB's Executive Assistant at 2601 25th St. SE, Ste. 150, Salem, OR 97302, [kayleen.r.swift@oregon.gov](mailto:kayleen.r.swift@oregon.gov), or via fax at (503)373-1684.

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

### Board Meeting: "Contingent Hourly Rate" (Attorney Fees) - Further Discussion of Language for Proposed Rule/Amendment

At their December 17, 2019, public meeting, the Members decided to continue their discussions regarding language for proposed rule amendments that would concern a "contingent hourly rate" for use in determining a reasonable assessed attorney fee under OAR 438-015-0010. The Members directed staff to prepare possible language for such rule amendments to be discussed at a future public meeting.

Members Lanning and Ousey have each offered language for proposed rule amendments that will address a "contingent hourly rate" under OAR 438-015-0010. Those proposals have been posted on WCB's website. <https://www.oregon.gov/wcb/Pages/meetings-minutes.aspx>. A public meeting will be scheduled for early April, at which time the Members will consider approval of proposed rule amendments regarding a "contingent hourly rate." In advance of this meeting, parties/practitioners are welcome to submit written comments regarding the proposed rule language offered by Members Lanning and Ousey.

Following their meeting, should the Members initiate rulemaking, a public hearing will be scheduled, which will allow interested parties, practitioners, and the general public an opportunity to present written/oral comments regarding the proposed rule amendment. Following that public hearing, a future Board meeting will be scheduled for the Members to consider those written/oral comments and discuss whether to adopt permanent rule amendments.

A formal announcement regarding this future Board meeting will be electronically distributed to those individuals, entities, and organizations who have registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>.

### Staff Attorney Recruitment

WCB will soon be recruiting for a staff attorney position. The key criteria for a successful candidate includes a law degree and extensive experience reviewing case records, performing legal research, and writing legal arguments or proposed orders. Excellent research, writing, and communication skills are essential. Preference may be given for legal experience in the area of workers' compensation.

The recruitment is scheduled to begin in March and will run for two to three weeks. Further details about the position and information on how to apply will soon be available online at [https://oregon.wd5.myworkdayjobs.com/SOR\\_External\\_Career\\_Site](https://oregon.wd5.myworkdayjobs.com/SOR_External_Career_Site). WCB is an equal opportunity employer.

## ALJ Recruitment - Salem Office

The Workers' Compensation Board intends to fill an Administrative Law Judge position in the Salem Hearings Division. The position involves conducting workers' compensation and OSHA contested case hearings, making evidentiary and other procedural rulings, conducting mediations, analyzing complex medical, legal, and factual issues, and issuing written decisions which include findings of fact and conclusions of law. Applicants must be members in good standing of the Oregon State Bar or the Bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia. The position requires periodic travel, including but not limited to Eugene, Roseburg, and Coos Bay, and working irregular hours. The successful candidate will have a valid driver's license and a satisfactory driving record. Employment will be contingent upon the passing of a fingerprint-based criminal background check.

The announcement will be posted on February 17, 2020, on the Department of Consumer and Business Services (DCBS) [website](#) and will contain additional information about compensation and benefits of the position and how to apply. Questions regarding the position should be directed to Ms. Kerry Garrett at (503) 934-0104. The close date for receipt of application materials is March 30, 2020. DCBS is an Equal Opportunity, Affirmative Action Employer Committed to Workforce Diversity.

## *In Camera* Review - Relevant Medical Records to Be Provided to Parties Electronically

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. 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.

## CASE NOTES

**Attorney Fee: On Remand, Increased Penalty Under “268(5)(f)” - No “388(1)” Award (“Penalty” Not “Compensation”); No “382(3)” Award for Court Services (Claimant, Not Carrier, Had Appealed to Court); “382(3)” Award for “Board on Remand” Services (Carrier Challenged Entitlement to Penalty, Board Affirmed ALJ’s Entitlement Decision)**

*James L. Williams*, 72 Van Natta 43 (January 15, 2020). The Board held that, on remand from the Court of Appeals, *Williams v. SAIF*, 291 Or App 328 (2018), it was not authorized to award a carrier-paid attorney fee under ORS 656.388(1) for claimant’s counsel’s services before the court and on remand in securing an increased penalty under ORS 656.268(5)(d) (now renumbered (f)) because a penalty is not “compensation,” but that claimant’s counsel was entitled to a carrier-paid attorney fee under ORS 656.382(3) for services rendered on Board review and on remand in defense of the ALJ’s penalty award.

After summarizing ORS 656.388(1), the Board stated that the statute refers to “any claim or award for compensation” in which a claimant “finally prevails after remand” and provides for a reasonable attorney fee for services before “every prior forum as authorized under \* \* \* 656.382 or 656.386. \* \* \*.” Citing *William J. Lefave*, 59 Van Natta 427 (2007), the Board reiterated that, because an attorney fee is not “compensation,” a claimant does not finally prevail after remand, “in respect to any claim or award for compensation” as required by ORS 656.388(1), and therefore, an attorney fee award for the claimant’s counsel’s services before every prior forum on an attorney fee issue was not available.

Applying the *Lefave* rationale to the case at hand, the Board reasoned that, because a penalty is also not “compensation,” ORS 656.388(1) did not authorize an attorney fee award for claimant’s counsel’s services where, on remand from the court in response to claimant’s successful appeal, claimant is awarded an increased penalty under ORS 656.268(5)(d) (now (f)). See *Cayton v. Safelite Glass Corp.*, 258 Or App 522, 524 (2013) (the claimant’s counsel was not entitled to an ORS 656.382(1) attorney fee for services on Board review for securing an ORS 656.268(5)(d) penalty because that penalty was “compensation”); *Warren D. Dufour*, 70 Van Natta 176, 181 n 9 (2018) (same).

Addressing ORS 656.382(3), the Board acknowledged that a carrier-paid attorney fee is authorized if a carrier raises attorney fees, penalties, or costs as a separate issue in a request for hearing/review, appeal/cross-appeal and the ALJ, Board, or court finds that the attorney fee, penalty, or cost awarded should not be disallowed or reduced. Applying that language to the case at hand, the

*An attorney fee is not “compensation” for purposes of ORS 656.388(1).*

*Because claimant petitioned for court review and the carrier did not raise a penalty as a separate issue, a “382(3)” fee was not awardable for services at court level.*

Board noted that claimant had petitioned the court for review of the Board's penalty award, contending that it should be increased. Reasoning that the carrier had not raised the penalty as a separate issue before the court, the Board concluded that claimant's counsel was not entitled to an attorney fee award under ORS 656.382(3) for services rendered before the court.

In reaching its conclusion, the Board distinguished *SAIF v. DeLeon*, 352 Or 130 (2012), which had held that a claimant's counsel was entitled to a carrier-paid attorney fee under ORS 656.382(2) for ultimately prevailing against a carrier's hearing request seeking elimination of a compensation award, regardless of which party initiated review before the tribunal making the final decision. Noting that ORS 656.382(3) was expressly conditioned on the carrier raising attorney fees, penalties, or costs "as a separate issue" and provided for an attorney fee to the claimant "for efforts in defending" the fee, penalty or costs, the Board determined that the legislature had designed the statute to apply to a carrier's request for review/appeal that the claimant had to defend.

Turning to claimant's entitlement to an attorney fee award under ORS 656.382(3) for services on review regarding the penalty under ORS 656.268(5)(d) (now (f)), the Board determined that, consistent with ORS 656.382(2), a carrier-paid fee is dependent on a finding that the attorney fees, penalties, or costs award should not be disallowed or reduced. See *Terlouw v. Jesuit Seminary*, 101 Or App 493, rev den, 310 Or 282 (1990). Nevertheless, noting that the carrier's initial brief on remand had challenged claimant's entitlement to a penalty under ORS 656.268(5)(d) (before subsequently conceding that such a challenge was beyond the scope of the Board's remand authority) and reasoning that its order on remand had affirmed the ALJ's determination that claimant was entitled to such a penalty (which the Board increased based on the court's mandate), the Board concluded that claimant's counsel was entitled to a carrier-paid attorney fee under ORS 656.382(3) for services concerning the penalty award on remand.

*On remand, because carrier initially challenged claimant's entitlement to a penalty, "382(3)" fee was awardable because ALJ's penalty was not reduced/disallowed.*

### Course & Scope: "Arising Out of" Employment - "Rest Break"/Sitting in Employer's Truck on Work Site - "Eye" Injury from Exploding Energy Drink

*John Chavez-Cordova*, 72 Van Natta 12 (January 3, 2020). The Board held that claimant's injury, which occurred while he was sitting in his employer's truck on his work site during a rest break from his painting job when his energy drink exploded as he was opening it, striking him in the eye, arose out of his employment. Although acknowledging that claimant's eye injury had occurred in the course of his employment (*i.e.*, during a "personal comfort" activity), the carrier contended that his injury did not arise out of his employment.

The Board disagreed with the carrier's assertion. Citing *Redman Indus., Inc. v. Lang*, 326 Or 32, 36 (1997) and *Legacy Health Sys. v. Noble*, 250 Or App 596, 603 (2012), the Board stated that an injury is deemed to have "arose out of" employment if it was the result of either "a risk connected with the nature of the work" (an employment-related risk) or "a risk to which the work environment exposed claimant." Referring to *Clark v. U.S. Plywood*, 288 Or 255,

*Injury "arises out of" work when employer impliedly acquiesces to a personal comfort activity.*

267 (1980) and *Halfman v. SAIF*, 49 Or App 23, 29-30 (1980), the Board noted that when an employer impliedly allows or acquiesces to a personal comfort activity, compensation should be provided for injuries sustained from that activity.

Turning to the case at hand, the Board acknowledged the carrier's contention that claimant's work environment did not expose him to the specific risk of an exploding drink. Nonetheless, relying on the Supreme Court's rationale in *Clark*, the Board reiterated that, if the place and time are connected to the work environment, "the exact nature and purpose of the activity itself does not have to bear the whole loss of establishing work connection." *Clark*, 288 Or at 261-62.

*Employer required claimant to stay at worksite on breaks and did not provide beverage or designate a break area.*

After conducting its review, the Board found that the employer had impliedly allowed and acquiesced to claimant bringing a beverage to work, which was the personal comfort activity that resulted in his injuries. In reaching this finding, the Board reasoned that the employer expressly allowed claimant to drink any non-alcoholic beverages at work, required him to stay on the worksite during breaks, but did not provide anything to drink or a designated break room.

*Claimant's eye injury (from exploding energy drink) resulted from risk to which employment exposed him.*

Because claimant was injured in the employer's work truck, on a worksite, while engaging in a typical break activity (drinking a beverage) that was impliedly allowed and acquiesced to by the employer, the Board determined that his injury resulted from a risk to which his work environment exposed him. Accordingly, the Board concluded that claimant's injury "arose out of" his employment.

### Reclassification: "Disabling" "PTSD" Claim - "Reasonable Expectation of Permanent Disability" - "Psychiatrist" Rating Not Required - "005(7)(c)"

*Ross A. Fuhrman*, 72 Van Natta 92 (January 22, 2020). Applying ORS 656.005(7)(c), the Board reclassified claimant's post-traumatic stress disorder (PTSD) claim as disabling, holding that his psychologist's opinion was sufficient to establish a reasonable expectation of permanent disability from the accepted PTSD condition. Relying on OAR 436-035-0400(1), the carrier contended that, because claimant's PTSD condition had not been "diagnosed by a psychiatrist or other mental health professional as provided for in a managed care organization," the record did not establish a reasonable expectation of permanent disability and, as such, its "nondisabling" classification for the PTSD claim was justified. In response, claimant asserted that his psychologist's opinion that he had PTSD with permanent limitations established that there was a reasonable expectation of permanent disability, which entitled him to a "disabling" claim classification.

The Board agreed with claimant's contention. Citing ORS 656.005(7)(c), the Board stated that a compensable injury is not disabling if no temporary disability benefits are due and payable, unless there is a reasonable expectation that permanent disability will result from the injury. Referring to *SAIF v. Schiller*, 151 Or App 58, 62 (1997), *rev den*, 326 Or 389 (1998), the Board reiterated that ORS 656.005(7)(c) does not require evidence of a specific and actual impairment as defined by statute or rule.

*Reclassification of claim to disabling does not require specific, actual permanent impairment.*

*Treating psychologist's opinion established reasonable expectation of permanent disability; psychiatrist's "impairment" opinion not required for "reclassification" purposes.*

*Before a claim is excluded under "027(4)" on an LHWCA theory, there must be a conclusive determination that claimant has received LHWCA compensation.*

Turning to the case at hand, the Board noted that there was no contention that temporary disability was due and payable. Addressing the "reasonable expectation of permanent disability" prong of the "disabling" claim classification analysis, the Board reasoned that a presently ratable impairment under OAR 436-035-0400(1) was not required. See *Schiller*, 151 Or App at 62. Consequently, the Board rejected the carrier's contention that claimant's psychologist's opinion could not establish claimant's entitlement to a reclassification of his PTSD claim to disabling.

After conducting its review, the Board found that the treating psychologist's opinion established that claimant: (1) had PTSD; (2) would likely have significantly impaired occupational functioning; (3) would remain vulnerable to aggravated symptoms in response to life stress; (4) would have some degree of interference with life and work activities; and (5) have a permanent PTSD condition. Under such circumstances, the Board was persuaded that there was a reasonable expectation of mental function disability in terms of its effect on claimant's activities of daily living, social functioning, and deterioration or decompensation in work settings. See OAR 436-035-0400(3). Accordingly, the Board reclassified the claim to disabling.

Subject Worker: "LHWCA" Exclusion ("027(4)") - Not Applicable, Record Did Not Establish "LHWCA" Claim Conclusively Determined

Responsibility: "LIER" - Claimant Could Assert "Impossibility/Sole Cause" Defense for "Unjoined" "Presumptively Responsible" Employer

*Thomas L. Chenoweth*, 72 Van Natta 55 (January 15, 2020). Analyzing ORS 656.027(4) and applying the Last Injurious Exposure Rule (LIER), the Board held that an earlier carrier was not responsible for claimant's hearing loss condition because a subsequent employer, although not a party to the proceeding, could be considered for determining responsibility for the claimed condition (because claimant's Longshore and Harbor Workers' Compensation Act (LHWCA) claim with that employer had not been conclusively determined) and was presumptively responsible and the record did not establish that it was impossible for conditions at the subsequent employer to have caused claimant's condition. Claimant argued that, because he had filed a LHWCA claim with his "unjoined" later employer, the "unjoined" carrier could not be considered in analyzing the responsibility for his hearing loss claim under ORS 656.027(4), which left the earlier carrier responsible for his claim.

The Board disagreed with claimant's contention. Citing ORS 656.027(4), ORS 656.023, *Mann v. SAIF*, 91 Or App 715, 716 (1988), and *Kenneth R. Barker*, 42 Van Natta 2419, 2420 (1990), the Board explained that ORS 656.027(4) addresses whether a *worker* is a subject worker and in turn, whether a *claim* is excluded (as opposed to whether an *employer* is a subject employer or could be considered for purposes of determining responsibility). Referring

*Because claimant was not compensated for claimed hearing loss under LHWCA, he remained a “subject worker.”*

*Because “unjoined” employer employed one/more subject workers, it was a “subject employer.”*

*Claimant assumed the “unjoined” employer’s burden to attempt to shift responsibility from presumptively responsible last employer under LIER to an earlier employer pursuant to “impossibility/sole cause” defense.*

*Carrier acknowledged it did not have lien rights on claimant’s uninsured motorist claim.*

to *Mann*, and *Walter H. Kreuzer, DCD*, 64 Van Natta 220, 221 (2013), (among other decisions), the Board reiterated that before a claim is excluded under ORS 656.027(4) under an LHWCA theory, it must be conclusively determined that the claimant received compensation for a condition under the LHWCA.

Turning to the case at hand, the Board was not persuaded that claimant was compensated for a hearing loss condition under the LHWCA. Consequently, the Board determined that claimant remained a subject worker and that his claim was not excluded under ORS 656.027(4). Moreover, finding that the subsequent employer had employed one or more Oregon subject workers and maintained Oregon workers’ compensation insurance while claimant was employed, the Board concluded that the subsequent employer was a subject employer.

Addressing the responsibility issue under LIER, the Board assigned presumptive responsibility for the hearing loss claim to the subsequent employer, who was claimant’s last employer and (based on an examining physician’s opinion) had contributed to claimant’s condition. See *Agricomps Ins. v. Tapp*, 169 Or App 208, 213 (2000), and *John M. Burlington*, 71 Van Natta 408, 409 (2019). Furthermore, because the subsequent employer was not a party to the proceeding, the Board remarked that claimant could assume the “unjoined” carrier’s burden to prove that it was either impossible for claimant’s employment with the second carrier to have caused the claimed hearing loss condition or that the disease was solely caused by conditions at one or more previous employments. See *Charles F. Spencer*, 57 Van Natta 3088, 3089 (2005); see also *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997).

Noting that an examining physician had opined that that all of claimant’s work exposures had contributed to his hearing loss condition, the Board was not persuaded that it was impossible for conditions at the “unjoined” subsequent employer to have caused claimant’s hearing loss condition or that the condition was caused solely by one or more previous employments. Accordingly, the Board concluded that responsibility for claimant’s hearing loss condition did not rest with the earlier employer.

### Third Party: “Malpractice” Settlement with Former Attorney - Stemmed from “Third Party” Action - Settlement Proceeds “Lienable”

*Manuel T. Resendiz*, 72 Van Natta 27 (January 7, 2020). Analyzing ORS 656.587, and ORS 656.593(1), and (3), the Board held that the proceeds from claimant’s malpractice settlement involving his former attorney was subject to the carrier’s third party lien because the malpractice settlement was based on the attorney’s negligence stemming from the third party claim. Following his compensable injury, claimant retained an attorney and elected to pursue a cause of action against the allegedly negligent third party. After claimant’s attorney announced that he intended to pursue an uninsured motorist claim under the employer’s coverage, the carrier acknowledged that it did not have the right to a share of proceeds from such a claim. See ORS 742.504(4)(c); *Longstreet v. Liberty Northwest Ins. Corp.*, 238 Or App 396 (2010); *Lorraine I. McKinnon*, 62 Van Natta 274, *recons*, 62 Van Natta 459 (2010). The carrier further noted

*By the time former attorney discovered vehicle was insured, statute of limitations had passed.*

*Proceeds of malpractice recovery against claimant's attorney for negligence in pursuing "third party" action was subject to carrier's lien.*

*Despite carrier's "re-assignment" letter, claimant continued to pursue "third party" action, without objection.*

*Carrier's "just and proper" share of settlement proceeds mirrored statutory formula under "593(1)."*

that it interpreted claimant's announcement as a re-assignment of the third party action to the carrier. Thereafter, claimant's attorney discovered that the third party vehicle was insured and filed a negligence cause of action with the third party's insurer. However, because the action exceeded the statute of limitations, the lawsuit was unsuccessful. Claimant then filed a malpractice claim against his former attorney, which eventually resulted in a settlement offer. After the carrier opposed the settlement (because claimant declined to acknowledge the validity of its "third party" lien), claimant sought Board resolution of the following disputes: (1) whether the carrier's lien was valid; and (2) whether the settlement was approvable and if so, the carrier's "just and proper" share of the settlement proceeds. ORS 656.587; ORS 656.593(3).

Citing *Toole v. EBI Cos.*, 314 Or 102, the Board noted that a carrier's statutory third party lien regarding the proceeds of an injured worker's recovery against a negligent third party extends to the proceeds of a malpractice action against the worker's former attorney if that action was derived from the third party claim.

Turning to the case at hand, the Board found that the malpractice claim involved claimant's former attorney's failure to investigate and timely file a claim against the third party's insurance carrier. Consequently, the Board determined that the malpractice claim derived from the third party claim.

In reaching its conclusion, the Board acknowledged the carrier's "assignment" letter. Nonetheless, the Board reasoned that the carrier's "assignment" interpretation was predicated on claimant's pursuit of an uninsured motorist claim (which he did not subsequently pursue). The Board further noted that claimant had subsequently continued to pursue the third party action without the carrier's objection. Under such circumstances, the Board concluded that the carrier's lien was valid and extended to claimant's malpractice settlement.

The Board next addressed whether the malpractice settlement was approvable. Relying on ORS 656.587, *Bennanico Rosales, III*, 68 Van Natta 1552 (2016), and *Alfred Storms*, 48 Van Natta 1470 (1996), (among other decisions), the Board stated that it will generally approve a settlement unless it is grossly unreasonable. Applying those points and authorities, the Board concluded that the malpractice settlement was reasonable and approvable.

Finally, analyzing the carrier's "just and proper" share of the malpractice settlement under ORS 656.593(3), the Board reiterated that, although it is improper to automatically apply the ORS 656.593(1) distribution scheme (which applies to third party judgments) to determine the "just and proper" distribution of third party settlement proceeds under ORS 656.593(3), the statutory distribution scheme prescribed in ORS 656.593(1) may provide general guidance. See *Urness v. Liberty Northwest Ins. Corp.*, 130 Or App 454 (1994); *Ralph A. Hernandez*, 66 van Natta 1815, *Norman H. Perkins*, 47 Van Natta 488 (1995).

After conducting its review, the Board concluded that a distribution of the malpractice settlement proceeds that mirrored ORS 656.593(1) was "just and proper." Consequently, after allotting for claimant's counsel's one-third attorney

fee and claimant's statutory one-third share, the Board determined that it was "just and proper" for the carrier to recover the remaining balance of settlement proceeds (which did not exceed the carrier's third party lien).

### Worker-Requested Medical Examination (WRME): No Entitlement to WRME - "Records Review" IME Done Prior to Denial - Subsequent IME "Exam" Done - Denial not Based on the "Exam" IME - WCD Denial of WRME Affirmed

*Julie A. Dellinger*, 72 Van Natta 35 (January 8, 2020). Analyzing ORS 656.325(1)(e) and OAR 436-060-0147(1), the Board held that claimant was not entitled to a Worker-Requested Medical Examination (WRME) because, at the time of her WRME request before the Workers' Compensation Division (WCD), the carrier's claim denial was not based on an "in-person" independent medical examination (IME) report. After the carrier issued its claim denial (based on an IME's "records review" report), claimant filed a hearing request with the Board's Hearings Division, as well as a WRME request with WCD. After WCD denied the WRME request, claimant filed another hearing request. In doing so, she contended that she was entitled to a WRME because the carrier had subsequently obtained a "post-denial" "in-person" IME to support its claim denial and, as such, the statutory requirements for a WRME had been satisfied.

*Claimant sought entitlement to WRME based on "post-denial" IME.*

The Board disagreed with claimant's contention. Citing ORS 656.325(1)(e) and OAR 436-060-0147(1), the Board stated that a claimant is entitled to a WRME if three conditions are met: (1) the claimant has filed a timely request for hearing on a compensability denial; (2) the denial is based on one or more carrier-requested IME reports; and (3) the attending physician or authorized nurse practitioner does not concur with the report(s). Referring to *Lorinda L. Gauthier*, 70 Van Natta 96 (2018), the Board further noted that a claimant is entitled to a WRME if the record demonstrates that a denial was "in fact" based on an "in-person" examination pursuant to ORS 656.325(1)(a).

*Claimant would be entitled to WRME if carrier's denial was based on "in-person" examination under "325(1)(a)."*

Turning to the case at hand, the Board acknowledged claimant's assertion that the carrier's "post-denial" "in person" IME report supported her right to a WRME because, in effect, the carrier's denial became based on that "in person" IME report. Nevertheless, the Board noted that that, at the time of claimant's WRME request, the "pre-denial" IME report had been based on a "record review," not an "in person" examination. Under such circumstances, the Board concluded that, at the time of claimant's WRME request, the statutory prerequisites for a WRME had not been satisfied. ORS 656.325(1)(a); OAR 436-060-0147(1)(b); *Gauthier*, 70 Van Natta at 96.

*At the time of the WRME request, denial was based on an IME "records review," not an "in-person" exam; thus, statutory requirement for WRME not met.*

## APPELLATE DECISIONS UPDATE

Combined Condition: “005(7)(a)(B)” & “266(2)(a)”  
Applied to Initial Injury Claim - “Accepted Condition”  
Not Required for “Otherwise Compensable Injury”

*Cooper v. Travelers Insurance Company*, 302 Or App 124 (January 29, 2020). The court, *per curiam*, affirmed the Board’s order in *Amanda Cooper*, 69 Van Natta 1742 (2017), previously noted 36 NCN 12:2, which, in upholding a carrier’s denial of claimant’s low back injury claim, applied ORS 656.005(7)(a)(B) and ORS 656.266(2)(a) in determining the compensability of an *initial injury* claim, and rejected claimant’s contention that the phrase “otherwise compensable injury” as used in those statutes (as interpreted in *SAIF v. Brown*, 361 Or 241, 251 (2017), in the context of analyzing a “ceases” denial concerning an accepted combined condition) to mean a previously accepted condition. The court cited *Hammond v. Liberty Northwest Ins. Corp.*, 296 Or App 241 (2019).

Extent: Impairment Findings - “Combined Condition” (Whether Claimed/Accepted) - No  
“Pre-Closure” Denial - All Impairment Ratable

*Stryker v. SAIF*, 301 Or App 761 (January 15, 2020). On remand from the Supreme Court, *Stryker v. SAIF*, 365 Or 657 (2019) (which had vacated the Court of Appeals decision in *Stryker v. SAIF*, 287 Or App 769 (2017), that had affirmed the Board’s order in *Claudia S. Stryker*, 67 Van Natta 1003 (2015)), the court, *per curiam*, reversed the Board’s order, previously noted 34 NCN 6:5, which had held that apportionment of claimant’s permanent impairment between her accepted conditions and legally cognizable preexisting conditions was appropriate because the preexisting conditions had neither been accepted nor denied before claim closure. Citing *Caren v. Providence Health System Oregon*, 365 Or 466 (2019), the court remanded to the Board.

## APPELLATE DECISIONS COURT OF APPEALS

Extent: Impairment Findings - “Combined Condition” (Whether Claimed/Accepted) - No  
“Pre-Closure” Denial - All Impairment Ratable

*Eaken v. SAIF*, 301 Or App 852 (January 23, 2020). On remand from the Supreme Court, *Eaken v. SAIF*, 365 Or 657 (2019) (which had vacated the Court of Appeals decision in *Eaken v. SAIF*, 291 Or App 447 (2018), that had affirmed the Board’s order in *William J. Eaken*, 67 Van Natta 1003 (2015)), the court, *per curiam*, reversed the Board’s order, which had held that apportionment of claimant’s permanent impairment between his accepted conditions and legally cognizable preexisting conditions was appropriate because the preexisting conditions had neither been accepted nor denied before claim closure. Citing *Caren v. Providence Health System Oregon*, 365 Or 466 (2019), the court reversed the Board’s decision.