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BOARD NEWS

Adoption of Permanent Rules/Amendments (Attorney Fees - OAR 438 Division 015) - Effective June 1, 2020

At their February 27, 2020, public meeting, the Members adopted rules/amendments relating to attorney fees (OAR 438 Division 015). The Members took these actions after considering written/oral comments presented at a January 31, 2020, rule-making hearing, as well as discussing submissions from Members Ousey, Curey, and Woodford, and comments presented by attendees at their February 27 meeting. Highlights of the rule amendments include:

- 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 language based on 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 "Fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director's annual report pursuant to ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers under ORS Chapter 656." OAR 438-015-0010(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-insured employers, requiring that such fees be reasonable and not exceed any applicable retainer agreement. OAR 438-015-0115.

The effective date for the permanent rules/amendments is June 1, 2020, to be applied in the manner prescribed in the Board's Order of Adoption. The Board's Order of Adoption can be found here: <https://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>. In addition, copies of the Order of Adoption will be distributed to all parties/practitioners on WCB's mailing list.

At their February 27 meeting, the Members also decided to continue their deliberations regarding a rule that would, on a voluntary basis in certain cases on Board review, allow the bifurcation of the determination of a reasonable attorney fee award from the merits of a claim. Those discussions will resume at the Board's next public meeting, which is scheduled for 9:30 a.m., April 7, 2020, at the Board's Salem office (with remote access at all permanently staff Board offices).

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Board Meeting: April 7, 2020 - Discussion of Language for Proposed Rules/Amendments (Attorney Fees - OAR 438 Division 015) - "Contingent Hourly Rate" - "Bifurcation of Board Attorney Fee Awards/Voluntary Procedure" - "Specifying Statutes for Carrier-Paid Attorney Fees" - ("015-0010(2), (4)", Proposed "015-0125")

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.

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>) Parties'/practitioners' written comments concerning the proposed language are welcome.

A public meeting has been scheduled for Tuesday, April 7, 2020, at the Board's Salem office. Arrangements will also be made at each permanently staffed Board office to allow attendees to view the Members' Salem meeting and participate remotely.

At their public meeting, the Members will discuss the memos from Members Lanning and Ousey and 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. Any written comments should be directed to Kayleen Swift, WCB's Executive Assistant at 2601 25th St SE, Suite 150, Salem, OR 97302, kayleen.r.swift@oregon.gov, or via fax at (503)373-1684.

At the April 7 meeting, the Members will also resume their discussion regarding possible language for a proposed rule that would, on a voluntary basis in certain cases on Board review, allow the bifurcation of the determination of a reasonable attorney fee award from the merits of a claim. As discussed in the previous news article, at their February 27 meeting, the Members deferred their deliberations regarding that proposed rule for the April 7 meeting, at which time additional possible language for the rule will be discussed. Draft rule language from Jim Moller, WCB's Managing Attorney, and from Julene Quinn, Attorney at Law, have been posted on WCB's website. (<https://www.oregon.gov/wcb/Pages/meetings-minutes.aspx>) Parties'/practitioners' written comments concerning the proposed rule/language are welcome.

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 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>.

Annual Workers' Compensation Conference - Salishan Lodge and Resort - May 8-9, 2020 - Save the Date

The 2020 Oregon State Bar Workers' Compensation Section's Annual Meeting, at Salishan Lodge in Gleneden Beach, Oregon, is scheduled for Friday, May 8, 2020, through Saturday, May 9, 2020. The CLE committee is happy to report that it has secured a few discounts for activities during the conference, including: (1) 10% off any one-hour spa treatment; (2) 10% off Aerial Park use; and (3) 10% off standard green fees. Attendees need to book their own events and all will be based upon availability.

The program begins on Friday, 5/8/2020, with a lunchtime keynote speech by Oregon Supreme Court Chief Justice Martha Walters, who will focus on Access to Justice and the Court's Strategic Campaign. The program runs through 5:15 pm on Friday, 5/8 and finishes around noon on Saturday, 5/9. Presentation topics include a presentation on the lumbar spine, PTSD, timeliness issues, cross-examination/deposition techniques, own motion practice and tips, brief writing, employment release agreements, and an appellate update. Also offered is two sessions on beginner's workers' compensation practice. The ever popular reception will occur on Friday night.

Rooms are available at Salishan Lodge at a special conference rate. To secure a room at the conference rate, please call 1-800-452-2300. Make sure you identify yourself as a participant in the OSB Workers' Compensation Section Annual Meeting to get the special rate.

ALJ Recruitment

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

The announcement (number 18-0239), found on the Department of Consumer and Business Services (DCBS) website at <http://www.oregon.gov/DCBS/jobs/Pages/jobs.aspx>, contains additional information about compensation and benefits of the position and how to apply. Questions regarding the position should be directed to Ms. Kerry Garrett at (503)934-0104. The close date for receipt of application materials is March 30, 2020. DCBS is an equal opportunity, affirmative action employer committed to workforce diversity.

Staff Attorney Recruitment

WCB is recruiting for a staff attorney position. The key criteria 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 begins March 9, 2020, and ends March 30, 2020. Further details about the position and information on how to apply will be available online at https://oregon.wd5.myworkdayjobs.com/SOR_External_Career_Site. WCB is an equal opportunity employer.

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: Carrier Withdraws Request for Review After Filing Appellant's Brief - In Response to Claimant's "Dismissal" Motion - "382(4)" Fee Granted

Donald Shannon, 72 Van Natta 140 (February 5, 2020). Applying ORS 656.382(4), and OAR 438-015-0070(3)(a) and (b), the Board held that claimant's counsel was entitled to an attorney fee award because, after filing its appellant's brief and in response to claimant's motion to dismiss, the carrier had withdrawn its appeal. After the carrier filed a request for Board review of an ALJ's order and an appellant's brief, claimant moved to dismiss the appeal based on untimely notice. See ORS 656.289(3); ORS 656.295(2). When the carrier withdrew its request for review, claimant sought an attorney fee award under ORS 656.382(4).

The Board granted claimant's request. Citing ORS 656.382(4), the Board stated that, when a carrier's appeal has been withdrawn prior to a Board decision, an attorney fee award is justified for a claimant's counsel's efforts in

Because the carrier had withdrawn its appeal after filing its appellant's brief, the matter had been "briefed"; "382(4)" attorney fee award justified.

Claimant contended arbiter's findings were inconsistent with "apportionment" rules because a legally cognizable preexisting condition was not identified.

If impairment is not caused in any part by the compensable injury, a permanent impairment award is not appropriate.

Apportionment of impairment was not justified because there was no causal relationship between impairment findings and the compensable injury.

briefing the matter. Relying on OAR 438-015-0070(3)(a) and (b), the Board noted that a matter is considered "briefed" when the carrier has filed its initial brief.

Turning to the case at hand, the Board found that, because the carrier had filed its appellant's brief, the matter had been briefed. Furthermore, because the carrier had withdrawn its appeal after filing its appellant's brief, the Board concluded that an attorney fee award under ORS 656.382(4) was justified. Finally, in accordance with the carrier's withdrawal, the Board dismissed the carrier's request for review.

Extent: Impairment Findings - Arbiter Did Not Relate Any Permanent Impairment to Accepted Condition - No "Apportionment"

Robin R. Jorgensen, 72 Van Natta 179 (February 14, 2020). Applying OAR 436-035-0007(1)(b)(C) and (5), the Board held that claimant was not entitled to a permanent impairment award for her accepted lumbar spine conditions because a medical arbiter consistently and unambiguously explained that she did not have any impairment findings related to the accepted conditions. After an Order on Reconsideration did not award claimant permanent impairment based on the medical arbiter's opinion, she requested a hearing, contending that the arbiter's opinion was inconsistent with the apportionment rules (OAR 436-035-0007(1)) because the arbiter attributed lost "range of motion" ("ROM") findings to age without identifying a legally cognizable preexisting condition.

The Board disagreed with claimant's contention. Citing OAR 436-035-0007(5) and *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012), the Board stated that impairment is based on the medical arbiter's findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. Referring to *Stuart C. Yekel*, 67 Van Natta 1279 (2015), *aff'd per curiam*, *Yekel v. SAIF*, 286 Or App 837 (2017), the Board reiterated that impairment is awarded based on the accepted conditions and the direct medical sequelae of the accepted conditions. Furthermore, relying on OAR 436-035-0007(1)(b)(C) and *Paula Magana-Marquez*, 66 Van Natta 1300 (2014), *aff'd*, *Magana-Marquez v. SAIF*, 276 Or App 32 (2016), the Board noted that, if impairment is not caused in any part by the compensable injury, a permanent impairment award is not appropriate.

Turning to the case at hand, the Board acknowledged that the arbiter had attributed 100 percent of claimant's valid lumbar ROM loss to normal decreasing ROM, stating that such a loss occurred with aging, which was not a statutory preexisting condition. Nonetheless, the Board found no ambiguity or inconsistency in the medical arbiter's conclusion that claimant did not have objective findings or impairment attributable to her accepted conditions. In doing so, the Board reasoned that the arbiter's opinion did not support any causal relationship between claimant's valid impairment findings and her compensable injury and, as such, apportionment of her impairment findings was not appropriate. See *Magana-Marquez*, 276 Or App at 36-37; *cf. Caren v.*

“AP” findings not more accurate than arbiter’s consistent/unambiguous findings.

Providence Health Sys. Or., 365 Or 466 (2019). Furthermore, the Board noted that claimant was not entitled to an impairment value for the portion of her lumbar ROM loss that the arbiter considered to be invalid due to her inability to follow testing instructions and her poor, inconsistent effort. OAR 436-035-0007(11).

Finally, the Board did not find the attending physician’s impairment findings to be more accurate than the arbiter’s consistent and unambiguous findings. In reaching its conclusion, the Board reasoned that the medical arbiter (who had examined claimant closer in time to the reconsideration order) had provided a more detailed opinion explaining why the impairment findings were not related to her compensable injury. See *Douglas E. Rivas*, 71 Van Natta 1029 (2019).

Under such circumstances, the Board concluded that claimant had not established that the Order on Reconsideration’s award of no permanent impairment was in error. See *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000). Consequently, the Board affirmed the reconsideration order.

Premature Closure: “AP” Did Not Specifically Concur With Examining Physician’s “No Impairment” Report - Not a “Qualifying Statement” - “Insufficient Information” to Close Claim - “030-0020(2)(a)”

Attorney Fee: Board “Premature Closure” Decision - Claimant Did Not Finally Prevail in “TTD” Dispute - No “383(2)” Fee

Guadalupe Gonzalez-Ramirez, 72 Van Natta 141 (February 5, 2020). Applying ORS 656.268(1)(a) and OAR 436-030-0020(2), the Board held that claimant’s injury claim was prematurely closed because his attending physician had not concurred with an examining physician’s “no impairment” opinion regarding claimant’s accepted combined conditions. The carrier closed claimant’s low back injury/combined condition claim based on an examining physician’s statement of no permanent impairment and the attending physician’s concurrence with portions of that report. After an Order on Reconsideration affirmed a Notice of Closure, claimant requested a hearing. Contending that the attending physician’s partial concurrence with the examining physician’s report did not constitute sufficient information to close the claim, claimant asserted that the carrier had prematurely closed the claim.

Claimant contended that claim closure based on “AP’s” concurrence with portions of an examining physician’s report did not constitute “sufficient information.”

The Board agreed with claimant’s contention. Citing ORS 656.268(1)(a) and OAR 436-030-0020(1)(a), the Board stated that a carrier may close a claim when the worker is medically stationary and there is sufficient information to determine permanent disability. Relying on OAR 436-030-0020(2), and *Juan M. Orta-Carrizales*, 71 Van Natta 794, 803 (2019), the Board reiterated that sufficient information requires either a qualifying statement of no permanent disability from an attending physician or a qualifying closing report.

“AP” had not specifically concurred with an examining physician’s statement of no permanent impairment regarding accepted combined low back condition; thus, “insufficient information” to close claim.

No entitlement to “383(2)” attorney fee based on Board’s “premature closure” determination.

TTD dispute was not encompassed in a “premature closure” decision.

If TTD obtained after Board’s “premature closure” decision, claimant could seek “383(1)” fee.

ARU abated/republished its prior reconsideration order to consider additional information it had received before issuance of its “recon” order; ARU’s second order issued after the parties had filed hearing requests regarding “recon” order, but before expiration of 30-day appeal period from “recon” order.

Turning to the case at hand, the Board acknowledged that claimant’s attending physician had concurred with portions of an examining physician’s report concerning “measurements and other descriptions of impairment and the residual functional capabilities” for claimant’s accepted back strain and L3-4 disc protrusion. Nonetheless, noting that the attending physician had not specifically concurred with the examining physician’s statement of no permanent impairment due to claimant’s accepted low back combined condition, the Board reasoned that the attending physician’s concurrence with portions of the examining physician’s report did not constitute a “qualifying statement” of no permanent disability. See OAR 436-030-0020(2)(a)(A); *Orta-Carrizales*, 71 Van Natta at 803. Under such circumstances, the Board concluded that the carrier did not have sufficient information to close the claim.

Finally, the Board addressed whether claimant’s counsel was entitled to a carrier-paid attorney fee award under ORS 656.383(2) for achieving the “premature closure” determination. The Board noted that, in accordance with ORS 656.383(2), a carrier-paid attorney fee is granted if the claimant finally prevails in a dispute over temporary disability benefits pursuant to ORS 656.210, 656.212, 656.262, 656.268 or 656.325 after a request for hearing has been filed. Referring to *Bledsoe v. City of Lincoln City*, 301 Or App 11 (2019), the Board observed that a temporary disability issue is not encompassed by an issue concerning a claimant’s medically stationary date.

Relying on the *Bledsoe* rationale, the Board reasoned that a temporary disability dispute is similarly not encompassed in a premature closure decision. Thus, the Board concluded that, although it had concluded that the claim closure was premature, claimant had not finally prevailed over a dispute concerning temporary disability benefits as required by ORS 656.383(2).

Nonetheless, the Board noted that, if claimant subsequently obtained temporary disability benefits, his attorney could seek a fee under ORS 656.383(1) for being instrumental in obtaining such benefits prior to the filing of a hearing request. The Board further observed that, if the carrier opposed such a request, a hearing request could be filed at that time to resolve the attorney fee dispute.

Reconsideration Proceeding: “ARU” Authorized to “Abate/Withdraw/Republish” its Order on Reconsideration - W/I 30-Day Appeal Period (Even if Hearing Request Filed)

Melonie Cramer, 72 Van Natta 183 (February 14, 2020). Applying OAR 436-030-0007(2) and OAR 436-030-0135(7), the Board held that the Appellate Review Unit (ARU) was authorized to “Abate, Withdraw & Republish” its Order on Reconsideration during the 30-day appeal period from its initial order, even when a hearing request challenging that order had already been filed. After an Order on Reconsideration rescinded a Notice of Closure as premature, both claimant and the carrier filed requests for hearing challenging that order. Before the 30-day appeal period from the initial reconsideration order expired, ARU

abated its initial Order on Reconsideration to consider additional information that it had received before the issuance of its initial order and republished its previous determination that the claim was prematurely closed. Both parties timely filed respective hearing requests challenging ARU's second reconsideration order.

On review, the Board adopted and affirmed an ALJ's order (without supplementation) that had affirmed the Order on Reconsideration, and awarded a penalty and attorney fee for the carrier's allegedly unreasonable claim closure. The carrier then sought reconsideration of the Board's order, asserting that: (1) ARU did not have the authority to issue its second reconsideration order; (2) the claim was not prematurely closed; and (3) its claim closure was not unreasonable.

The Board disagreed with the carrier's contentions. Citing *Stephanie A. Straub*, 62 Van Natta 3005 (2010) and *Jorge Pedraza*, 49 Van Natta 1019 (1997), the Board reiterated that, by adopting and affirming the ALJ's order, it had necessarily found that the facts and conclusions in that order expressed its own opinion. Nevertheless, on reconsideration, the Board further addressed the validity of ARU's second order.

Relying on OAR 436-030-0007(2) and OAR 436-030-0135(7), the Board stated that ARU is expressly allowed to abate, withdraw, or amend an Order on Reconsideration during the 30-day appeal period from the Order on Reconsideration if a party discovers that additional documents were not provided by the opposing party. Furthermore, referring to *SAIF v. Fisher*, 100 Or App 288 (1990), the Board noted that the administrative rules did not alter ARU's authority if the reconsideration order has been appealed during that 30-day appeal period.

Turning to the case at hand, the Board observed that, because the 30-day appeal period for the initial Order on Reconsideration ended on a Sunday (which was a holiday), and because the succeeding Monday was a legal holiday, the 30-day appeal period ran until the end of the next succeeding business day, which was the date ARU issued its second order. See ORS 187.010(1)(h), (2), (3). Because ARU had issued its second order within the 30-day appeal period from its initial reconsideration order, the Board concluded that ARU's second order was valid.

After reviewing ARU's second order, the Board found that the ALJ's reasoning concerning the premature closure and penalty issues equally applied to ARU's second order. Consequently, on reconsideration, the Board affirmed the ALJ's order.

Reconsideration Proceeding: Untimely "Request" From "NOC" - No "Good Cause" Exception - "268(5)(e)," "030-0145(1)"

Juan Lopez-Ciro, 72 Van Natta 166 (February 12, 2020). Applying ORS 656.268(5)(e), and OAR 436-030-0145(1), the Board held that claimant's request for reconsideration of a Notice of Closure (NOC), which was filed after the 60-day statutory appeal period had expired, was untimely. After claimant's request

ARU was authorized to alter its "recon" order within 30-day appeal period, even if hearing request had been filed.

Board is not statutorily authorized to overlook an untimely request for reconsideration of NOC; i.e., there is no “good cause” exception for an untimely request for “recon” of NOC.

Concurring opinion expressed concern regarding the lack of a “good cause” exception for untimely “recon” requests.

In its initial order, Board found it unnecessary to resolve unaddressed “recon/reopen record” requests to ALJ based on its “TTD rate calculation” decision; however, because court reversed that decision and remanded for further consideration of a “waiver” issue, it was necessary for Board to address procedural “recon/reopen record” requests.

for reconsideration of the NOC was denied as untimely filed, claimant requested a hearing, arguing that the carrier’s untimely response to his discovery request constituted “good cause” for his untimely filed request for reconsideration.

The Board disagreed with claimant’s contention. Citing ORS 656.268(5)(e), and OAR 436-030-0145(1), the Board stated that a request for reconsideration must be filed within 60 days of the mailing date of a NOC. Relying on *Brian S. Patrick*, 68 Van Natta 366 (2016), and *Douglas R. Yarbrough*, 51 Van Natta 1435 (1999), the Board reiterated that there is no “good cause” exception to the 60-day statutory filing period for a request for reconsideration. Finally, referring to *Kenneth A. Gilbert*, 71 Van Natta 834 (2019), the Board observed that it was not statutorily authorized to overlook an untimely filed request.

Turning to the case at hand, the Board found that claimant’s request for reconsideration was filed more than 60 days after the NOC was mailed to the parties. Reiterating that there was no “good cause” exception to the 60-day filing requirement, the Board concluded that claimant’s request for reconsideration concerning the NOC was untimely filed.

Member Ousey offered a concurring opinion, expressing concern regarding the lack of a “good cause” exception to the 60-day filing requirements of ORS 656.268(5)(e) and OAR 436-030-0145(1). Noting that “good cause” exceptions are available in several statutory and regulatory contexts (e.g., ORS 656.319(1)(b); ORS 656.265(4)(c); OAR 438-012-0060(2)), Member Ousey urged the Management-Labor Advisory Committee (MLAC) to consider this apparent statutory “gap” and encouraged the legislature to address the matter.

Remanding: For ALJ Ruling on Unaddressed “Reopen Record” Request/“Waiver” Issue - “295(5)”/“007-0025”

Robert J. Marsh, 72 Van Natta 194 (February 24, 2020). On remand, *Marsh v. SAIF*, 297 Or App 486 (2019), citing ORS 656.295(5), and OAR 438-007-0025, the Board held that it was appropriate to remand for an ALJ to address the parties’ previously unaddressed motions for reconsideration/reopen the record and to determine whether a temporary disability issue had been waived at the hearing level. In its initial order, the Board had found that it was unnecessary to resolve claimant’s unaddressed “reconsideration” motion to the ALJ (and the carrier’s “record reopening” request in response) because it had determined that the carrier had properly calculated the rate of claimant’s temporary disability (TTD) benefits under OAR 436-060-0025(5)(a)(A) (April 1, 2011) and that his request for TTD benefits for a particular period had been waived at the hearing. The court reversed the Board’s determination that the carrier’s TTD rate calculation had been correct and remanded for recalculation of such benefits, as well as reconsideration of whether claimant had waived the TTD benefit issue.

Citing ORS 656.295(5), *Ted D. Strong*, 60 Van Natta 2155, 2156 (2008), *Rick Sandeno*, 59 Van Natta 2279, 2782 (2007), and *Herbert Gray*, 49 Van Natta 714, 714 (1997), the Board stated that it may remand to the ALJ if the case has been “improperly, incompletely or otherwise insufficiently developed.”

Relying on OAR 438-007-0025, and *Strong*, the Board noted that the carrier's submission of additional exhibits in response to claimant's motion to the ALJ for reconsideration was, in effect, a request to reopen the record for the admission of new evidence.

Turning to the case at hand, the Board acknowledged that claimant had filed his request for Board review of the ALJ's order before the ALJ could address claimant's motion for reconsideration of the ALJ's decision, as well as the carrier's request to reopen the record for consideration of additional evidence in response to the motion. The Board reiterated that, because it had previously found that claimant was not entitled to additional temporary disability benefits, it had not been necessary to address these procedural issues.

However, in light of the court's reversal of the "TTD rate" issue and its directive for further consideration of the "waiver" issue, the Board reasoned that it was appropriate to remand for the ALJ to first address the parties' respective procedural motions because the ALJ's rulings on such matters may have relevance to the "waiver" and "TTD rate" issues. See OAR 438-007-0025; *Strong*, 60 Van Natta at 2155. In reaching its conclusion, the Board explained that it was generally equipped to proceed with its review of the aforementioned issues without remanding. Nonetheless, considering the unaddressed reconsideration and record reopening requests (which had been filed before claimant's appeal of the ALJ's order), the Board determined that, in this particular instance, the record was insufficiently developed and that remand was warranted.

Remand appropriate for ALJ to address procedural motions because of possible relevance to "waiver" and "TTD rate" issues.

APPELLATE DECISIONS UPDATE

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

McDermott v. SAIF, 302 Or App 310 (February 20, 2020). On remand from the Supreme Court, *McDermott v. SAIF*, 365 Or 657 (2019) (which had reversed the Court of Appeals decision, 286 Or App 406 (2017), that had affirmed the Board's order in *Maurice McDermott*, 67 Van Natta 1250 (2015), that had apportioned claimant's permanent impairment between that attributable to his accepted condition from that attributable to an unaccepted preexisting/combined condition), the court reversed the Board's order. Citing *Caren v. Providence Health System Oregon*, 365 Or 466 (2019), the court reiterated that, as long as the work injury is a material contributing cause of the worker's total impairment, the total impairment is compensable, even if the impairment includes impairment due to preexisting conditions, unless the carrier has identified and denied a combined condition before claim closure.

Noting that the carrier had not denied a combined condition involving claimant's preexisting condition, the court determined that the Board's apportionment (or reduction) of claimant's impairment benefits was not appropriate under *Caren*. Consequently, the court reversed and remanded to the Board for reconsideration.

Unless a carrier has denied a combined condition prior to claim closure, all impairment is ratable, so long as work injury is material cause of total impairment.

Caren implicitly overruled Serrano, which had held that “pre-closure” denial requirement for a combined condition only applied to accepted combined condition.

In reaching its decision, the court noted that the Supreme Court’s *Caren* decision had implicitly overruled *Croman Corp. v. Serrano*, 163 Or App 136, 140 (1999), which had held that a pre-closure denial of a combined condition claim applied only to an *accepted* combined condition claim.