



News & Case Notes

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BOARD NEWS

Rulemaking: Discussion of Language For Proposed Rules/Amendments (Attorney Fees - OAR 438 Division 015) - "Contingent Hourly Rate" - "Bifurcation of Board Attorney Fee Awards/Voluntary Procedure"

"Late June" Board Meeting Anticipated - "Public Participation" Via "Phone" Link - "Pre-Meeting" Written Comments Encouraged

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 was cancelled. Once this current public health crisis subsides, a future Board meeting, to held at the Board's Salem office, will be rescheduled. At the present time, the Members anticipate rescheduling that meeting for "late June," at which time several of them will likely be appearing by "videoconference." Also, because of "social distancing" requirements, arrangements will be made to allow the public to participate in the meeting by means of a "phone conference" link.

Once a date for the "rescheduled" meeting has been set, 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, because of the "social distancing" limitations and because the distribution of written comments on the day of the Board meeting will create logistical challenges, parties/practitioners are encouraged to submit written comments

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regarding the proposed rule language offered by Members Lanning and Ousey, as well as their own suggestions regarding rule language. 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 their 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. 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>

Again, because of the "social distancing" restrictions and because of the logistical challenge of distributing written comments on the day of the meeting, the Members encourage parties/practitioners to submit written comments regarding this rule language (as well as their own rule language suggestions) for the Members' consideration at the future Board meeting well in advance of the meeting. Those written comments should also 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.

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.

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

ALJ Recruitment - Extended to May 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 May 30, 2020. DCBS is an equal opportunity, affirmative action employer committed to workforce diversity.

CASE NOTES

Course & Scope: “Arising Out Of” Employment - “Unexplained” Fall - No “Facially Nonspeculative Explanation” for Fall - *Sheldon* Applied

Elena Rodriguez, 72 Van Natta 356 (April 28, 2020). The Board held that claimant’s injury, which occurred when she fell while performing her work duties, was unexplained because the record did not establish a facially nonspeculative explanation for her fall and, as such, her injury arose out of her employment. Asserting that claimant had fainted before her fall, the carrier contended that her injury was not unexplained and, therefore, did not arise out of her employment.

The Board disagreed with the carrier’s contention. Citing *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996), the Board stated that the requirement that an injury “arise out of” employment depends on the causal link between the injury and the employment. Relying on *Phil A. Livesley Co. v. Russ*, 296 Or 25, 29-30 (1983), the Board reiterated that a risk of injury generally falls into one of three categories: (1) risks distinctly associated with employment; (2) risks personal to the claimant; and (3) neutral risks having no particular employment or personal character. Referring to *Sheldon v. U.S. Bank*, 364 Or 831 (2019), and *Russ*, the Board noted that an injury that is unexplained is a neutral risk and is considered to “arise out of” employment, provided that it occurred “in the course of” employment. Finally, the Board summarized the *Sheldon* framework to determine whether an injury is unexplained: (1) determine whether there are any nonspeculative explanations for the injury; (2) if there is a nonspeculative explanation, such an explanation prevents establishing that a fall is unexplained; (3) if there is no facially nonspeculative explanation available, the injury is unexplained; (4) eliminating idiopathic causes is an intermediate step that arises only when there is a facially nonspeculative idiopathic explanation(s) for a fall; and (5) if there is no facially nonspeculative idiopathic cause(s) for explaining a fall, there is no idiopathic cause(s) for a claimant to eliminate.

Turning to the case at hand, the Board acknowledged that two managers of the employer had testified that claimant said she “felt faint” before her fall. Nonetheless, the Board noted that one of the managers admitted that claimant had reported that she had tripped, but the manager decided not to include it in her report and that the other manager conceded that she only remembered the incident in general and that it had been a long time since the event. Reasoning that claimant’s descriptions of her work incident in contemporaneous claim forms, recorded statement, and her medical records referred to her as “trip[ping]” or that she had fallen for an unknown reason (and that she had repeatedly denied losing consciousness), the Board was not persuaded that there was a facially nonspeculative explanation for claimant’s fall.

Under such circumstances, the Board concluded that claimant’s fall was unexplained. Consequently, because claimant’s unexplained fall had occurred in the course of claimant’s employment, the Board found that her injury “arose out of” her employment.

Carrier asserted claimant had fainted; therefore not “unexplained” fall.

“Unexplained” injuries that occur in the course of employment are deemed to also “arise out of” work.

Claimant consistently described “tripping” and denied losing consciousness; Board found no “facially nonspeculative explanation” for fall.

Course & Scope: “Course Of” Employment - Fall in Front of Office Building Elevator - “Right of Passage”/“Right to Require/Obtain Maintenance” of Elevator Lobby

Employer had the “right of passage” and right to require the landlord to perform maintenance in area where claimant was injured (elevator lobby).

“Parking lot” exception applies to areas on or near where the employer exercises some control.

*Employer’s lease gave it a right to use “lobbies * * * elevators.”*

Employer paid a portion of the “operating expenses” for the building.

Sally Houk, 72 Van Natta 372 (April 30, 2020). The Board held that claimant’s injury, which occurred when she slipped/fell while exiting an elevator in an office building on her way to her employer’s office to begin her work day, occurred in the course of her employment because, under its lease with the landlord, the employer had a “right of passage” regarding common areas of the building and the right to require/obtain maintenance concerning the area where she was injured. Asserting that the employer did not have sufficient control of the common area where claimant fell, the carrier contended that the “parking lot” exception to the “going and coming” rule was not applicable.

The Board disagreed with the carrier’s contention. Citing *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994), the Board stated that an injury sustained while the worker is going to, or coming from, the place of employment generally does not occur “in the course of” employment. However, again referring to *Gilmore*, as well as *Beverly M. Helmken*, 55 Van Natta 3174, 3175 (2003), *aff’d without opinion*, 196 Or App 787 (2004), the Board reiterated that the “parking lot” exception to the “going and coming” rule applies when a worker traveling to or from work sustains an injury “on or near” the employer’s premises over which the employer exercises “some” control. Relying on *Henderson v. S.D. Deacon Corp.*, 127 Or App 333, 337 (1994) (which quoted 1 Larson, *Workmen’s Compensation Law* 4-132, Section 15.43 (1990)), the Board observed that such “control” over the common area of a building where a claimant is injured is sufficient as some kind of “right of passage, as in the case of common stairs, elevators * * * or passage ways through which the employer has something equivalent to an easement.”

Turning to the case at hand, the Board found that claimant’s injury had occurred in the common lobby area of the office building where her employer was a tenant. Further noting that the employer’s lease expressly gave it a “right to the use * * * of lobbies, entrances, stairs, elevators, and other public portions of the [b]uilding,” the Board concluded that the employer held a property interest in the lobby/elevator area where claimant was injured sufficient to establish “control” over that area.

In addition, the Board determined that the employer had sufficient “control” over the area based on its right to require/obtain maintenance of the area under the lease. In doing so, the Board acknowledged that the lease provided that the landlord was required to maintain the common areas of the building. Nonetheless, reasoning that the employer paid a portion of its “operating expenses” for the building and could complain to the landlord and request maintenance/repairs of common areas, the Board did not consider the landlord’s contractual obligation under the lease to maintain the lobby area to be dispositive.

Under such circumstances, the Board concluded that the employer had sufficient control over the elevator lobby area where claimant was injured to satisfy the “parking lot” exception to the “going and coming” rule. Consequently, the Board held that claimant’s injury had occurred in the course of her employment.

Dissent argued that the lease expressly provided that landlord was responsible for maintenance/repairs.

Member Curey dissented. Although acknowledging that the employer paid a portion of the landlord’s “operating expenses” for the building’s common areas, Curey asserted that the lease expressly provided that the landlord was responsible for the maintenance, repairs, replacements, or improvements over those areas. Reasoning that the employer’s recourse for “common area” problems was to complain to the landlord, Member Curey did not consider such circumstances sufficient to establish that the employer had a right/obligation to require maintenance of the elevator lobby area.

Moreover, Member Curey noted that, at the time of claimant’s injury, the landlord was maintaining/repairing the elevator lobby area (*i.e.*, replacing the marble floor with wooden ramps during the reconstruction project), which was directly responsible for claimant’s injury. Reasoning that there was no indication that the employer had any input into the landlord’s maintenance/improvement project, Curey contended that the employer lacked the right to require/obtain maintenance of the elevator lobby area where claimant was injured.

Dissent contended that “right of passage” rationale conflicted with Board precedent requiring right to require maintenance/repair.

Finally, Member Curey disagreed with the majority’s reliance on the “right of passage” rationale. To begin, citing the *Bruntz-Ferguson* decision (among others), Curey argued that the majority’s reasoning conflicted with Board case precedent that has required an employer’s right to require/obtain maintenance of the area where a claimant was injured when the employer does not an ownership/leasehold interest in that area. Moreover, although acknowledging the *Henderson* court’s reference to the “right of passage” rationale, Member Curey asserted that the court had based its “sufficient control” holding on the employer’s right to require/obtain maintenance of the elevator where the claimant had been injured.

Dissent concluded that employer did not have sufficient control over “elevator lobby” area.

Based on the aforementioned reasoning, Member Curey did not consider the employer to have sufficient control over the elevator lobby area where claimant had been injured to satisfy the “parking lot” exception to the “going and coming” rule. Consequently, Curey contended that claimant’s injury had not occurred in the course of her employment.

Course & Scope: “Course Of” Employment - Slip/Fall on Icy “Adjoining” Parking Lot at Start of Work Day - Landlord Arranged Parking Privileges in “Adjoining” Lot for Employer’s Workers

Lahna K. Lynn, 72 Van Natta 362 (April 30, 2020). The Board held that claimant’s low back injury, which occurred when she slipped/fell on ice on a parking lot while walking to her employer’s dentist office to begin her work day, occurred in the course of her employment because the employer’s landlord (who had a parking lot where the employer’s patients and the mall’s customers parked) had made arrangements with the owner of an adjoining parking lot to

Employer contended it did not have a property interest or right/obligation to maintain adjoining parking lot.

allow the employer's workers to park in that lot. The employer had denied claimant's injury claim, contending that the "parking lot" exception to the "going and coming" rule did not apply because the employer did not have a property interest in the adjoining parking lot or the right/obligation to maintain the lot under a lease.

Landlord leased "adjoining lot" parking spaces for the exclusive use of the employer's workers.

Finding that the employer exercised at least "some control" over the area where claimant was injured, the Board concluded that the "parking lot" exception applied. Citing *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994), the Board stated that an injury sustained while the worker is going to, or coming from, the place of employment generally does not occur "in the course of" employment. However, again referring to *Gilmore*, the Board reiterated that the "parking lot" exception to the "going and coming" rule applies when a worker traveling to or from work sustains an injury "on or near" the employer's premises over which the employer exercises "some" control.

Turning to the case at hand, the Board acknowledged that the employer's lease with its landlord concerned the mall's parking lot, not the adjoining parking lot. Nevertheless, the Board found that, specifically in response to the employer's concerns about a lack of parking spaces, the landlord had leased spaces in an adjoining parking lot owned by another entity for the employer's worker's exclusive use. Moreover, based on the employer's testimony and consistent with the employer's past practices regarding the leased parking lot, the Board noted that the employer would have informed the landlord if there was snow or ice on the adjoining parking lot.

Employer's ownership/leasehold interest in area where worker is injured is not always required.

Under such circumstances, the Board concluded that the employer exercised at least "some control" over the area where claimant was injured and, as such, the "parking lot" exception to the "going and coming" rule applied. See *Cope v. West Am. Ins. Co.*, 309 Or 232, 237 (1990); *John R. Benson*, 50 Van Natta 273, 274-75 (1998).

Consistent with past practices regarding "leased" lot, the employer believed landlord would be responsive to requests for maintenance of the lot.

In reaching its conclusion, the Board acknowledged the carrier's contention that the "parking lot" exception did not apply because the employer did not have a property interest in the adjoining parking lot or the right/obligation to maintain the lot under a lease. Nonetheless, relying on *Henderson v. S.D. Deacon Corp.*, 127 Or App 333, 337 (1994), the Board stated that ownership or even a leasehold interest in the place where a worker is injured is not always required.

Applying the *Henderson* rationale to the present case, the Board reiterated that, although the adjoining parking lot was not acquired by a lease or subject to a lease, the employer's use of the lot was exclusive, and based on past practices under the lease, the employer believed that the landlord would be responsive to any requests for maintenance of the adjoining lot. Based on those particular circumstances, the Board reasoned that the absence of a lease addressing the adjoining parking lot did not preclude a conclusion that the "parking lot" exception applied.

Member Woodford dissented, asserting that the employer neither owned/leased the adjoining parking lot nor that the adjoining lot was designated for only the employer's workers. Further noting that the employer did not pay maintenance costs for the adjoining lot and reasoning that the landlord's prior response to the employer's requests regarding the "leased" parking lot had no

Dissent argued that employer did not own, lease, or pay maintenance for the lot.

bearing on the adjoining “unleased” lot, Woodford did not consider the employer’s exclusive use of nine spaces in an otherwise shared adjoining lot sufficient to establish that the employer had a right to require maintenance in the area where claimant was injured. Consequently, consistent with the reasoning in several previous Board decisions (e.g., *Ashley Bruntz-Ferguson*, 69 Van Natta 1531, 1533 (2917)), Member Woodford contended that the “parking lot” exception to the “going and coming” rule applied.

Extent: Impairment - “Chronic Condition” - No “Significant Limitation/Repetitive Use” - Claimant Was Able to Repetitively Use Low Back More Than 2/3 Time - “035-0019(1)”

Claimant argued that the medical arbiter’s restrictions on repetitive bending and lifting established a “significant limitation/repetitive use”

Viorica Gramada, 72 Van Natta 339 (April 23, 2020). Applying OAR 436-035-0019, the Board held that claimant was not entitled to a “chronic condition” permanent impairment value for her low back condition, finding that the record did not establish a significant limitation in the repetitive use of her low back because the medical arbiter determined that she was able to repetitively use her lumbar spine more than 2/3 of the time. After claimant requested reconsideration of a Notice of Closure (NOC) that did not award a “chronic condition” impairment value for her low back condition, a medical arbiter found that she was able to repetitively use her lumbar spine for more than two-thirds of a period of time. After an Order on Reconsideration affirmed the NOC, claimant requested a hearing, arguing that the medical arbiter’s restrictions regarding repetitive bending or lifting, and lifting more than 25 pounds, established “significant limitation” under OAR 436-035-0019.

Under “Broeke/Wiggins,” “significant limitation” means restricted from repetitive use for one-third or more of period of time.

The Board disagreed with claimant’s contention. Citing OAR 436-035-0019(1), the Board stated that a worker is entitled to a five percent “chronic condition” impairment value if a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, he/she is significantly limited in the repetitive use of the body part. Referring to *Wiggins v. SAIF*, 300 Or App 319, 321 (2019), and *Broeke v. SAIF*, 300 Or App 91, 98-99 (2019), the Board noted that a worker is “significantly limited” under OAR 436-035-0019 if he/she can repetitively use the body part at issue for, at most, two-thirds of a period of time (or put another way, restricted from the repetitive use of the body part for one-third or more of a period of time).

Claimant was able to repetitively use her lumbar spine for more than 2/3 of a period of time -- no “significant limitation/repetitive use” under “Broeke/Wiggins.”

Turning to the case at hand, the Board determined that the medical arbiter had unequivocally opined that claimant was able to repetitively use her lumbar spine for more than two-thirds of a period of time. Reasoning that such a determination exceeded the “at most two-thirds” threshold articulated in *Wiggins* and *Broeke*, the Board concluded that the medical arbiter’s opinion did not establish that claimant was significantly limited in the repetitive use of her lumbar spine under OAR 436-035-0019(1).

The Board also acknowledged claimant’s contention that the medical arbiter’s statements regarding her bending/lifting limitations established that she was “significantly limited.” Nonetheless, relying on *Mike P. Teachworth*, 69 Van Natta 1158, 1162 (2017), *Donald V. Burch*, 67 Van Natta 1866, 1869 (2015), and

“Chronic condition” concerns whether claimant is significantly limited in repetitive use, not whether limited in performing certain activities.

Because no entitlement to “chronic condition” value under “Broeke/Wiggins,” Board did not address WCD’s December ’19 “Industry Notice.”

Employer testified that no hearing notices had been received; contended its failure to appear at hearing was justified.

“Unjustified” failure of a party/ representative to attend a scheduled hearing is waiver of appearance under “006-0071(2).”

Jonathan M. Myers, 65 Van Natta 1174, 1178 (2013), the Board explained that “chronic condition” impairment concerns whether a worker is significantly limited in the repetitive use of a body part, not in performing certain activities.

Finally, the Board noted the carrier’s argument that the Workers’ Compensation Division’s (WCD’s) December 9, 2019, Industry Notice (which had issued in response to the *Broeke* court’s interpretation of WCD’s December 2014 Industry Notice and OAR 436-035-0019) had superseded the *Wiggins/Broeke* interpretations of the rule and previous Industry Notice. However, reasoning that claimant was not entitled to a “significant limitation/chronic condition” impairment value under the *Wiggins/Broeke* interpretation of OAR 436-035-0019, the Board did not consider it necessary to address WCD’s December 2019 Industry Notice.

Hearing Procedure: Carrier’s “Failure to Appear” at Hearing Not “Unjustified” Under “006-0071(2)” - Notice of Hearing Not Mailed to Employer/Claim Administrator

Saba Zahilay, 72 Van Natta 334 (April 23, 2020). Analyzing OAR 438-006-0071(2), the Board held that a carrier’s failure to appear at a scheduled hearing was not “unjustified” because the record did not establish that either the employer (or its claim administrator) were either mailed copies of the hearing notice or otherwise were notified of the hearing. In response to claimant’s hearing request from the carrier’s denial, a “Notice of Hearing” issued, which indicated that copies had been mailed to the self-insured employer at two of its offices. When neither the employer, its claim administrator, or an attorney appeared at the scheduled hearing, an ALJ issued a “show cause” order, directing the employer to explain why it failed to appear and why it should be allowed to present evidence in support of its denial. At a “show cause” hearing, the employer’s witnesses testified about its “incoming mail” procedures and stated that no hearing notice had been received. In addition, a Board manager acknowledged that, from “time-to-time,” parties have reported not receiving hearing notices and that he was not aware of a “mailing confirmation” procedure. Based on such evidence, the ALJ concluded that the employer had not adequately rebutted a presumption that the hearing notice had been mailed in the regular course of the mail. See ORS 40.135(1)(q). Consequently, the ALJ determined that the employer’s failure to appear was unjustified and, based on the evidence presented by claimant, found the claim compensable. The employer requested Board review, contending that its failure to appear at the hearing was not “unjustified” under OAR 438-006-0071(2).

The Board agreed with the employer’s contention. Citing OAR 438-006-0071(2), the Board stated that an unjustified failure of a party or a party’s representative to attend a scheduled hearing is a waiver of appearance. Relying on *Grinstead v. Lacamas Labs., Inc.*, 212 Or App 408, 413 (2007), the Board noted that it has *de novo* review over an ALJ’s determination over whether a party’s failure to appear at a hearing was unjustified.

Court has previously held that the “presumption of mailing” can be overcome with sworn evidence that copies of an order were not received.

Testimony did not indicate a confirmation procedure for mailing notices of hearing and employer’s witnesses testified that they had not received notices.

Board not persuaded that copies of hearing notices were mailed to employer; thus, its failure to appear at hearing was not “unjustified.”

WCD’s “262(12)(a)” administrative order directed parties to appeal to WCD, but claimant filed hearing request with WCB.

Moreover, referring to *Berliner v. Weyerhaeuser Co.*, 92 Or App 264, 266 (1988), the Board observed that the court had previously held that where there was no method of verifying whether mailing procedures had been followed regarding a Board order and a claimant and his counsel’s affidavits swore that they did not receive a copy of the order, the presumption of the Board’s duty to mail an order in the usual course of business had been overcome and the order was not final. Finally, the Board reiterated that the presumption under ORS 40.135(1)(q) that a “letter duly directed and mailed was received in the regular course of the mail” may be rebutted with evidence that copies of the document were not properly mailed. *David J. Lampa*, 66 Van Natta 1052 (2014).

Turning to the case at hand, the Board acknowledged that the hearing notice indicated that copies had been mailed to the employer at two separate addresses. However, the Board noted that the Board manager had testified (without contradiction) that he was unaware of a confirmation procedure for the mailing of hearing notices and that reports of not receiving hearing notices had previously been received. Furthermore, the Board observed that the employer’s witnesses had confirmed that, after investigating the matter, no one in their two offices had received a hearing notice and a copy of the notice was not in claimant’s file. Finally, the Board noted that the record did not establish that either the employer or the claim administrator had received notice of the scheduled hearing.

Under such circumstances, the Board was not persuaded that copies of the hearing notice were mailed to the employer or its claim administrator or that they had notice of the scheduled hearing. Consequently, the Board concluded that the employer’s failure to appear at the hearing was not “unjustified” under OAR 438-006-0071(2). Accordingly, the Board remanded the case to the Hearings Division for further proceedings to allow the parties an opportunity to present evidence regarding the denied claim.

Jurisdiction: “262(12)(a)” - WCD’s “Penalty/Fee” Administrative Decision - “Original” Jurisdiction Concerning Hearing Request Rests with WCD

Sylvano V. Anchietta, 72 Van Natta 275 (April 9, 2020). Applying ORS 656.262(12)(a), the Board held that the Hearings Division lacked original jurisdiction to consider claimant’s hearing request concerning a Workers’ Compensation Division (WCD) administrative order that had awarded penalties/ attorney fees based on a carrier’s untimely payment of medical bills pursuant to an approved Disputed Claim Settlement (DCS). Although the WCD order directed a dissatisfied party to file a hearing request with WCD, claimant filed his request with the Board’s Hearings Division. At the hearing, neither the parties nor the ALJ questioned the ALJ’s authority to resolve the “penalty/ attorney fee” issue under ORS 656.262(12)(a). After the ALJ affirmed WCD’s administrative order, claimant requested Board review, asserting that WCD had original jurisdiction over claimant’s hearing request and that the ALJ’s order should be vacated.

Penalty/fee disputes for untimely payment of medical bills pursuant to a DCS -- subject to WCD authority ("262(12)(a)").

ALJ lacked original jurisdiction over "262(12)(a)" dispute; hearing request transferred to WCD.

At the time the hearing request was filed, the only matters at issue were penalties/attorney fees for allegedly unreasonable claim processing.

WCD has exclusive jurisdiction over "penalty/fee" dispute under "262(11)(a)" -- determination of issues before Hearings Division is made upon filing of hearing request.

The Board agreed with claimant's contention. Citing ORS 656.262(12)(a), *Shawna R. Neil*, 69 Van Natta 1295, 1298 n 5 (2017), and *Elvin Rodriguez*, 68 Van Natta 1618, 1620 n 3 (2016), the Board reiterated that penalty/attorney fee disputes under ORS 656.262(12)(a) concerning a carrier's alleged untimely payment of medical bills involving an approved DCS are subject to WCD's authority. The Board further noted that WCD's administrative order contained language notifying the parties that a hearing request should have been directed to WCD.

Turning to the case at hand, the Board found that, because the "penalty/attorney fee" dispute concerned alleged untimely paid medical bills involved in an approved DCS, jurisdiction over the matter rested with WCD. Thus, the Board determined that claimant's hearing request should have been directed to WCD. Under such circumstances, the Board concluded that the ALJ lacked jurisdiction over the dispute and, as such, transferred the matter to WCD under ORS 656.704(5). *Harry L. Rumer*, 69 Van Natta 536, 539-40 (2017).

In reaching its conclusion, the Board noted that WCD was authorized to refer claimant's request to the Hearings Division for a "Proposed and Final" order. See OAR 436-001-0023(1)(a). Nonetheless, in the absence of such a WCD referral, the Board reasoned that the ALJ lacked jurisdiction over claimant's request.

Penalties: "WCD" Jurisdiction - "262(11)(a)" - Although Hearing Request Referred to "Other" Issues, Record Established "Penalties/Attorney Fees" Were Sole Issues When Request Filed

Andre L. Garnett, 72 Van Natta 329 (April 21, 2020). Applying ORS 656.262(11)(a), the Board held that the Hearings Division lacked authority to consider claimant's request for penalties/attorney fees for a carrier's allegedly unreasonable claim processing because, although his hearing request referred to "other" issues (in addition to penalties/attorney fees), the record established that the only matters at issue when the request was filed were penalties/attorney fees. Some eight months after a carrier had recalculated his rate of temporary disability benefits, claimant filed a hearing request, which raised penalties, attorney fees, "TPD," and "other" issues. However, at the hearing, claimant agreed that the carrier's recalculation (which had occurred some eight months before the filing of the hearing request) was correct and that he was seeking penalties/attorney fees for the carrier's initial underpayment of temporary disability benefits.

The Board held that the Hearings Division lacked jurisdiction to resolve the parties' dispute. Citing ORS 656.262(11)(a), the Board stated that the Director has exclusive jurisdiction over proceedings regarding solely the assessment of penalties/attorney fees. Relying on *Icenhower v. SAIF*, 180 Or App 297, 305 (2002), the Board noted that the determination of whether issues before the Hearings Division extend beyond penalties/attorney fees under ORS 656.262(11)(a) is made upon the filing of the hearing request. Referring to *David C. Sellers*, 69 Van Natta 1336, 1340, *on recon*, 69 Van Natta 1463 (2017), the Board observed that, when a hearing request had alleged a discovery violation

Although the TPD and “other” boxes were checked on the “hearing request” form, record established that benefits had been correctly calculated by the time the request was filed and that penalties/fees were only issues.

Board transferred “penalty/fee” dispute to WCD.

and sought penalties/fees, but the record had established that discovery had already been provided at the time the request was filed and the claimant had not sought an order compelling discovery, it had previously held that the Hearings Division lacked jurisdiction over the dispute that solely concerned penalties/fees under ORS 656.262(11)(a) when the hearing request had been filed.

Turning to the case at hand, the Board acknowledged that claimant had checked the “TPD” and “other” boxes on his hearing request form, in addition to the “penalties/attorney fees” boxes. Nonetheless, the Board emphasized that claimant had agreed at the hearing that the carrier had correctly recalculated his temporary disability benefits some eight months before he filed the hearing request and that the only issue was whether the carrier’s initial calculation of such benefits had been unreasonable.

Under such circumstances, the Board was persuaded that penalties/attorney fees under ORS 656.262(11)(a) were the only matters at issue when claimant’s hearing request was filed. Consequently, the Board concluded that the Hearings Division lacked jurisdiction over the parties’ dispute. Accordingly, relying on ORS 656.704(5), and *Harry L. Rumer*, 69 Van Natta 536, 539 (2017), the Board dismissed claimant’s hearing request and transferred the matter to the Workers’ Compensation Division.

Standards: Work Disability - Claimant Not Released to “At Injury” Job - Based on Job Description, “Agreed” Job Analysis - “214(2),” “726(4)(f)(E)”

Issue Preclusion: “Release to Regular Work” For Particular Period - Prior “TTD” Litigation - Not Preclusive Regarding Subsequent “Work Disability” Litigation

Penalty: “268(5)(g)” - Increased PPD Award From Recon Order - Based on “Info” That Carrier Should Have Known at Claim Closure

Sandra L. Read, 72 Van Natta 278 (April 10, 2020). Applying ORS 656.214(2) and ORS 656.726(4)(f)(E), the Board held that claimant was entitled to a work disability award because (based on a specific approved job analysis and her attending physician’s “post-closure” opinion) she was not released to her “regular work,” and, because the carrier could have sought clarification of the attending physician’s opinion before closing the claim without a work disability award, a penalty under ORS 656.268(5)(g) was warranted. Before closure of claimant’s low back claim, a Board order had found that claimant was not entitled to temporary disability benefits for a particular period because her then-attending physician had released her to regular work. Based on that Board decision, as well as the current attending physician’s opinion that claimant’s work restrictions had not changed since the Board’s previous order, a Notice of Closure did not award work disability. After claimant requested reconsideration, her attending

Carrier could have sought clarification of AP’s opinion regarding whether claimant was released to “regular work” before closing the claim.

Post-closure, “AP” was provided a specific job analysis for “at injury” job for the first time and did not release claimant to regular work.

physician submitted a “post-closure” opinion, which indicated that, based on a specific job analysis (that the physician had not previously been provided), claimant was precluded from performing her “at-injury” job as an alternative education teacher. Based on the attending physician’s “post-closure” opinion, an Order on Reconsideration awarded work disability award and assessed a penalty under ORS 656.268(5)(g). The carrier requested a hearing, contending that claimant was not entitled to a work disability award based on other job descriptions and her attending physician’s “pre-closure” release to regular work. Alternatively, the carrier asserted that a “268(5)(g)” penalty was not justified because the increase in claimant’s compensation resulted from the attending physician’s “post-closure” change of opinion that it could not reasonably had known at the time of claim closure.

The Board disagreed with the carrier’s contentions. Citing ORS 656.214(2) and ORS 656.726(4)(E), the Board stated that whether claimant was entitled to work disability depended on whether she returned to regular work or was released to regular work by the attending physician. Referring to ORS 656.283(6), *SAIF v. Hernandez*, 155 Or App 401 (1998), and *Jeffery L. Frost*, 63 Van Natta 1641, *recons*, 63 Van Natta 1890 (2011), the Board noted that the evaluation of a worker’s disability is as of the date of issuance of the reconsideration order. Relying on *C. Or. Intergovernmental Counsel-COIC v. Albert*, 260 Or App 640 (2014), and *Tyrel Albert*, 66 Van Natta 1212 (2014) (on remand), the Board explained that the determination of whether claimant was released, or returned, to “regular work” is based on the evidence in the record, including medical records describing the work that she was performing when she was injured, her own description of her work history, the employer’s regular duty job description, and the evidence regarding her post-injury physical capacity.

Specific job analysis signed by both parties was the more detailed description of physical requirements for claimant’s “at injury” job; because “AP” did not release claimant to regular work, work disability award granted.

Turning to the case at hand, the Board found the specific job analysis (which had been signed by both parties and specifically prepared for claimant’s job-at-injury as an “alternative education teacher”) to be a more detailed description of the physical requirements of her “regular work” than other job descriptions (which applied to all teachers, and did not describe the physical requirements of claimant’s job). Noting that the attending physician had opined that claimant was precluded from performing the work duties described in the specific job analysis, the Board concluded that claimant was entitled to a work disability award.

Prior “regular work release” finding in TTD proceeding, not preclusive on subsequent “work disability” dispute.

In reaching its conclusion, the Board acknowledged that, in a prior proceeding, it had determined that claimant’s former-attending physician had released her to regular work for the purpose of her entitlement to temporary disability benefits during an earlier time period. Nevertheless, the Board reasoned that the current proceeding concerned whether claimant’s current-attending physician had released her to her regular “at injury” work duties for purposes of her entitlement to a work disability award at claim closure. Under such circumstances, the Board concluded that its prior decision had no preclusive effect on the present dispute. See *Drews v. EBI Cos.*, 310 Or 134 (1990); *Rennie v. Freeway Transp.*, 294 Or 319 (1982); *Ronald G. Rogerson*, 55 Van Natta 1482 (2003).

Finally, regarding the penalty issue under ORS 656.268(5)(g) and OAR 436-030-0175(2)(c), the Board observed that, if a reconsideration order awards an increase of 25 percent or more from that granted by a Notice of Closure and the claimant is more than 20 percent permanently disabled, a 25 percent penalty shall be assessed if the increase in compensation results from information that the carrier could reasonably have known at the time of claim closure. The Board explained that such “information” includes information that the carrier could have obtained at claim closure through a request for clarification. *Walker v. Providence Health Sys. Or.*, 267 Or App 87 (2014); *Stuart A. MacDonald*, 66 Van Natta 2046 (2014).

After conducting its review, the Board noted that the attending physician’s “pre-closure” opinion (agreeing that claimant’s work restrictions did not preclude her from returning to her regular work) was based on job descriptions provided by the carrier (which were not in the record), as well as the Board’s prior order (which had no preclusive effect on claimant’s release to regular work for work disability purposes at claim closure). The Board further observed that, in a “post-closure” opinion, the attending physician had confirmed that the specific job analysis (which both parties had signed more than five years before claim closure) was not the same as the job descriptions provided with the carrier’s “pre-closure” inquiry and that, based on that specific job analysis, claimant’s permanent work restrictions precluded her from performing her “regular work.”

Under such circumstances, the Board was persuaded that the “post-closure” opinion was based on information that existed before claim closure. Moreover, the Board concluded that the carrier had not demonstrated that such information (which the basis for the increased in claimant’s compensation from the work disability award granted by the reconsideration order) could not reasonably have been known at the time of claim closure. *Walker*, 267 Or App at 144; *Anita Ferrer*, 67 Van Natta 5 (2015); *Kenneth P. Anderson*, 63 Van Natta 1496 (2011). Consequently, the Board held that a penalty under ORS 656.268(5)(g) was justified.

APPELLATE DECISIONS UPDATE

TTD: Rate - “Irregular” Hours - “Averaging” of Hourly Wage Permissible For Approximating Wage “At The Time Of Injury” - “060-0025(4)” W/I Director’s Authority Under “210(2)(e)”

Poland v. SAIF, 303 Or App 665 (April 22, 2020). The court, *per curiam*, affirmed the Board’s order in *Richard Poland*, 71 Van Natta 172 (2018), previously noted 37 NCN 2:8, that found that the carrier had accurately computed the rate of claimant’s temporary total disability (TTD) benefits under OAR 436-060-0025(4) (Feb 2, 2017), which bases a worker’s TTD rate (when the worker is paid by the hour, but works irregular hours) on a daily or weekly wage that is “based on the weekly average of the worker’s total earnings for the period up to 52 weeks before the date of injury.” On appeal, claimant contended that the rule conflicted with the requirement in ORS 656.210(2)(d)(A) that TTD benefits be based on a worker’s wage “at the time of injury.” Noting that he

Because AP’s “post-closure” opinion regarding claimant’s ability to perform “at injury job” could have reasonably been known at closure, “268(5)(g)” penalty was assessed.

Claimant contended that TTD rate should be based on wage “at time of injury,” rather than weekly average over preceding 52 weeks under “060-0025(4).”

Court noted that “210(2)(e)” gives the Director broad “TTD rate” authority to prescribe methods for approximating the wage at the time of injury for workers who are not regularly employed; therefore, at least for some workers, “assumed wage” will deviate from “actual wage.”

received an increase in his hourly wage shortly before his work injury, claimant asserted that basing his TTD rate on a weekly average over the 52 weeks preceding his injury resulted in an hourly wage less than his actual hourly wage “at the time of injury.”

The court disagreed with claimant’s contention. Citing *Hadley v. Cody Hindman Logging*, 144 Or App 157, 159-60 (1996), the court reiterated that ORS 656.210(2)(e) grants the Director “broad authority to prescribe by rule ‘methods’ of approximating the wage amount at the time of injury of those workers who are not regularly employed.” Because such methods necessarily result in *approximations* of such workers’ wages, the court reasoned that, at least for some workers, the worker’s assumed wage under the rule will deviate from what the worker’s actual wage would be. Nonetheless, referring to *State Farm Ins. Co. v. Lyda*, 148 Or App 424, 426-30 (1997), the court reasoned that the existence of such a deviation does not, standing alone, establish that the administrative rule is inconsistent with ORS 656.210.

Turning to the case at hand, the court stated that, beyond the fact that the rule’s averaging of claimant’s hourly wages effectively resulted in a TTD rate that was less than his actual hourly wage at the time of his injury, he had identified no other basis for concluding that OAR 436-060-0025(4) (Feb 2, 2017). Under such circumstances, the court affirmed the Board’s decision.

APPELLATE DECISIONS COURT OF APPEALS

Responsibility: “LIER” - “Sole Cause/Impossibility”
Defense

NAES Corp. v. SCI 3.2, Inc., 303 Or App 684 (April 29, 2020). The court affirmed the Board’s order in *William H. Lodge*, 69 Van Natta 924 (2017), which had held that an earlier employer was responsible for claimant’s occupational disease claim for a hearing loss condition under the “last injurious exposure rule” (LIER) because a later “presumptively responsible” employer had established that his employment with the earlier employer was the sole cause of his hearing loss. On appeal, the earlier employer contended that: (1) the Board had applied an incorrect standard of proof because it was at least possible that claimant’s employment with the later employer had contributed to his hearing loss; and (2) the record lacked substantial evidence/reasoning to support the Board’s findings that had shifted responsibility from the “presumptive responsible” last employer to the earlier employer.

The court disagreed with the earlier employer’s contentions. Citing *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997), the court stated that, under the LIER, a presumptively responsible employer may shift responsibility to an earlier employer if it establishes that: (1) it was impossible for conditions at its workplace to have caused the disease; or (2) the disease was caused solely by conditions at one or more previous employments. Relying on *Liberty Metal Fabricators v. Lynch Co.*, 295 Or App 809, 813, *ad’h to as modified on recons*, 302 Or App 110 (2020), the court reiterated that, in a LIER

Board shifted responsibility to the earlier employer under the “sole cause” prong of LIER.

Only “actual” contribution from later employment is necessarily inconsistent with a finding that previous employment was the “sole cause” of claimed hearing loss.

“Presumptively responsible” last employer not required to prove that conditions at its workplace could not possibly have caused claimed hearing loss to shift responsibility to earlier employer.

No inconsistency in Board finding that earlier employer was the sole cause of claimed hearing loss and finding that later employer had not eliminated all “possibility” that its employment had contributed to claimant’s hearing loss.

case, evidence offered in terms of reasonable medical probability suffices to establish that it was not possible for an employment in question to have caused a claimant’s hearing loss; *i.e.*, the standard of proof in a LIER case is a preponderance of evidence.

Turning to the case at hand, the court observed that the Board had declined to shift responsibility to the earlier employer because it did not consider it impossible for the later employer to have caused claimant’s hearing loss. However, the court noted that the Board had shifted responsibility to the earlier employer under the “sole cause” prong because the record established to a medical probability that claimant’s work prior to his last employment was the sole cause of his occupational disease.

The court acknowledged that, if the evidence in the record compelled a finding that claimant’s work for the later employer had some causal relationship (however slight) to his hearing loss, it would be neither impossible for that relationship to exist nor true that claimant’s work for his earlier employer had been the sole cause of his condition. In other words, the court clarified that only actual contribution from claimant’s later employment is necessarily inconsistent with a finding that claimant’s previous employment was the sole cause of his hearing loss.

Thus, the court disagreed with the earlier employer’s argument that, if one cause remains possible, then another cause cannot be considered the “sole” cause. Stated another way, consistent with its reasoning in *Long*, the court explained that the presumptively responsible later employer was not required to prove that conditions at its workplace could not possibly have caused claimant’s hearing loss in order to shift responsibility for the claim to the earlier employer.

Finally, after conducting its “substantial evidence/reason” review under ORS 183.482(8)(a), (c) and *SAIF v. Harrison*, 299 Or App 104, 105 (2019), the court determined that there was ample affirmative evidence that claimant’s work as a boilermaker for the earlier employer was the likely cause of his hearing loss and, based on the reasoning expressed in *Long* regarding the independence between the “impossibility” and “sole cause” prongs of the LIER defense, there was no inconsistency in the Board’s finding that the earlier employer had been the sole cause of claimant’s hearing loss despite concurrently finding that the later employer had not eliminated all possibility that its working conditions had contributed to his hearing loss. Consequently, the court concluded that the Board’s order did not lack substantial reason and was supported by substantial evidence.