



News & Case Notes

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Rulemaking Hearing - July 31, 2020 - Proposed Rules/ Amendments (Attorney Fees - OAR 438 Division 015) - "Contingent Hourly Rate"/"Voluntary Bifurcation of Attorney Fee Award for Certain Cases on Board Review" (OAR 438-015-0010(6); OAR 438-015-0125)

The Board has scheduled a public rulemaking hearing on Friday, July 31, 2020 at 10 a.m. at its Salem office to receive public comments on proposed rules/amendments relating to attorney fees (OAR 438 Division 015). The proposed rules follow a series of public meetings, as well as an advisory committee report, regarding attorney fee concepts. The proposed rules are summarized as follows:

- Allowing the submission and consideration of information regarding a claimant's attorney's "contingent hourly rate," including the calculation of such a rate. (OAR 438-015-0010(6)).
- Establishing a procedure regarding the voluntary bifurcation of an attorney fee award from the merits concerning certain cases on Board Review. (OAR 438-015-0125).

Notice of this rulemaking action has been filed with the Secretary of State's office. Electronic copies of these rulemaking materials are available on WCB's website at <https://www.oregon.gov/wcb/legal/Pages/laws-and-rules.aspx>. Copies will also be distributed to parties/practitioners on WCB's mailing list.

Because of the Governor's "social distancing" requirements, arrangements have been made to allow the public to participate in the hearing by means of a "phone conference" link. This "phone conference" link will be made available during the week preceding the rulemaking hearing. Any questions regarding this link may be directed to Greig Lowell, 2601 25th St SE, Suite 150, Salem, OR 97302, by phone (503)378-3308, email greig.lowell@oregon.gov or by fax at (503)373-1458.

Due to these "social distancing" limitations, in lieu of testifying, interested parties, practitioners, and the general public may wish to consider submitting written comments regarding these proposed rule amendments. Those written comments can be submitted for admission into the record by mail (2601 25th St. SE, Ste 150, Salem, OR 97302-1280), fax (503-373-1684), by hand delivery at any permanently staffed Board office, or by email to rulecomments.wcb@oregon.gov. Please address your comments to Ian Brown, Rulemaking Hearing Officer, Workers' Compensation Board. Any such written comments that are received by the Board on or before July 31, 2020, will be considered.

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Annual Adjustment to Maximum Attorney Fee and Hourly Rate for Statement Fee Effective July 1, 2020

The maximum attorney fee awarded under ORS 656.262(11)(a), ORS 656.262(14)(a), and ORS 656.382(2)(d), which is tied to the increase in the state's average weekly wage (SAWW), will rise by 4.693 percent on July 1, 2020. On June 15, 2020, the Board published Bulletin No. 1 (Revised), which sets forth the new maximum attorney fees. The Bulletin can be found on the Board's website at: <https://www.oregon.gov/wcb/legal/Pages/bulletins.aspx>

An attorney fee awarded under ORS 656.262(11) shall not exceed **\$4,797**, absent a showing of extraordinary circumstances. OAR 438-015-0110(3).

An attorney fee awarded under ORS 656.262(14)(a) shall be **\$366** per hour. OAR 438-015-0033. This rule, which was amended with an effective date of June 1, 2020, concerns the reasonable hourly rate for an attorney's time spent during a personal or telephonic interview conducted under ORS 656.262(14).

An attorney fee awarded under ORS 656.308(2)(d) shall not exceed **\$3,459**, absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5).

These adjusted maximum fees apply to attorney fees awarded under ORS 656.262(11)(a) and ORS 656.308(2)(d) by orders issued on July 1, 2020 through June 30, 2021, and to a claimant's attorney's time spent during a personal or telephonic interview or deposition under ORS 656.262(14)(a) between July 1, 2020 and June 30, 2021.

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, rulemaking 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.

CASE NOTES

Cost Award: “Extraordinary Circumstances” Not Established - Obtaining Specialist’s Opinion to Prevail Over “O.D.” Denial Concerning “CTS” Claim - “386(2)(d)”

Kevin J. Siegrist, 72 Van Natta 491 (June 10, 2020). Applying ORS 656.386(2)(d), on remand, *SAIF v. Siegrist*, 297 Or App 284, *on recons* 299 Or App 93 (2019), the Board analyzed claimant’s request for reimbursement of litigation costs exceeding the statutory \$1,500 threshold, and found that obtaining a specialist’s report in prevailing over a carrier’s occupational disease denial for a bilateral carpal tunnel syndrome condition did not constitute “extraordinary circumstances.” In its mandate, the court had directed the Board to explain why the disputed claim was of greater than average complexity or whether it was uncommon to obtain expert opinions from medical specialists. On remand, in support of his “extraordinary circumstances” contention, claimant asserted that he had prevailed against a denial of a complex occupational disease claim, he lacked private health insurance, and he had been required to pay for a specialist examination to successfully rebut the carrier’s specialist’s opinion.

After conducting its review of the record, the Board concluded that the circumstances presented were not extraordinary. Citing ORS 656.386(2)(d) and OAR 438-015-0019(2), the Board stated that a claimant who prevails against a denial is limited to a \$1,500 cost reimbursement, unless he/she demonstrates extraordinary circumstances justifying payment of a greater amount. Referring to the court’s *Siegrist* decision, the Board reiterated that “extraordinary circumstances” means circumstances that are not usual, regular, common, or customary for workers’ compensation matters.

Turning to the case at hand, the Board found that the claim was not particularly complex. The Board further observed that the litigation of disputed occupational disease claims with multiple expert opinions is not uncommon. In

Claimant alleged “extraordinary circumstances” based on prevailing over denial of complex O.D., lacking health insurance, and paying for a specialist exam/report to rebut another specialist’s opinion.

“Extraordinary circumstances” means circumstances that are not usual, regular, common, or customary.

Board did not consider litigation with multiple expert opinions to be uncommon.

addition, the Board did not consider it unusual for a claimant to obtain an expert opinion to rebut the opinion of a carrier's medical expert nor was it uncommon for workers to lack private health insurance.

Finally, the Board acknowledged claimant's policy arguments regarding the expense of experts and an inequity between workers and carriers in obtaining experts. Nonetheless, the Board reasoned that, while such arguments might be relevant before the legislature in support of increasing the \$1,500 statutory threshold, they did not establish extraordinary circumstances based on the present record.

Member Ousey concurred to express certain policy concerns. After discussing the 2007 legislative history of ORS 656.386(2)(d) (where the legislature had discussed the possibility of adjusting the \$1,500 statutory threshold in future legislative sessions), Ousey encouraged the legislature and the Management Labor Advisory Committee (MLAC) to reexamine the statute and extend the current \$1,500 threshold to a more reasonable figure that reflects the current realities of today's litigation process.

Member Ousey further suggested that the legislature and MLAC consider implementing a "cost of living adjustment" (COLA), similar to that of ORS 656.262(11)(a) (regarding a statutory threshold concerning a penalty-related attorney fee), that could be adjusted annually by the same percentage increase as the state's average weekly wage under ORS 656.211. Had ORS 656.386(2)(d) included such a COLA provision, Ousey reasoned that the current litigation (which had spanned nearly five years regarding a disputed \$50 in claimed litigation costs) could have been avoided.

Finally, Member Ousey proposed that the legislature and MLAC consider expanding workers' access to carrier-paid worker-requested medical examinations under ORS 656.325, to include all situations in which a carrier intends to rely on a medical opinion in support of its denial. Ousey remarked that such an expansion might reduce a worker's litigation costs and also lessen the financial disparity between the worker and the carrier.

Claim Processing: "Clarification" Request of Initial Acceptance Notice - "60-Day" Response Period - No "Clear Request for Formal Written Acceptance" - No "New/Omitted Medical Condition" Claim/No "De Facto" - "262(6)(d)"/"267(1)"

Penalty: Carrier's Acceptance of "Right" Epicondylitis (Following Litigation Order Finding "Bilateral" Epicondylitis Compensable) Found Unreasonable - No "Amounts Then Due" to Base Penalty - "262(11)(a)"

Sean S. Edmunson, 72 Van Natta 485 (June 9, 2020). Analyzing ORS 656.262(6)(d), and ORS 656.267(1), the Board held that, because claimant

Concurring opinion suggested that legislature/MLAC consider adopting a "COLA" to the \$1,500 threshold consistent with annual changes to the state average weekly wage.

Concurrence also suggested expanding availability of WRMEs whenever carrier relies on a medical opinion.

Following acceptance, claimant sought clarification of the acceptance notice.

Less than 60 days after clarification request, claimant filed a hearing request alleging “de facto” denial.

If a “new/omitted medical condition” claim is initiated, carrier must issue either acceptance/denial within 60 days.

Carrier timely responded to “clarification” request within 60 days by revising acceptance.

“Clarification” request was not clear request for formal written acceptance of an alleged “omitted” medical condition.

sought clarification of a carrier’s Notice of Acceptance (rather than requesting formal written acceptance of a new/omitted medical condition), the carrier’s modification of its acceptance notice within 60 days of the clarification request was timely and, as such, the carrier was not required to accept/deny a new/omitted medical condition claim. Following a prior litigation order which found claimant’s bilateral epicondylitis condition compensable, the carrier issued a Notice of Acceptance for a *right* epicondylitis condition. In response, claimant sought “clarification/modification” of the acceptance notice to include *bilateral* epicondylitis. Less than 60 days after his “clarification” request, claimant filed a hearing request, alleging a *de facto* denial of his bilateral epicondylitis. Thereafter, within 60 days of claimant’s “clarification” request, the carrier modified its acceptance notice to include “right and left epicondylitis.” Asserting that the carrier’s initial acceptance of only *right* epicondylitis constituted a *de facto* denial of his *left* epicondylitis, claimant contended that he was entitled to an attorney fee award for prevailing over the *de facto* denial, as well as penalties/attorney fees for the carrier’s unreasonable claim processing.

To begin, the Board concluded that there had not been a *de facto* denial. Citing ORS 656.262(6)(d), the Board stated that, if a claimant believes that a condition has been incorrectly omitted from an acceptance notice, he/she *must* first communicate in writing to the carrier that he/she objects to the acceptance notice. Relying on the statute and *Ernest R. Lyons*, 69 Van Natta 688, 694 (2017), the Board reiterated that, if these communication requirements are not followed, a claimant may not allege at any hearing or other proceeding the *de facto* denial of a claim for a condition based on information in the acceptance notice. Again referring to ORS 656.262(6)(d), the Board remarked that, when a claimant asks for clarification of the acceptance notice, the carrier has 60 days to revise the notice or provide further clarification. Finally, citing ORS 656.267(1), and *Rose v. SAIF*, 200 Or App 654, 662 (2005), the Board recited that, if a claimant initiates a new/omitted medical condition claim, the carrier is obligated to supply “written notice of acceptance or denial.”

Turning to the case at hand, the Board found that, following the carrier’s acceptance of his *right* epicondylitis, claimant had not requested formal written acceptance of *bilateral* epicondylitis, but rather had expressly sought clarification/modification of the acceptance notice. Under such circumstances, the Board concluded that claimant’s request was consistent with a “clarification” request under ORS 656.262(6)(d). Because the carrier had responded to claimant’s “clarification” request within the 60-day period prescribed by that statute, the Board determined that there had not been a *de facto* denial and that the carrier’s response to claimant’s “clarification” request had not been unreasonable.

In reaching its conclusion, the Board further noted that claimant had not clearly requested formal written acceptance of an alleged “omitted” medical condition (*i.e.*, his *left* epicondylitis). See ORS 656.262(7)(a); ORS 656.267(1). Consequently, because of his noncompliance with this statutory directive before the filing of his hearing request, the Board reasoned that claimant was prohibited from alleging a *de facto* denial of the aforementioned condition. See *Lyons*, 69 Van Natta at 694.

Finally, the Board held that the carrier's initial acceptance of *right* epicondylitis to be unreasonable. Relying on ORS 656.262(11)(a), the Board stated that a carrier is liable for penalties/attorney fees for an unreasonable delay in the acceptance of a claim. Referring to *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991), the Board remarked that the standard for making such a determination is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. Citing *George B. Furst*, 65 Van Natta 1664, 1666 (2013), and *Nancy E. Petock*, 59 Van Natta 2280, 2284 (2007), the Board reiterated that a final litigation order's finding that a particular condition is compensable controls over a carrier's acceptance notice, obligating the carrier to accept the condition found compensable by the litigation order.

Carrier had no legitimate doubt that litigation order found bilateral epicondylitis compensable. Thus, acceptance of only right epicondylitis was unreasonable.

Applying those principles to the present case, the Board determined that, in light of the litigation order (which had expressly found claimant's *bilateral* epicondylitis compensable), the carrier had no legitimate doubt concerning its liability for the aforementioned condition. Consequently, the Board concluded that the carrier's initial acceptance of only a *right* epicondylitis condition was unreasonable.

No evidence of "amounts then due" - no penalty assessed, but attorney fee granted.

Addressing claimant's entitlement to a penalty, the Board found that the record did not establish the existence of any "amounts then due" as a result of the carrier's unreasonable initial acceptance notice. Under such circumstances, the Board determined that a penalty was not awardable. See *Devynne C. Krossman*, 70 Van Natta 372, on recons, 71 Van Natta 775, 776 (2019). Nonetheless, notwithstanding the absence of a penalty, the Board awarded a carrier-paid attorney fee for claimant's counsel's services at the hearing level and on review regarding the carrier's unreasonable claim processing. See *SAIF v. Traner*, 273 Or App 310, 320-21 (2015); *Krossman*, 71 Van Natta at 777.

Death Benefits: Surviving "Cohabitant" - Not Entitled to Benefits - No Children Living as a Result of Relationship - "226"

Herbert Williams, DCD, 72 Van Natta 517 (June 17, 2020). Applying ORS 656.226, the Board held that claimant, the surviving cohabitant of the deceased worker, was not entitled to survivor benefits because a child had not been born of her relationship with the decedent. Claimant had lived with the deceased worker for eight years and he acted as a father to her three children from a previous relationship. She acknowledged that the Court of Appeals had previously held that survivor benefits are awardable under ORS 656.226 only when the surviving cohabitant and deceased worker have "given birth to children living at the time of the claim." See *Allen v. Paula Ins.*, 182 Or App 259 (2002); *Thomas v. SAIF*, 8 Or App 414 (1972). However, she contended that: (1) those decisions were no longer controlling because the statute had since been amended; and (2) as interpreted by the Court of Appeals, the statute impermissibly discriminates against same sex couples in violation of Article I, Section 20, of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Worker had lived with cohabitant and acted as a father to her three children, but no child was born from their relationship.

Court of Appeals precedent interpreted “226” to require that cohabitant and decedent have “given birth to children living at the time of the claim.”

’15 amendment to “226” did not alter “children living as a result of relation” language.

Board concluded that cohabitant was not entitled to bring a “same sex” constitutional challenge because she/worker were not same sex.

Concurring opinion encouraged the court to reexamine its precedent to account for modern family structures.

The Board disagreed with claimant’s contention regarding the amendment of ORS 656.226. Citing ORS 656.226, the Board noted that survivor benefits are awardable to a surviving cohabitant if the cohabitant and the deceased worker cohabited in Oregon for over one year prior to the work accident and “children are living as a result of that relation.” Citing *Allen and Thomas*, the Board reiterated that the Court of Appeals has interpreted the phrase “children are living as a result of that relation” to require that the claimant and the decedent have “given birth to children living at the time of the claim.” Relying on *State v. Ofodrinwa*, 353 Or 507 (2012), the Board stated that legislative amendments that materially change the terms of an earlier statute change the meaning of preexisting language only to the extent such a change is expressly declared or necessarily implied.

Turning to the case at hand, the Board acknowledged that ORS 656.226 had been amended in 2015 (after the court’s decisions) to replace the prior gender specific terms in the statute with its current gender neutral terms. However, the Board emphasized that the amendment did not alter the phrase interpreted by the court in *Allen and Thomas* (*i.e.*, “children are living as a result of that relation”). Further, the Board explained that the legislative history of the 2015 amendment revealed that it was designed to be a “housekeeping” amendment with no policy impact.

Under such circumstances, the Board determined that the 2015 amendment did not expressly declare or necessarily imply a change to the meaning of the phrase “children are living as a result of that relation.” Consequently, the Board concluded that the rationale expressed in *Allen and Thomas* was controlling. Accordingly, the Board held that claimant was not entitled to survivor benefits under ORS 656.226.

In reaching its conclusion, the Board declined to address claimant’s constitutional argument. Citing *Couey v. Atkins*, 357 Or 460 (2015) and *State v. Sutherland*, 329 Or 359, 365 (1999), the Board explained that a party generally cannot assert that a statute violates the constitutional rights of others (when the statute constitutionally applies to them) outside the context of a challenge to the regulation of free expression under Article I, section 8 of the Oregon Constitution or the First Amendment to the United States Constitution.

Applying such reasoning to the present case, the Board noted that because claimant contended that ORS 656.226 violated the constitutional rights of same-sex couples (when she and the deceased worker were not a same-sex couple), she was asserting that the statute violated the rights of others. Reasoning that claimant’s constitutional challenge arose from the Equality Guarantee in Article I, section 20 and the Equal Protection Clause of the Fourteenth Amendment (rather than Article I, section 8 and the First Amendment), the Board concluded that she was not entitled to bring such a challenge.

Member Ousey and Chair Wold joined the majority opinion, but concurred to express their concern that ORS 656.226, as interpreted by the court, produced harsh results inconsistent with the purpose of the Workers’ Compensation Act to provide benefits to the dependents of injured workers. They encouraged the court to reexamine the *Allen* decision and noted that, in their view, the statute should be amended to account for modern family structures that were likely not considered when the statute was adopted.

Concurring opinion found result unfair, but decision legally correct.

Dissenting opinion asserted that the 2015 amendment to the statute and a federal court decision extended benefits to same-sex couples, which is consistent with Oregon's domestic partnership law and the Governor's recent Executive Order.

Dissent alternatively argued that statute violated Oregon constitution - disparate treatment to same-sex couples.

Member Curey also concurred, writing separately to clarify her position that, although she found the result to be unfair, the Board's decision was legally correct. Specifically, Member Curey emphasized that, in light of the legislative history, the 2015 amendment to ORS 656.226 did not expressly declare or necessarily imply any legislative intent to substantively extend the benefits awardable under the statute.

Member Lanning dissented, asserting that he would interpret the phrase "children are living as a result of that relation" to require only that the cohabitant and deceased worker had taken on the responsibility to raise and support children as a family unit. In doing so, he reasoned that the 2015 amendment to ORS 656.226 changed the meaning of the phrase "children are living as a result of that relation" such that the *Allen* decision no longer controlled the Board's interpretation of the statute. Specifically noting that the amendment changed the gender specific terms in the statute to gender neutral terms in response to the federal court decision in *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 9D. Or. (2014) (which declared Oregon's ban on same-sex marriage unconstitutional and permanently enjoined the state's executive branch from enforcing laws or rules denying same-sex couples the benefits that accompany marriage in Oregon), Member Lanning believed that the necessary implication of such a change was the extension of benefits under the statute to same-sex couples. Reasoning that the *Allen* court's (as well as the majority's) interpretation of "children are living as a result of that relation" to limit benefits under the statute to those couples who have children biologically related to both the surviving cohabitant and the deceased worker (and noting that same-sex couples cannot have children biologically related to both partners), Lanning concluded that those interpretations conflicted with the amendment.

Member Lanning further emphasized that his interpretation was consistent with Oregon's domestic partnership law and the Governor's recent Executive Order ensuring equal treatment under the law for Oregon's LGBTQ+ community. Alternatively, Lanning explained that he would hold that the statute, as interpreted in *Allen*, violates the Equality Guarantee of Article I, section 20 of the Oregon Constitution because it subjects same-sex couples to disparate treatment.

Hearing Request: "Good Cause" for Untimely Filed Hearing Request - "Mistakes/Inadvertences" (Due to Claimant's Illiteracy, Dyslexia, Misunderstanding of Process) - Liberally Construed in Light Most Favorable to Party Seeking Relief - *Goodwin* Court's Interpretation of "319(1)(b)" Applied

Samuel Goodwin II, 72 Van Natta 508 (June 11, 2020). Applying ORS 656.319(1)(b), on remand, *Goodwin v. NBC Universal Media - NBC Universal*, 298 Or App 475 (2019), the Board held that claimant's mistakes and inadvertences in failing to timely file a hearing request from a carrier's claim denial was attributable to his illiteracy, dyslexia, and misunderstanding of the process, which constituted "good cause" for his untimely hearing request. Concluding that claimant's failure to explicitly request a hearing, reference the

denial, or mail a request for hearing to the Board's Hearings Division by the 60-day statutory deadline, qualified as mistakes and inadvertences, the court had mandated that the Board reconsider whether he had established "good cause" under ORS 656.319(1)(b) for his untimely filed hearing request.

On remand, the Board concluded that the record supported a "good cause" determination. The Board agreed with claimant's contention. Citing ORS 656.319(1)(b), the Board stated that a hearing request from a claim denial filed after 60 days (but within 180 days) of a denial confers jurisdiction if the claimant establishes "good cause" for the late filing. Relying on *Sekermestrovich v. SAIF*, 280 Or 723, 726 (1977), the Board noted that the standard for determining "good cause" under ORS 656.319(1)(b) is analogous to the standard of "mistake, inadvertence, surprise, or excusable neglect" under ORCP 71 B. Referring to the *Goodwin* decision, the Board reiterated that a "good cause" determination under ORS 656.319(1)(b) must be liberally construed and viewed in the light most favorable to the party seeking relief so as to avoid depriving a party of its day in court.

"Good cause" determination must be liberally construed and viewed in the light most favorable to the party seeking relief.

Claimant was dyslexic, semi-literate, misunderstood process - intended to appeal denial in his letter.

Turning to the case at hand, noting that claimant was dyslexic, could not read or write very well, and had trouble understanding, the Board found that, although claimant had mistakenly omitted an explicit request for hearing in his initial letter, he had intended it as an appeal of the denial. The Board further reasoned that, although an Ombudsman's representative had spoken to claimant on the day the 60-day statutory period expired and advised him to send a letter to the Board requesting a hearing, the representative had not informed him that the request for hearing was due that specific day. Finally, the Board observed that claimant followed the representative's instructions and mailed a second letter, which although mailed two days after the deadline, demonstrated his diligence.

Claimant's mistakes/inadvertences constituted "good cause."

Liberally construing the record in a light most favorably to claimant, the Board concluded that claimant's aforementioned mistakes and inadvertences constituted "good cause" for his untimely filed hearing request. See ORS 656.319(1)(b). Consequently, the Board reinstated claimant's hearing request, overturned the carrier's denial, and awarded penalties/attorney fees for unreasonable claim processing.

In reaching its conclusion, the Board disagreed with the carrier's contention that a "good cause" determination should not be liberally construed because the court's statement was *dicta*. In doing so, the Board determined that the court's statement was a conclusion of law and foundational to its reasoning regarding whether claimant's circumstances qualified as a mistake or inadvertence.

Liberal construction in light most favorable to party seeking "good cause" relief under "319(1)(b)" did not conflict with "impartial/balanced" policy of "012(3)."

Finally, the Board recognized that it had previously not found "good cause" under similar circumstances and had ruled that, under ORS 656.012(3), it must construe the law "in an impartial and balanced manner." See *Daron J. Havlik*, 71 Van Natta 427 (2019); *Shaun L. Rhoades*, 50 Van Natta 2258, 2261 (1998). Nonetheless, the Board emphasized that the *Goodwin* court had unequivocally clarified that a "good cause" determination must be liberally construed in the light most favorable to the party seeking relief under ORS 656.319(1)(b) and that such a construction did not conflict with ORS 656.012(3). *Goodwin*, 298 Or App at 487, n 7.

Medical Service: “Physical Therapist” Services - Alleged Violation of WCD Rule - Jurisdiction Rests With WCD, Not WCB - “704(3)(a), (b)(B)”/“250”

Medical dispute concerned a physical therapist’s alleged noncompliance with a WCD rule regarding providing services without MCO/“AP” approval.

Jacob E. Mantle, 72 Van Natta 505 (June 10, 2020). Analyzing ORS 656.704(3)(a), and (b)(B), the Board held that the Hearings Division was not authorized to resolve a medical service dispute regarding a physical therapist’s alleged noncompliance with a Workers’ Compensation Division’s (WCD’s) rule based on ORS 656.250. When claimant requested WCD review of a dispute concerning the nonpayment of his physical therapist’s bills, WCD transferred the dispute to the Hearings Division for a determination of whether the disputed physical therapy services were causally related to claimant’s compensable thoracic/lumbar strain injury claim. At the hearing level, claimant also contended that the Hearings Division was authorized to address the physical therapist’s alleged violation of ORS 656.250 and accompanying WCD rule (*i.e.*, providing services without approval from a Managed Care Organization or attending physician) and to determine that he was not financially responsible for the therapist’s bills. After an ALJ found that the medical services were unrelated to the compensable injury and declined to consider the alleged violation of the WCD rule and ORS 656.250 for lack of jurisdiction, claimant requested Board review, seeking a determination that he was not financially responsible for the disputed bills.

A dispute that requires a determination of whether services are in violation of medical rules is not a “matter concerning a claim” for WCB jurisdiction.

The Board held that it was not authorized to address claimant’s concerns. Citing ORS 656.704(3)(a) and *AIG Claim Servs. v. Cole*, 205 Or App 170, 174 (2006) the Board stated that its jurisdiction over a medical services dispute depends on whether the dispute is a “matter concerning a claim.” Relying on ORS 656.704(3)(a), the Board further noted that any disputes under statutory provisions directly related to the provision of medical services are not “matters concerning a claim.” Finally, the Board referred to ORS 656.704(3)(b)(B), which provides that a dispute that requires a determination of whether medical services are in violation of rules regarding the performance of medical services is not a “matter concerning a claim.”

“250” not expressly listed in “704(3)(a)” as not a “matter concerning a claim”; but “250” is directly related to the provision of medical services; thus, WCD has jurisdiction.

Turning to the case at hand, the Board acknowledged that ORS 656.250 was not a specifically enumerated provision listed in ORS 656.704(3)(a), which describes medical service disputes that are not “matters concerning a claim.” Nonetheless, reasoning that ORS 656.250 (which provides that physical therapists shall not provide compensable medical services except as allowed by a MCO contract or authorized attending physician) was directly related to the provision of medical services, the Board concluded that such a dispute was also not a “matter concerning a claim” under ORS 656.704(3)(a) and, as such, jurisdiction over the dispute rested with WCD.

Moreover, the Board determined that the dispute involved an alleged violation of ORS 656.250 (and accompanying WCD rules) concerning the performance of medical services. When so analyzed, the Board concluded that the dispute was also not a “matter concerning a claim” under ORS 656.704(3)(b)(B) and, as such, the Hearings Division was not authorized to resolve the dispute.

Concurring opinion observed that therapist should not be permitted to charge claimant for unauthorized services; but, objections must be directed to WCD.

Member Ousey concurred. Noting that the physical therapist had not provided services pursuant to a treatment plan as required by ORS 656.250, Ousey observed that the therapist should not be permitted to charge claimant for the unauthorized services. Nonetheless, acknowledging the Board's lack of jurisdiction over the matter, Member Ousey emphasized that claimant's objections should be directed to WCD.

Mental Disorder: Employment Conditions ("Groping" By Customer, Targeted/Harassed by Supervisor/Co-Workers) - Not "Generally Inherent" in Every Working Situation - "802(3)"

Grant Smith, 72 Van Natta 543 (June 23, 2020). Analyzing ORS 656.802(3), the Board held that claimant's mental disorder claim for post-traumatic stress disorder (PTSD) was compensable because several work-related incidents (being "groped" by a customer, being sent to the back of the store by a supervisor due to a customer's comment regarding claimant's gender identity, and observing the words "I hate [claimant]" carved into a shelf) were employment conditions that were not generally inherent in every working situation and were the major contributing cause of his claimed PTSD. Referring to a psychiatrist's opinion (which attributed claimant's mental health issues to his personality, cognitive deficits, and social factors), the carrier contended that claimant's mental disorder claim was not primarily related to his work activities.

To establish a compensable mental disorder claim, employment conditions producing the mental disorder must not be generally inherent in every working situation.

The Board set aside the carrier's denial. Citing ORS 656.802(3)(a), (c), the Board stated that a compensable mental disorder claim requires a diagnosis of a mental or psychological disorder generally recognized in the medical or psychological community, and the employment conditions producing the mental disorder must exist in a real and objective sense. Relying on ORS 656.802(3)(b), the Board further noted that the employment conditions producing the mental disorder must not be conditions generally inherent in every working situation. Referring to *Liberty Northwest Ins. Corp. v. Shothafer*, 169 Or App 556 (2000), the Board reiterated that the causal factors for a claimed mental disorder must be placed in three different categories: (1) "non-excluded" causative work-related factors; (2) "excluded" causative work-related factors; and (3) causative "non-work-related" factors. If, after analyzing these factors, the "non-excluded" causative work-related factors were the major contributing cause of the claimed mental disorder, the Board explained that the claim would be compensable. See ORS 656.802(3); *Shothafer*, 169 Or App at 565.

Treating psychiatrist weighed off-work and work-related stressors.

Turning to the case at hand, the Board acknowledged the opinion of examining and consulting physicians/psychiatrists, who had opined that claimant's personality, cognitive deficits, and social factors influenced his mental health. Nonetheless, reasoning that those opinions were general in nature, the Board was persuaded by the opinion of claimant's treating psychiatrist, who had also attended the hearing and heard claimant's description of the stressful work events he had experienced.

Furthermore, the Board noted claimant's attending psychiatrist had weighed claimant's off-work and work-related stressors and had specifically attributed the major contributing cause of his PTSD to work events that made

Several work events (“groped” by customer, targeted/harassed by supervisor/coworkers) were not generally inherent in every work place and were “non-excluded” work-related factors.

Despite non-attendance at arbiter exam, claimant argued she was statutorily entitled to a medical arbiter examination or a record review.

Under amended statute, if “good cause” for not attending a medical arbiter examination is not established, ARU must issue an Order on Reconsideration based on the existing record; no entitlement to arbiter report.

him feel targeted and harassed; *i.e.*, being “groped” by a customer; having a supervisor send him to the back of the store because of a customer’s comment regarding his gender identity; and observing “I hate [claimant]” carved into a shelf. Reasoning that those events were not “generally inherent” in every work place, the Board concluded that these “non-excluded” work-related stressors were the major contributing cause of claimant’s PTSD. *Lori R. Wehrli*, 67 Van Natta 755, 757 (2015); *Heather D. Whitaker*, 65 Van Natta 1793, 1794 (2013). Consequently, the Board determined that the mental disorder claim was compensable.

Reconsideration Proceeding: Failure to Attend Medical Arbiter Exam (Without “Good Cause”) - Recon Order is Based on Existing Record (No Arbiter Exam/Report)

Isis R. Harris, 72 Van Natta 540 (June 19, 2020). Applying ORS 656.268(8)(e)(B) and (C), the Board held that claimant was not entitled to a rescheduled medical arbiter examination because she had not attended the initially scheduled arbiter examination and had not established “good cause” for her nonattendance. After claimant did not attend a scheduled medical arbiter examination, the Appellate Review Unit (ARU) (on behalf of the Director) suspended her disability benefits, postponed the reconsideration proceeding, and gave her an opportunity to show good cause for her absence from the examination. When claimant did not timely respond to ARU’s “good cause” notice, an Order on Reconsideration reviewed the existing record and affirmed a Notice of Closure (which had not awarded permanent disability). Claimant requested a hearing, seeking a medical arbiter examination/report. Relying on *Juan Ramirez*, 49 Van Natta 2117 (1997), claimant argued that she was statutorily entitled to a medical arbiter examination or report based on a record review.

The Board disagreed with claimant’s contention. Referring to ORS 656.268(8)(e)(B), the Board stated that ARU (on the Director’s behalf) was authorized to suspend a claimant’s disability benefits to compel attendance at a medical arbiter examination, and to postpone the reconsideration proceeding for an additional 60 days from the date of a determination that the claimant failed to attend the examination without good cause. Citing ORS 656.268(8)(e)(C), the Board noted that, if good cause is not established, a claimant may not attend a medical arbiter examination, and the reconsideration record must be closed and ARU must issue an Order on Reconsideration based on the existing record.

Applying those principles to the case at hand, the Board found that claimant had not established “good cause” for her non-attendance at the initially scheduled medical arbiter examination. Under such circumstances, the Board concluded that ORS 656.268(8)(e)(C) required ARU to close the reconsideration record and to issue a reconsideration order based on the existing record. Determining that ARU’s actions were consistent with the aforementioned statutory requirements, the Board found no error in the reconsideration process and affirmed the reconsideration order. See *Marvin Wood Prods. v. Callow*, 171 Or App 175 (2000).

In reaching its conclusion, the Board distinguished *Ramirez* and its progeny, which had applied ORS 656.268(7)(d) (1995), that had since been renumbered as ORS 656.268(8)(e) and amended. In contrast to the statute applied in *Ramirez*, the Board observed that the current version of ORS 656.268(8)(e)(B) and (C) provides that, if a claimant has not established good cause for not attending a medical arbiter examination, a reconsideration order shall be based on the existing record. Thus, the Board disagreed with claimant's contention that, under the current statutory scheme, she was entitled to a medical arbiter examination or record review.

TTD: "Rate" Calculation - "Irregular Hours" - "Average Weekly Wage" Between New "Collective Bargaining Agreement" & Injury Date - "New Wage Earning Agreement" - More Than Change in Rate of Pay - Former "060-0025(4)(a)"

Mohammad Abed-Rabuh, 72 Van Natta 478 (June 9, 2020). Applying OAR 436-060-0025 (WCD Admin Order 18-050 (eff. February 21, 2018)), the Board held that the rate of claimant's temporary disability (TTD) benefits were based on the average of his "irregular" weekly wages between the date of a new collective bargaining agreement (CBA) and the date of his compensable injury because the CBA constituted a "new wage earning agreement" that was not limited to only a change in the rate of his pay. Following claimant's compensable injury, the carrier calculated the rate of his TTD benefits based on his average weekly wages from the date of the new CBA to the date of his work injury (rather than on his average weekly wage over the 52 weeks preceding his injury). Claimant requested a hearing, contending that the CBA did not qualify as a "new wage earning agreement" under OAR 436-060-0025(4)(a) and, therefore, his "average weekly wage" should have been calculated based on the full 52 weeks preceding the date of his injury. In addition, claimant argued that the applicable rule was inconsistent with ORS 656.210(2)(d)(A), which requires a determination of the "wage of the worker at the time of the injury."

The Board disagreed with claimant's contention. Citing the former version of OAR 436-060-0025(4)(a) (which applied at the time of claimant's injury (WCD Admin Order 18-050 (eff. February 21, 2018))), the Board noted that a "new wage earning agreement" meant a change in a wage earning agreement for reasons other than only a change in rate of pay, including but not limited to a change of hours worked, or a change of job duties. Relying on *Poland v. SAIF*, 303 Or App 665 (2020), the Board reiterated that the Director has broad authority to establish the methods for determining a claimant's "at-injury" wage.

Turning to the case at hand, the Board acknowledged that a "new wage earning agreement" means the worker's wage earning agreement that has been changed for reasons other than only a change in the rate of pay. See OAR 436-060-0025(4)(a). However, based on the testimony of the employer's controller, the Board found that, in addition to a change in the rate of claimant's pay, the

New "CBA" constituted a "new wage earning agreement" for purposes of establishing claimant's average weekly wage; changes in agreement were for reasons other than only pay (e.g., shift hours, "OT," vacation, seniority, IRAs).

Director has broad authority to determine a worker's "at-injury" wage.

CBA had resulted in multiple changes; e.g., changes to the allowable shift starting time, resulting changes in the structure of overtime hours/pay, vacation leave accrual/eligibility, seniority forfeiture, bonuses, and employer contributions to IRAs.

Under such circumstances, the Board concluded that the CBA constituted a “new wage earning agreement” under OAR 436-060-0025(4)(a). Accordingly, the Board determined that the carrier’s calculation of claimant’s TTD benefits (which was based on his average wages from the date of the CBA until his compensable injury) had been appropriate.

Finally, the Board acknowledged claimant’s argument that the WCD rule, as applied to his situation, was inconsistent with ORS 656.210(2)(d)(A), which provides that TTD benefits are based on the “wage of the worker at the time of injury.” Nevertheless, relying on the rationale expressed by the court in *Poland*, the Board reiterated that the Director has broad authority to determine the methods in which a worker’s wage at injury should be determined and that the calculation of a worker’s rate of TTD benefits when the worker is not compensated by the day or week is not an exact science and, as such, is necessarily an approximation. Consequently, consistent with the *Poland* holding, the Board concluded that, while another method of calculating claimant’s average weekly wage may have resulted in a higher TTD rate, WCD’s rule was within the Director’s broad statutory authority.

WCD rule not inconsistent with “210(2)(d)(A)” (which provides that TTD benefits are based on “wage of worker at the time of injury”); Director has broad authority.

APPELLATE DECISIONS COURT OF APPEALS

Mental Disorder: “Reasonable Disciplinary/Corrective Action” (“802(3)(b)”) Actions Arose from Worker’s Inconsistent Statement (Truthfulness Concerns) - All Components of Investigation Must Be Considered

Vaughn v. Marion County, 365 Or App 1 (June 24, 2020). Analyzing ORS 656.802(3)(b), the court affirmed the Board’s order in *Sherrill J. Vaughn*, 70 Van Natta 327 (2018), that upheld a carrier’s mental disorder denial for post-traumatic stress disorder (PTSD). On appeal, contesting the Board’s determinations that her employer’s (a county sheriff’s department) actions were disciplinary or corrective, even though she was not ultimately disciplined and that such actions were not reasonable, claimant also asserted that the employer’s actions were not reasonable as a matter of law because they constituted an unlawful employment practice under ORS 659A.203(1)(b)(A).

Claimant asserted employer’s actions were not “disciplinary, corrective, or reasonable,” and constituted “unlawful employment practice.”

The Board rejected claimant’s contentions. Citing ORS 656.802(3)(b), the court stated that a worker seeking compensation for a mental disorder claim must prove that the causal work conditions were not reasonable disciplinary, corrective or job performance evaluation actions by the employer. Reasoning that the words “disciplinary” and “corrective” are not delegative terms, the court reviewed the Board’s order to determine whether it reflected an erroneous interpretation of those statutory provisions and, if so, whether the correct interpretation required the Board to take a particular action. ORS 183.482(8)(a); *SAIF v. Tono*, 265 Or App 525, 528 (2014).

An investigation required as a prelude to possible disciplinary action qualifies as “disciplinary” or “corrective” for purposes of “802(3)(b).”

After conducting its review and applying the aforementioned analysis, the court found no legal error in the Board’s decision. Noting that it was undisputed that claimant’s employer’s investigative actions had been undertaken because her inconsistent statements had given rise to concerns about her truthfulness, the court reasoned that an employee’s dishonesty is often grounds for discipline and certainly grounds for correction. Furthermore, insofar as claimant argued that investigations that did not ultimately lead to discipline could not be considered disciplinary under ORS 656.802(3)(b), the court reiterated that it had previously ruled that an investigation that “was a required prelude to any direct disciplinary action” was “disciplinary” for purposes of the statute and also qualified as “corrective.” *Crowley v. SAIF*, 115 Or App 460, 462-63 (1992).

Addressing claimant’s argument that her employer’s disciplinary or corrective measures were not “reasonable,” the court considered the term to be delegative which required it to determine whether the Board’s exercise of discretion in implementing the term was “within the range of discretion allowed by the more general policy of the statute.” ORS 183.482(8)(b); *Springfield Education Assn. v. School Dist.*, 290 Or 217, 229 (1980).

Applying that review standard, the court was not able to conclude that the Board’s judgment about the reasonableness of the employer’s actions fell outside the boundary of the Board’s discretion under ORS 656.802(3)(b). In reaching this conclusion, the court emphasized that the Board had considered the basis for the investigation (claimant’s suspected untruthfulness) and had carefully examined the manner and scope of the investigation and its component parts (including the justification of an internal affairs officer’s aggressive orders to claimant to answer the questions when claimant was not giving responsive answers).

Board had considered employer’s overall investigation/ actions reasonable; court held not outside range of Board’s discretion in finding “reasonable” disciplinary/ corrective action.

Although acknowledging claimant’s contention that several aspects of the employer’s investigative process and the Board’s analysis required a conclusion that the employer’s actions were not reasonable, the court reasoned that the Board decision (which had supplemented and adopted the ALJ’s order) had taken the employer’s challenged actions into account when it determined that the employer’s overall investigation and disciplinary/corrective actions were reasonable. Consequently, the court rejected claimant’s assertion that the Board had failed to take into account the reasonableness of the individual components of the employer’s overall course of disciplinary action. See *Liberty Northwest Ins. Corp. v. Shothafer*, 169 Or App 556, 565-67 (2000). Accordingly, the court determined that the Board’s decision that the employer’s disciplinary/corrective actions had been reasonable had not fallen outside the range of discretion delegated to it under ORS 656.802(3)(b).

Court concluded that any evidence of unlawful activity by employer under the “whistleblower statute” had been considered and weighed in the Board’s decision; therefore, no basis to set aside Board order for declining to expressly rule on “whistleblower” contention.

Finally, regarding claimant’s argument that her employer’s disciplinary action constituted an unlawful employment practice under the “whistleblower” statute (ORS 659A.203(1)(b)(A)), the court observed that the Board had declined to go beyond the confines of ORS Chapter 656 in determining whether the employer’s investigation was a reasonable disciplinary or corrective action. Nonetheless, noting that claimant had acknowledged that she had submitted all of the relevant evidence on the “reasonableness” of the employer’s actions

to the Board, the court reasoned that any evidence of unlawful activity on the employer's part had been considered and weighed in the Board's decision (whether or not it had jurisdiction to evaluate claimant's claim under ORS 659A.203(1)(b)(A)).

Consequently, in light of the Board's findings that the employer had undertaken the investigation because of founded concerns regarding claimant's truthfulness after making inconsistent statements on multiple occasions, the court determined that such findings precluded a legal conclusion that the employer's investigation was retaliatory. Accordingly, the court concluded that any error in the Board's failure to separately analyze whether the employer's actions were retaliatory under ORS 659A.203(1)(b)(A) provided no basis to set aside the Board's order.