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BOARD NEWS

Hearings: All "Telephonic" - Beginning April 6

In accordance with Governor Brown's guidance to limit the spread of COVID-19, WCB suspended all in-person hearings beginning March 13th. On March 23rd, Governor Brown issued Executive Order 20-12 that closed all executive branch offices to the public. At WCB, we have spent the ensuing weeks evaluating and prioritizing processes in order to keep our employees and the public safe, as well as maintaining critical functions for our stakeholders.

As of April 6, all hearings are being conducted telephonically. In-person hearings will not resume until WCB determines that it is safe to do so, consistent with Governor Brown's direction and the recommendations of public health officials.

Because attorneys and parties may be working from alternate locations, they are requested to work with the assigned ALJ's office to ensure that they have accurate contact information for anyone that will be participating in their hearing.

Regarding mediations, many have been successfully completed telephonically. For the reasons discussed above, WCB will not be hosting mediations at any of our locations, as our offices are closed to the public. Please work with your mediator to determine if your mediation can proceed.

Thank you for your patience and willingness to adjust as we all deal with this unprecedented situation.

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. The adopted rules include (among other rule amendments):

- 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 the following language to OAR 438-015-0010(4) based on ORS 656.388(5) to the "rule-based factors" in the 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-

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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."

- 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 have been distributed to all parties/practitioners on WCB's mailing list.

Finally, at their February 27 meeting, the Members 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 was initially scheduled for April 7, 2020, at the Board's Salem office (with remote access at all permanently staff Board offices). However, consistent with the Governor's executive order regarding the coronavirus pandemic, the April 7 meeting has been cancelled. Once this current public health crisis subsides, a future Board meeting will be rescheduled. Arrangements will also be made at each permanently staffed Board office to allow attendees to view the Members' Salem meeting and participate remotely.

In the meantime, possible language for this "bifurcation" rule (from Jim Moller, the Board's Managing Attorney, and Julene Quinn, Attorney at Law) have been posted on WCB's website. [<https://www.oregon.gov/wcb/Pages/meetings-minutes.aspx>] The Members also welcome parties/practitioners to submit written comments regarding this rule/language for consideration at their future meeting.

Board Meeting: April 7 Meeting (Concerning "Contingent Hourly Rate" and "Bifurcation") - Cancelled Due to Coronavirus Pandemic - To Be Rescheduled for a Future Date

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>].

A public meeting was initially scheduled for Tuesday, April 7, 2020, at the Board's Salem office. However, consistent with the Governor's executive order regarding the coronavirus pandemic, the April 7 meeting has been cancelled. Once this current public health crisis subsides, a future Board meeting, to be held at the Board's Salem office, will be rescheduled. Arrangements will also be made at each permanently staffed Board office to allow attendees to view the Members' Salem meeting and participate remotely. A formal announcement regarding this 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>.

At their future 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 also 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 Board's future 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 their future meeting, at which time additional possible language for the rule will be discussed. In the meantime, draft language for this "bifurcation" rule (from Jim Moller, the Board's Managing Attorney, and Julene Quinn, Attorney at Law) have been posted on WCB's website. [<https://www.oregon.gov/wcb/Pages/meetings-minutes.aspx>] The Members also welcome parties/practitioners to submit written comments regarding this rule/language for consideration at their future meeting.

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 any 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.

Use the WCB Portal to Work Remotely

With many people working remotely, the Board would like to remind people of the availability to file, serve, and receive requests and documents through the WCB Portal. In particular, many current Portal users have not opted in to receive hearing notices electronically. Hearing notices sent by email have all of the same information you see in a paper notice, and can be printed directly from a button on your Portal screen. You will receive them a few days before regular mail delivery.

To activate email receipt of hearing notices, go to your "Contacts" tab, choose "Contact Detail," and then check the box for "Hearing Notice: Receive Hearing Notices by email." Here is a picture of that screen:

SETTLEMENT:

Settlement Requests: Notification when a Settlement order has been issued.

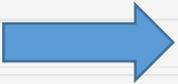
Settlement Requests: Notification when a Settlement request has been processed.

APPEARANCE/RESPONSE INTERNAL PROCESSING:

File An Appearance Submission Notification

Response To Issues Submission Notification

Hearing Request:

Hearing Notice: Receive Hearing Notices by email 

Hearing Request: Hearing scheduled / rescheduled *

Hearing Request: Notice of Request for Hearing sent to parties *

Hearing Request: Notification of filing *

Hearing Request: Receipt of filing *

Other Notifications: Approved CDA *

Request for Board Review:

Request for Board Review: Acknowledgement of Request for Board Review *

Request for Board Review: Receipt of request *

*At least one contact must subscribe to this notification

You can have all of your “Contacts” receive the hearing notice and/or designate a specific email box for receipt. Copies of those hearing notices are stored in your “Contact History” in the Portal, so if your email system is down or you inadvertently delete a message, there is a backup copy within your Portal account. The backup copy cannot be inadvertently deleted.

Please note that if anyone in your organization elects to receive hearing notices by email, the paper notices through the regular mail will stop. This is an either/or choice; you cannot receive them by both email and on paper.

We understand that many firms prefer the paper hearing notice. If you would like to elect to receive notices by email temporarily, you can later return to paper notices by simply unchecking that box. Be sure that all of the “Contacts” on your list have the box unchecked if you want to return to paper notices.

As you may know, the following items may also be filed, served, and received through the WCB Portal:

- Hearing Requests
- Board Review Requests
- Appearance
- Response to Issues
- Settlements
- CDA approval announcements

We can assist you immediately in setting up or changing your account, and can provide training telephonically. Please contact Greig Lowell at 503-934-0151, or write us at portal.wcb@oregon.gov

ALJ Recruitment - Extended to April 30

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 has been extended to April 30, 2020. DCBS is an equal opportunity, affirmative action employer committed to workforce diversity.

Staff Attorney Recruitment - Extended to May 4, 2020

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 final day for accepting applications has been extended to May 4, 2020. Further details about the position and information on how to apply are available online at https://oregon.wd5.myworkdayjobs.com/SOR_External_Career_Site. WCB is an equal opportunity employer.

CASE NOTES

Appeal/Review: "Recon" Motion Denied - Filed Within "30 Day" Appeal Period - But Initially Identified as "Request for Judicial Review" - By Time "Request" Clarified, Board's "Recon" Authority Had Expired - "295(8)"

Lori Welborn, 72 Van Natta 215 (March 3, 2020). Applying ORS 656.295(8), the Board held that it lacked authority to reconsider its prior order (which had set aside a carrier's claim denial) because, by the time carrier

Request was filed on final day of "295(8)" appeal period.

"Appeal" time continues to run unless order has been "stayed," withdrawn, or modified.

Board attempts to respond expeditiously to "recon" requests, but ultimate responsibility for preserving appeal rights rests with the party.

Because order had not been withdrawn, abated, or reconsidered within statutory "appeal" period, Board lacked authority to alter its decision, even if "request" was filed within "appeal" period.

Focus is on the onset of the condition itself, rather than the onset of symptoms.

clarified that its "request for judicial review" was intended as a "request for reconsideration" of the Board's prior order, the order had become final. On the Tuesday following a Monday (which was a federal holiday) and Sunday, the 30th day from the Board's order that had set aside a carrier's compensability denial, the carrier filed a request which it identified in its cover letter as a "request for judicial review." After the Board's staff routed the appellate record to the court, it was advised that the carrier had intended its "request" as a "request for reconsideration" of the Board's order.

The Board held that it lacked statutory authority to reconsider its decision. Citing ORS 656.295(8), the Board stated that a Board order is final unless, within 30 days after the date copies of the Board order are mailed, one of the parties files a petition for judicial review. Relying on *International Paper Co. v. Wright*, 80 Or App 444 (1986), and *Fischer v. SAIF*, 76 Or App 656, 659 (1986), the Board noted that the time within which to appeal an order continues to run unless the order has been "stayed," withdrawn, or modified. Finally, referring to *Cynthia Thiesfeld*, 51 Van Natta 1420, 1421 (1999), the Board reiterated that, although it attempts to respond to reconsideration motions as expeditiously as possible, the ultimate responsibility for preserving a party's right of appeal must rest with the party.

Turning to the case at hand, the Board acknowledged that the carrier's "request" had been filed on the final day that the Board could exercise its authority to reconsider its prior order; *i.e.*, the Tuesday following a Monday federal holiday and Sunday (the 30th day since its prior order). See *James L. Twigg*, 72 Van Natta 41 (2020). Nonetheless, noting that the carrier's cover letter had described the "request" as one for "judicial review" of the Board's order, the Board stated that the "request" had been initially processed as a petition for judicial review, not as a request for reconsideration, and, by the time the carrier clarified its intention to seek reconsideration of the Board's prior order, the Board's authority to abate/reconsider its order had expired.

Moreover, even if the carrier's "request" had been initially identified as a "request for reconsideration," the Board reiterated that the 30-day statutory period would have continued to run because the Board's prior order had not been withdrawn, abated, or reconsidered within that statutory period. *Twigg*, 72 Van Natta at 41, n 1. Consequently, the Board concluded that its authority to alter its prior order had expired. In reaching its conclusion, the Board emphasized that, although it attempts to respond to reconsideration motions as expeditiously as possible, the ultimate responsibility for preserving a party's right of appeal must rest with the party. *Thiesfeld*, 51 Van Natta at 1421.

Injury vs. O.D.: Onset of Condition - Identifiable Event/Discrete Period - "Injury" Theory Applied

Michael M. Kemp, 72 Van Natta 206 (March 3, 2020). Analyzing ORS 656.005(7)(a), (B), and ORS 656.266(2)(a), the Board held that claimant's shoulder condition should be analyzed under an "injury" theory because the condition arose from a specific work event or during a discrete period of work activity (*i.e.*, throwing a 30-pound bag of cans into the back of a truck resulting in a "painful pop" immediately followed by the inability to use the shoulder) and, because the carrier had not established that the work injury was not the major

contribution of his new treatment/disability for his combined shoulder condition, the claim was compensable. Before the work incident, claimant had previously received treatment for his shoulder condition. In response to his shoulder claim, the carrier issued a denial, asserting that the claim was not compensable either as an occupational disease (because claimant's work activities were not the major contributing cause of his shoulder condition) or as an injury (because his preexisting shoulder condition was the major contributing cause of his need for treatment/disability). See ORS 656.005(7)(a)(B); ORS 656.266(2)(a); ORS 656.802(2).

Injury arises from identifiable event/onset traceable to discrete period of time.

The Board first determined that the claim should be analyzed as an injury. Citing *Mathel v. Josephine County*, 319 Or 235, 240 (1994), and *Smirnoff v. SAIF*, 188 Or App 438, 443 (2003), the Board stated that an occupational disease is distinguished from an industrial injury by its gradual onset. Relying on *Active Transportation Co. v. Wylie*, 159 Or App 12, 15 (1999), the Board reiterated that an injury arises from an identifiable event or has an onset traceable to a discrete period of time. Referring to *Smirnoff*, the Board emphasized that the focus is the onset of the condition itself, rather than the onset of the condition's symptoms.

Claimed condition arose from specific work event/ discrete period, i.e., throwing 30-pound bag into truck, followed by "painful pop" in shoulder.

Turning to the case at hand, the Board noted that, while throwing the 30-pound bag of cans into the back of the truck at work, claimant experienced a "painful pop," his shoulder "snapped," and he was immediately unable to use the shoulder. The Board further observed that claimant's attending physician and the carrier's examining physician had diagnosed an "acute or chronic shoulder problem" and an acute work injury (or episode) that had combined with his preexisting shoulder condition.

Under such circumstances, the Board determined that claimant's current shoulder condition arose from a specific work event or during a discrete period of work/work activity. Consequently, the Board analyzed the claim as an injury.

Persuaded that the physician's opinion established that claimant's work incident was a material contributing cause of his need for treatment/disability for his shoulder condition, the Board found that an "otherwise compensable injury" had been established. ORS 656.005(7)(a); *Albany General Hospital v. Gasperino*, 113 Or App 411, 415 (1992); *Robert O. Anderson*, 71 Van Natta 866, 867 (2019). Therefore, the Board next addressed whether the carrier had established that the "otherwise compensable injury" was not the major contributing cause of the need for treatment/disability for a combined shoulder condition. See ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jason J. Skirving*, 58 Van Natta 323, 324 (2006).

"Pathological worsening" opinion did not persuasively address the "combined condition" standard; carrier did not meet its "266(2)(a)" burden of proof.

After reviewing the medical record, the Board acknowledged that the carrier's physician had opined that claimant's work injury was not the major cause of his need for treatment. Nonetheless, the Board reasoned that the physician had not provided an adequate explanation for his opinion, which was apparently based on the proposition that the work injury did not result in any pathological worsening of the shoulder (which was not the appropriate "combined condition" standard). See *Gary L. Hawkensen*, 57 Van Natta 2610, 2611 (2005).

Under such circumstances, the Board found that the carrier had not persuasively met its burden of proving that the work injury was not the major contributing cause of claimant's need for treatment/disability for his combined shoulder condition. Accordingly, the Board set aside the carrier's denial.

Own Motion: Hearing Referral - Carrier Did Not Provide "Discovery" - Insufficiently Developed Record - "012-0040(3)"

Carrier did not respond to three separate Board Own Motion requests to submit the record; record insufficiently developed.

Modesto A. Valencia, 72 Van Natta 218 (March 5, 2020). Applying OAR 438-012-0040(3), the Board referred claimant's request for review of an Own Motion Notice of Closure (NOC) to the Hearings Division for a hearing because the carrier had neither provided discovery nor responded to several Board requests to provide the record in response to claimant's appeal of the closure notice.

Citing OAR 438-012-0017(1), and OAR 438-012-0110(1), the Board stated that a carrier is obligated to comply with Board rules/requests and that the failure to so comply can result in the imposition of penalties/attorney fees. Furthermore, relying on *Brian L. Dugger*, 71 Van Natta 328 (2019), the Board reiterated that the responsibility to submit a record regarding a claimant's request for Own Motion relief primarily rests with the carrier.

In referring Own Motion case for hearing, ALJ directed to address penalties and attorney fees for discovery-rule violations.

Turning to the case at hand, the Board noted that the carrier had not responded to three separate requests to submit the record regarding claimant's request for review of its NOC. In the absence of a sufficiently developed record to address claimant's request for Own Motion relief, the Board considered it appropriate to refer the matter to the Hearings Division for an evidentiary hearing and an unappealable ALJ recommendation. See OAR 438-012-0040(3); *Dugger*, 71 Van Natta at 328. In doing so, the Board directed the parties/ALJ to address the issues raised in claimant's appeal of the NOC, but also penalties and attorney fees for any carrier discovery-rule violations.

Premature Closure: "Insufficient Info" to Determine Impairment ("030-0020(2)(b)") - "Preponderance of Medical Opinion"/"Med Stat" Rule N/A ("030-0035")

Ryan Marchand, 72 Van Natta 242 (March 16, 2020). Applying OAR 436-030-0020(2)(b), the Board held that claimant's left shoulder claim was prematurely closed because there was insufficient information to determine the extent of his permanent impairment because his attending physician had not concurred with a report from the carrier's examining physician, which had stated that claimant lacked permanent impairment. Relying on OAR 436-030-0035, the carrier contended that a "preponderance of medical opinion" in the record established that claimant's condition was "medically stationary."

"Preponderance" standard for "medically stationary" determination did not apply to "sufficient information" standard for claim closure requirements.

The Board disagreed with the carrier's contention. Noting that OAR 436-030-0035 concerns whether a worker's condition is "medically stationary," the Board reasoned that the rule did not apply to the "sufficient information regarding permanent disability" claim closure requirements of OAR 436-030-0020(2).

“AP” provided neither a qualifying closing exam nor concurred with examining physician’s report of no impairment; “insufficient information” to determine PPD and to close claim.

ComPro, statutory claim agent, denied “supplemental disability” claim based on lack of “verifiable information” of second job.

Claimant’s hearing request listed employer and its claim administrator, but not ComPro.

“210(5)(b)” allows employer to elect Director to assign processing of “supplemental disability” claim to statutory agent.

Turning to the case at hand, the Board found that claimant’s attending physician had neither “provide[d]” a qualifying closing examination or “concur[red]” with the carrier’s examining physician’s report concerning claimant’s lack of permanent impairment. See OAR 436-030-0020(2). Under such circumstances, the Board concluded that there was insufficient information to determine claimant’s permanent disability and, as such, claimant’s left shoulder claim had been prematurely closed.

Supplemental Disability: Hearing Request (Referring to Employer/Claim Administrator) Encompassed ComPro’s “Ineligibility” Determination; “Verifiable Documentation” Untimely Provided

Mackenzie Wageman, 72 Van Natta 234 (March 16, 2020). Analyzing ORS 656.210(2)(b)(B) and (5)(b), the Board held that a claimant’s hearing request raising “supplemental disability” as an issue was sufficient to vest jurisdiction with the Hearings Division to resolve a dispute regarding an “ineligibility” determination issued by ComPro, as the statutory claim agent for the Workers’ Compensation Division, because the hearing request referred to the employer/claim administrator, who had assigned its processing of claimant’s “supplemental disability” claim to ComPro. More than five days after it learned that claimant was employed in a secondary job when she sustained her compensable injury, ComPro requested that claimant provide verifiable documentation of that second job. More than 60 days after its request, ComPro received a paystub regarding claimant’s second job. Thereafter, ComPro issued an “ineligibility” determination, stating that she was not entitled to supplemental disability because she had untimely responded to ComPro’s request for verifiable documentation. Within 60 days of ComPro’s determination, claimant filed a hearing request seeking supplemental disability benefits, listing the employer and its claim administrator as parties.

The Board held that claimant’s hearing request was sufficient to encompass ComPro’s ineligibility determination. Citing ORS 656.005(21), the Board stated that a “party” is defined as a claimant, the employer, and the insurer. In addition, relying on *Brian C. Dennis*, 69 Van Natta 1377, 1378 (2017), and *Randy Manning*, 58 Van Natta 2785, 2787 (2006), the Board noted that a claim administrator had also been treated as a “party” for purposes of receiving notice of a claimant’s request for Board review. Finally, referring to *Sara J. Smith*, 46 Van Natta 895, 897 (1994), the Board reiterated that the *Manning* rationale has been extended to the filing of hearing requests with the Hearings Division; *i.e.*, absent prejudice to the other party, timely services of a hearing request on a person/entity in privity with the other party is sufficient for the Hearings Division to retain jurisdiction over the request.

Turning to the case at hand, the Board acknowledged that ComPro was not a “party” under ORS 656.005(21). Nonetheless, citing ORS 656.210(5)(b), the Board reasoned that the statutory scheme recognizes the relationship between the employer/claim administrator and ComPro because the statute allows the employer to elect to have the Director assign the processing of “supplemental disability” claims to a statutory agent.

Considering statutory recognition of affiliation between employer and ComPro (statutory agent), reference to employer/claim administrator on hearing request (in the absence of prejudice to ComPro) was sufficient to rest authority with ALJ to resolve ComPro's "ineligibility" determination.

No "verifiable information" of second job provided within 60 days of ComPro's request; no entitlement to "supplemental disability" even if ComPro's request not sent within required "5 business day" period.

Considering this statutory recognition concerning the affiliation between the employer and ComPro regarding a "supplemental disability" claim, the Board reasoned that the *Manning/Smith* rationale also extended to the statutory relationship.

Applying the *Manning/Smith* rationale, the Board acknowledged that claimant's hearing request had referred to the employer/claim administrator, but not to ComPro. The Board further acknowledged that ComPro had not received notice of claimant's hearing request until more than 60 days from its "ineligibility" determination. Nonetheless, the Board found that the Department of Justice (who represented ComPro) had not asserted any prejudice related to the filing of claimant's hearing request and had raised no objection to its inclusion as a party to the hearing.

Under such circumstances, the Board concluded that ComPro was not prejudiced by the manner in which claimant's hearing request was filed or its notice of the requests. Consequently, the Board held that the Hearings Division was authorized to resolve the merits of claimant's "supplemental disability" claim with ComPro.

Addressing the merits of the claim, the Board found that ComPro had not received "verifiable documentation" of claimant's secondary job within 60 days of its request for such documentation. Under such circumstances, the Board concluded that claimant was not entitled to supplemental disability benefits. See ORS 656.210(2)(b)(B); OAR 436-060-0035(4)(b)(A)(ii).

In reaching its conclusion, the Board acknowledged that ComPro's request for verifiable documentation had not been sent within five business days of its notice/knowledge of claimant's secondary employment, as required by OAR 436-060-0035(4)(b)(A). Nevertheless, the Board reasoned that there was no statutory/regulatory provision that invalidated ComPro's untimely request. Moreover, the Board noted that ComPro's belated request provided claimant with the required 60 days from the request to submit the verifiable documentation.

Finally, because claimant was not entitled to supplemental disability benefits and ComPro's determination did not constitute an unreasonable delay/refusal to pay compensation, the Board concluded that penalties/attorney fees under ORS 656.262(11)(a) were not warranted for ComPro's apparent violation of OAR 436-060-0035(4)(b). See *Juanita Murillo*, 62 Van Natta 1746, 1752 (2010); *Jeffrey A. Schultz*, 65 Van Natta 829, 832-37 (2013). Instead, to the extent that ComPro's request for verifiable documentation may have violated OAR 436-060-0035(4)(b), the Board determined that was a matter for the Director's review under ORS 656.745(2)(a)(B).

APPELLATE DECISIONS UPDATE

Occupational Disease: Applying “LIER” Rule of Proof to Establish Compensability Against Subsequent Employer - Claimant Not Precluded from Including Work Activities from Prior Employer (Despite “DCS”)

Fleming v. SAIF, 302 Or App 543 (March 4, 2020). Analyzing ORS 656.289(4), the court reversed the Board’s order in *Lloyd R. Fleming*, 69 Van Natta 1238 (2017), previously noted 36 NCN 8:4, which held that, in analyzing claimant’s occupational disease claim for a shoulder condition, his employment with a previous employer could not be considered in determining the compensability of his claim under the “last injurious exposure rule” (LIER) because his claim with the previous employer had been resolved in a disputed claim settlement (DCS). On appeal, claimant contended that the Board had erred in concluding that his DCS with the prior employer precluded him from asserting in this current proceeding against the subsequent employer that his previous work had contributed to his claimed occupational disease for purposes of establishing the compensability of his occupational disease claim under LIER.

The court agreed with claimant’s contention. The court framed the issue as the legal effect of a DCS under ORS 656.289(4) on a subsequent claim against a different employer, which presented a question of law. See ORS 183.482(3).

After reviewing ORS 656.289(4), the court stated that, under paragraph (b), carrier “who are parties” to a DCS “shall not be joined as parties in subsequent proceedings under this chapter to determine responsibility for payment for claim conditions for which settlement has been made.” Notably, the court observed that the text of the statute does not state or imply that the effect of a DCS goes beyond that to resolve as a factual matter for the purposes of a subsequent proceeding what role employment with the relevant carrier might have played in the claimed condition. Had the legislature intended for the legal effect of a DCS in subsequent proceedings to extend beyond the express provisions in ORS 656.289(4), the court reasoned that the legislature would have so stated.

Turning to the case at hand, the court concluded that, as a matter of law, the Board had erred in determining that claimant’s DCS precluded him from litigating the role of his prior employment might have played in the shoulder condition on which his occupational disease against his subsequent employer was based. Consequently, the court reversed and remanded.

In reaching its conclusion, the court’s majority disagreed with the dissent’s assertion that the DCS regarding claimant’s claim with the prior employer gave rise to issue preclusion concerning his claim with his subsequent employer. Referring to *Gilkey v. SAIF*, 113 Or App 314, *rev den*, 314 Or 573 (1992), the majority stated that *Gilkey* had held squarely that a DCS does not give rise to claim or issue preclusion. In addition, questioning the dissent’s reasoning that effectively converted a DCS into a Board order, the majority considered it far from a foregone conclusion that fairness review converts a private settlement into a Board order. Finally, the majority did not believe that the dissent’s reliance

DCS with prior employer did not preclude claimant from later including that prior employment exposure in establishing a new occupational disease against a subsequent employer under “LIER.”

Court's majority questioned dissent's reasoning that a DCS is a Board order rather than a private settlement.

on treatise passages provided insight into the policy choices made by the Oregon legislature in enacting its workers' compensation scheme. Based on such reasoning, the majority determined that the dissent ultimately had not answered the core question presented by the current case; *i.e.*, Did the legislature intend for a DCS entered into under ORS 656.289 to be binding in a subsequent proceeding between a party to the agreement and a nonparty?

Judge DeVore dissented. Referring to ORS 174.010 (which prohibits inserting into a statute what has not been written), DeVore disagreed with the majority's inference that the silence in ORS 656.289(4) regarding the impact of a DCS in a proceeding involving a subsequent employer has no further significance for a claimant (despite the fact that the subsequent claim includes the same record). Further noting that the legislative history regarding ORS 656.289(4) was also silent regarding the legislature's intention regarding the effect of a DCS in a situation such as that currently presented, Judge DeVore considered the majority's construction of the statute to be unreasonable.

Dissent argued that a DCS is no less significant than a Board award in a contested decision and represents a stipulated judgement.

After examining the role of a DCS in the workers' compensation system, Judge DeVore determined that a DCS is not merely a private settlement, which is divorced from the adjudicatory process of workers' compensation. Instead, DeVore reasoned that the disposition accomplished by a DCS is no less significant than that made by a Board award in a contested decision and represents a stipulated judgment that has the same effect as judgment after a trial on the merits.

Thus, Judge DeVore identified the only open question, as presented by the current case, was whether an exception should be made to treat a DCS as anything less than a Board decision when claimant brings a claim (based on the same medical records) against a successive employer while attempting to deny his stipulations on ultimate facts contained in a Board-approved DCS. After reviewing case law regarding the effect of an approved DCS on subsequent claims against the same employer (*e.g.*, *Bennett v. Liberty Northwest Ins. Corp.*, 128 Or App 71, 73 (1994); *Gilkey v. SAIF*, 113 Or App 314, *rev den*, 314 Or 573 (1992), DeVore reasoned that the decisions provided "signposts" showing the differing effects of a DCS that does or does not include a set of ultimate facts expressed in stipulations and approved by the Board.

Dissent considered stipulated admissions in the DCS that claimant's conditions were not medically or legally attributable to previous employer were binding in subsequent proceeding concerning "O.D." claim with later employer.

Comparing the present case with the situations presented in *Gilkey* and *Bennett*, Judge DeVore considered the stipulated admissions made by claimant in the Board-approved DCS (which, among other provisions, stated that claimant's conditions were "not *medically* or legally attributable to the claimant's employment with [the previous employer]") to be specific, concrete, numerous, and determinative as those in *Gilkey*. Although acknowledging that the *Gilkey* decision did not involve a subsequent claim against a successive employer, DeVore asserted that the principles of issue preclusion were still applicable because the approved settlement had taken on the quality of an award and are given collateral estoppel effect. See 13 *Larson's Workers' Compensation Law* Section 132.06[2]; 3 *Modern Workers Compensation* Section 300:16.

After applying the requisites for issue preclusion to the present case, Judge DeVore believed that each had been satisfied: (1) the issue of the role of claimant's work with his previous employer to his claimed condition was the same in the prior proceeding; (2) the issue was actually litigated in a disputed

Dissent found no Board error in recognizing that factual terms in DCS required claimant to prove work conditions, other than those involving prior employer, were the major cause of currently claimed condition.

claim that was resolved by a final DCS with stipulations of ultimate fact making the DCS the functional equivalent of a stipulated judgment; (3) claimant had a full and fair opportunity to litigate his claim; (4) claimant was the same party in the prior claim; and (5) Board determinations are the kind of administrative decisions to which the court accords finality. See *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104 (1993).

Based on such reasoning, Judge DeVore concluded that nothing in statute or rule required the Board to disregard its prior determinations in the approved DCS. Consequently, DeVore asserted that the Board had not erred in recognizing that the factual terms in the DCS required claimant to prove that work conditions, other than involving his prior employer, were the major contributing cause of his claimed shoulder condition. Because it was undisputed that claimant's work with his subsequent employer had not met the requisite compensability standard, Judge DeVore believed that the Board acted with substantial evidence and reason in concluding that claimant had not carried his burden of proof.

APPELLATE DECISIONS COURT OF APPEALS

Medical Service: "Injury" Under "245(1)(a)" Means "Work Accident"

Schaffer v. SAIF, 302 Or App 652 (March 4, 2020). On remand from the Supreme Court, 365 Or 756 (2019) (which had vacated the Court of Appeals decision, 266 Or App 227 (2014), that had affirmed the Board's order in *Jeremy R. Schaffer*, 65 Van Natta 292 (2013), which, in upholding a carrier's medical service denial, had determined that the claimed medical service must be related to an accepted condition), the court, *per curiam*, reversed the Board's decision. Citing *Garcia-Solis v. Farmers Ins. Co.*, 365 Or 26 (2019), the court remanded.