Workers' Compensation Board

Volume XXXIX, Issue 10

October 2020

News & Case Notes

BOARD NEWS

Board Meeting - December 15, 2020 - Quarterly Meeting - Initial Discussion of Procedures for "Biennial Review" of Attorney Fee Schedules ("388(4)")

The Members have scheduled a public meeting for December 15, 2020 (at 10:00 a.m.), which will be held at the Board's Salem office (2601 25th St. SE, Ste. 150). The agenda for the Board meeting will be:

- The Members' quarterly meeting. OAR 438-021-0010(1)(d).
- Initial discussion of procedures for "biennial review" of attorney fee schedules. ORS 656.388(4).

Because of the Governor's "social distancing" requirements, arrangements have been made to allow the public to participate in the meeting by means of a "phone conference" link.

In addition, due to the logistical challenge of distributing written comments on the day of the meeting, the Members encourage parties, practitioners, and the general public to submit their written comments well in advance of the meeting. Any such written comments should be directed to Katy Gunville, WCB's Executive Assistant at 2601 25th St SE, Suite 150, Salem, OR 97302, katy.e.gunville@oregon.gov or via fax at (503)373-1684.

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

"FAX" Numbers: "Hearings Division"

Over the past several months, there has been an increase in the amount of documents submitted electronically. For exhibits that may need to be submitted electronically via Biscom to the Hearings Division, please continue to make such requests to the assigned ALJ. For other documents that may need to be submitted via fax, to improve timeliness and processing of such document filings, please make note of the following fax numbers:

- If you don't know the name of the ALJ, or if an ALJ is not yet assigned, fax your items to WCB Salem at (503) 373-1600.

APPELLATE DECISIONS

- If you know the Administrative Law Judge (ALJ) assigned to your case, use the fax number of the ALJ's home office:
  - Portland Hearings Division fax (971) 673-0902
  - Salem Hearings Division fax (503) 373-7742
  - Eugene Hearings Division fax (541) 349-4499
  - Medford Hearings Division fax (541) 772-6252

The entire list of WCB ALJs and Judicial Assistants (by office locations) can be found at: https://www.oregon.gov/wcb/Documents/contacts/alj.pdf

A directory for all contacts, including Board Review, Own Motion, CDA and Portal can be found at: https://www.oregon.gov/wcb/Pages/contact.aspx

Adoption of Permanent Rules/Amendments (Attorney Fees - OAR 438 Division 015) - ("Contingent Hourly Rate" - "015-0010(4)(l)"); "Voluntary Bifurcation of Attorney Fee Award for Certain Cases on Board Review - "015-0125") - Effective October 1, 2020

At their August 19, 2020, public meeting, the Members adopted rules/amendments relating to attorney fees (OAR 438 Division 015). The Members took these actions after considering comments presented at a July 31, 2020, rule-making hearing, as well as discussing submissions from Members Curey and Ousey, and comments presented by attendees at the Board's August 19 meeting. The rule adoptions include (among other rule amendments):

- 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(4)(l)).
- 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.

The effective date for the permanent rules/amendments is October 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.

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.

CDAs: "Double-Check" Proceeds, Attorney Fee, Claim Number, Injury Date

The Board has been addressing an increasing number of proposed Claim Disposition Agreements (CDAs) that contain inconsistent provisions regarding a variety of required information; *e.g.*, the total proceeds, consideration, attorney fee, claim number, and injury date. These inconsistencies often necessitate the issuance of a letter from the CDA Coordinator, seeking the parties' addendum to clarify their intentions.

This "addendum" process can delay the Board's approval of the CDA by several days and, sometimes, weeks. To avoid the additional time and expense resulting from this "addendum" process, parties/practitioners are encouraged to "double-check" these essential portions of their proposed CDA to ensure that the information provided in the agreement is consistent and accurate.

Parties/practitioners can also direct any "CDA-related" question to Nancy Coffelt, WCB's CDA Coordinator, at 503-934-0116.

CASE NOTES

"LIER": Compensability/"Rule of Proof" - "Could Have Contributed" Standard Not Applicable (Applies to Responsibility/"Rule of Assignment")

Claimant contended that, to prove compensability of his hearing loss claim under LIER, he need only prove that work exposure "could have" contributed to his claimed condition.

Manuel Gallardo, 72 Van Natta 1000 (October 22, 2020). Analyzing ORS 656.802(2)(a), the Board upheld a carrier's denial of claimant's occupational disease claim for bilateral hearing loss/tinnitus, rejecting his contention that his claimed condition was compensable under the "Last Injurious Exposure Rule" (LIER) because his exposure to noise at his various employments "could have contributed" to his conditions. A carrier denied claimant's bilateral hearing loss/ tinnitus claim, relying on examining physicians' opinions that did not attribute the major contributing cause of his conditions to his employment exposures (instead, they related his conditions to the aging process, presbycusis, a preexisting inner ear condition, as well as employment that preceded his current employment). Asserting that, under the LIER, he need only prove that his work exposure "could have contributed" to his claimed conditions (not that such exposures were the major contributing cause of the conditions), claimant contended that the carrier's denial (on behalf of the last of his several employers) should be set aside.

LIER ("rule of proof") allows a claimant to prove compensability of an "O.D." claim by establishing that employment exposures in general were the major cause of claimed condition.

The Board disagreed with claimant's contention. Citing ORS 656.802(2)(a), and *McGarrah v. SAIF*, 296 Or 145, 166 (1983), the Board stated that claimant must establish that his work activities were the major contributing cause of his claimed conditions. Relying on *SAIF v. Durant*, 271 Or App 216, 222 (2015), the Board stated that, as a "rule of proof," the LIER allows a claimant to establish the compensability of an occupational disease by proving that employment conditions in general were the major contributing cause of the disease, without having to prove the degree to which exposure to disability-causing conditions at a particular employment actually caused the disease. *See Jeff R. Lutz*, 69 Van Natta 1562, 1565 (2017); *Theresa L. Beland*, 69 Van Natta 1466, 1467 (2017), Finally, referring to *Durant*, and *Gerald W. Jessup*, 60 Van Natta 3368, 3368 n 1 (2008), the Board reiterated that as a "rule of assignment of responsibility," the LIER assigns full responsibility to the last employer that could have contributed to the claimant's claimed condition.

Under LIER ("rule of proof"), claimant must still prove that employment exposures in general were the major contributing cause of claimed "O.D."

Turning to the case at hand, the Board found that the record lacked a physician's opinion establishing that claimant's work exposures in general were the major contributing cause of his bilateral hearing loss/tinnitus. Furthermore, relying on *Durant*, the Board explained that the "could have contributed" standard advanced by claimant applied to the "rule of assignment of responsibility" aspect of the LIER. *See also SAIF v. Henwood*, 176 Or App 431, 435 (2001); *Jessup*, 60 Van Natta at 3368 n 1. In contrast, under the "rule of proof" aspect of the LIER, the Board reiterated that a claimant must still prove that his employment exposure in general were the major contributing cause of his claimed occupational disease. *See* ORS 656.802(2)(a); *Hunter v. SAIF*, 246 Or App 755, 759-60 (2011), *Lutz*, 69 Van Natta at 1565, and *John P. Hilferty*, 50 Van Natta 1340, 1341 n 1 (1997).

The Board also distinguished *Runft v. SAIF*, 303 Or 493 (1987), and *Inkley v. Forest Fiber Products Co.*, 288 Or 337 (1980), reasoning that in both decisions the issue of compensability had already been decided and the court

"Could have contributed" standard for LIER ("rule of assignment") applies in determination of responsibility, not compensation.

was discussing "could have contributed" in the context of the LIER as a "rule of assignment of responsibility" (not the LIER as a "rule of proof" concerning compensability).

Applying such reasoning, the Board concluded that the "rule of assignment of responsibility" aspect of the LIER (including the "could have contributed" language) did not apply to the compensability dispute regarding claimant's occupational disease claim. Rather, applying the "rule of proof" aspect of the LIER, the Board determined that the record did not persuasively establish that claimant's employment exposures in general were the major contributing cause of his claimed bilateral hearing loss/tinnitus.

Mental Disorder: "Manner" in Which Claimant Was Treated at Work (Demeaned, Belittled, "Stalked") - Not "Generally Inherent" - "802(3)(b)"

Jessica R. Cilione, 72 Van Natta 944 (October 13, 2020). Analyzing ORS 656.802(3)(b), the Board held that claimant's mental disorder claim for a panic disorder was compensable because the manner in which her manager, human resources (HR) department, fellow supervisors, and other coworkers had responded to her reports of illegal sale practices at the store where she worked (by demeaning, belittling, and "stalking" her) was not generally inherent in every working situation and was the major contributing cause of her claimed panic disorder. Asserting that claimant's attending physician had relied on work-related factors (*e.g.*, interpersonal interactions) that were "statutorily excludable" factors (because they were "generally inherent" in every work situation), the carrier contended that her mental disorder was not compensable.

Conditions "generally inherent" in every working situation are a statutorily excluded factor in determining compensability of a mental disorder.

The Board disagreed with the carrier's contention. Citing ORS 656.802(3)(b), the Board stated that the employment conditions producing a claimed mental disorder must be conditions other than conditions generally inherent in every working situation. Relying on *Liberty Northwest Ins. Corp. v. Shothafer*, 169 Or App 556 (2000), the Board reiterated that factors excluded under ORS 656.802(3)(b) and nonwork-related factors must be weighed against nonexcluded work-related factors and if nonexcluded work-related causes outweigh all other causes combined (to be the major contributing cause of the claimed mental disorder), the claim is compensable.

Although interpersonal conflicts at work are a common stressor, claimant experienced repeated neglect and unsupportive/demeaning behavior by manager, HR department, and coworkers, including their response to a "stalking" incident.

Referring to *Mulunesh Bahta*, 71 Van Natta 728 (2019), and *Gregory L. Brodell*, 45 Van Natta 924 (1993), the Board acknowledged that interpersonal conflict is a common work-related stressor that is generally inherent in every working situation. Nevertheless, the Board noted that it has recognized that certain work-related conflicts, and the manner in which working conditions occur, go beyond the normal interpersonal conflicts that are generally inherent in every working situation. *See e.g.*, *Heather D. Whitaker*, 65 Van Natta 1793 (2013); *Erin M. Garred*, 64 Van Natta 434 (2012); *Stephanie Whitaker*, 62 Van Natta 2825 (2010).

Turning to the case at hand, the Board found (based on claimant's credible testimony, as corroborated by the majority of the employer's witnesses and the record) that claimant had experienced repeated neglect and unsupportive

behavior by her manager, the HR department, her fellow supervisors, and other coworkers. Furthermore, in response to her reports of this demeaning behavior, the Board noted that the HR department had provided no assistance nor had it taken immediate action to resolve the "stalking" issue.

Considering the manner in which behavior occurred, it exceeded the bounds of "generally inherent" work situations.

Considering the manner in which these harassing, exclusionist, and demeaning actions occurred, the Board found that such behavior exceeded the bounds of work conditions that would be generally inherent in every work situation. Consequently, the Board concluded that claimant's work-related stress attributable to such conduct was not statutorily excludable as "generally inherent" in every work situation under ORS 656.802(3)(b).

"AP" adequately weighed all relevant stressors (statutorily excludable and includable) in attributing claimant's panic disorder to the "manner" she was treated at work.

Addressing the medical evidence, the Board acknowledged that claimant's attending physician's opinion had not explicitly weighed all of claimant's alleged work-related stressors. Nonetheless, reasoning that these stressors were not statutorily excludable factors and had been mentioned in the attending physician's chart notes, the Board determined that the attending physician had adequately weighed all relevant stressors (statutorily excludable and includable) in attributing claimant's panic disorder to the "manner" in which she was treated at work. Accordingly, the Board concluded that claimant's mental disorder claim was compensable.

Dissenting opinion considered claimant's uncorroborated testimony insufficient to establish how stress from "increased work demands" and being "treated differently" were not generally inherent in every working situation.

Member Curey dissented. Noting that claimant identified "increased work demands" as the "biggest contributor" to her claimed panic disorder, Curey was not persuaded that the record established how the increase in work demands (or the "manner" in which such demands were implemented) was unusual. Likewise, Member Curey did not consider claimant's description of "work stress" or being "treated differently" sufficient to establish that such stressors were not "generally inherent" in every working situation. Concerning the "manner" in which she was treated by her management, Curey considered the lack of prolonged confrontations, tantrums, and claimant's uncorroborated testimony of being yelled at insufficient to constitute stress that was not generally inherent in every working situation.

Dissent not persuaded that "AP" had attributed panic disorder to "stalking" behavior (which occurred after disorder diagnosed).

Reasoning that the only potential work-related stressor that was not statutorily excludable was the "stalking" behavior of her coworker, Member Curey noted that claimant had not reported such behavior while being treated by her attending physician. Furthermore, observing that her attending physician had diagnosed her panic disorder before the "stalking" behavior had occurred, Curey believed that the physician had neither specifically analyzed such behavior nor attributed claimant's disorder to the "stalking" behavior. Contending that the attending physician had not weighed claimant's statutorily excluded work-related stressors against the only potentially "includable" work-related stressor (*i.e.*, the "stalking" behavior), Member Curey was not persuaded that the claimed mental disorder was compensable.

Penalty: "268(5)(f)" - Unreasonable Claim Closure - Discrepancy in "AP" Impairment Findings Not Clarified Before Issuance of "NOC"

Standards: Work Disability - "BFC" - Claimant's Affidavit Regarding "At-Injury" Job Considered as Corroboration of "DOT" Description

David L. Lambert, 72 Van Natta 979 (October 20, 2020). Analyzing ORS 656.268(5)(f), the Board held that a carrier's closure of claimant's arm condition claim was unreasonable because the carrier had not sought clarification from his attending physician concerning discrepancies in the physician's reports regarding claimant's limitations/impairments. Before the carrier issued its Notice of Closure (NOC) regarding claimant's arm condition, an examining physician (with whom the attending physician concurred) stated that claimant had a significant limitation in the repetitive use of his upper extremity and was unable to return to his job-at-injury due to pain, but had also concluded that claimant had no permanent impairment because he had full range of motion and sensation. Although the carrier sought clarification from the attending physician concerning claimant's work release, it did not seek clarification concerning whether claimant had a "chronic condition" limitation or whether he had no permanent impairment. After the NOC awarded no permanent disability (impairment or work disability), claimant requested reconsideration, submitting the attending physician's statement that claimant was significantly limited in the repetitive use of his arm due to pain from his accepted conditions and restricted in his lifting ability with his arm to the degree that he was prevented from returning to his regular work. After an Order on Reconsideration awarded permanent impairment (but no work disability), claimant requested a hearing, seeking increased impairment/work disability awards, as well as a penalty under ORS 656.268(5)(f) based on the unreasonable claim closure.

"AP" ratified an examining physician's report, which stated claimant had a significant limitation, but also concluded that there was no permanent impairment. Without clarifying "AP" opinion, carrier closed claim.

Claimant submitted attending physician's clarifying statement during "reconsideration" proceeding.

Regarding the penalty issue, the Board agreed with claimant's contention that a penalty under ORS 656.268(5)(f) was warranted. Citing ORS 656.268(5)(f), the Board stated that, if the "correctness" of a claim closure is at issue in a hearing, and a finding is made at the hearing that the NOC was not reasonable, a penalty of 25 percent of "all compensation determined to be then due the claimant" shall be assessed. *Cayton v. Safelite Glass Corp*., 232 Or App 454 (2009). Referring to *Red Robin Int'l v. Dombrosky*, 207 Or App 476 (2006), and *David J. Morley*, 66 Van Natta 2052 (2014), the Board reiterated that the reasonableness of the NOC is determined on a case-by-case basis based on the information available to the carrier at the time of the closure.

Turning to the case at hand, the Board found that, at the time it issued its NOC, the carrier had received the attending physician's concurrence with an examiner's report which indicated that claimant had a significant limitation in the repetitive use of his arm and was unable to return to his at-injury job, but had also opined that claimant had no permanent impairment because he had full range of motion and sensation. Although acknowledging that the carrier had

Although carrier contacted "AP" to clarify work release, the carrier did not seek clarification concerning "significant limitation"/ other impairment.

contacted the attending physician regarding whether claimant had been released to his regular work, the Board noted that the carrier had not also sought clarification regarding whether claimant had a "significant limitation" or other permanent impairment.

Because carrier closed the claim without resolving impairment discrepancy, Board found NOC unreasonable under "268(5)(f)."

Because the carrier had issued its NOC without resolving that discrepancy, the Board found the NOC to be unreasonable. *See Marshall E. Shaw*, 71 Van Natta 1328 (2019); *Juan M. Orta-Carrizales*, 71 Van Natta 794 (2019); *Roger D. Samples*, 67 Van Natta 1672 (2015). Accordingly, the Board assessed a penalty under ORS 656.268(5)(f) (based on the total compensation awarded by the NOC, as modified by the Board's order) and awarded a penalty-related attorney fee under ORS 656.382(1). *See David A. Vansickle*, 69 Van Natta 1642 (2017).

Concerning the calculation of claimant's work disability award under OAR 436-035-0012(9)(a), the Board found that his Base Functional Capacity (BFC) was "very heavy" because his affidavit was corroborative of a DOT description that most accurately described his at-injury job as a garbage collector. Citing *Scott T. Richardson*, 70 Van Natta 734 (2018), *Charles L. Chase*, 67 Van Natta 1205 (2015), and *Kathyron D. Parsons*, 45 Van Natta 954 (1993), the Board reiterated that OAR 436-035-0012(9)(a) required that the strength category for the at-injury job be determined by either the category assigned in the DOT, a specific job analysis, or a job description agreed upon by the parties. Referring to *Richardson* and *Chase*, the Board noted that a claimant's affidavit may be corroborative of either a DOT description or a specific job analysis, relevant for determining what DOT description applies, or whether a DOT description or job analysis is more accurate. However, the Board emphasized that claimant's affidavit may not be relied upon to determine that no DOT description accurately describes his job in an effort to have his strength category determined without regard to the DOT. *See Chase*, 67 Van Natta at 1207; *Parsons*, 45 Van Natta at 955.

Claimant's affidavit may corroborate a DOT description or a job analysis, but it cannot be relied upon to determine that no DOT description applies.

Turning to the case at hand, the Board noted that the descriptions of claimant's job duties in the medical records and his affidavit were consistent with the DOT code for a "Garbage Collector (motor trans.)" because he collected trash from various locations within the city and emptied the trash from cans into his truck by hand. The Board also observed that claimant's affidavit corroborated that the weight he was required to lift was greater than "medium" category work, and did not describe using a packer-type truck, dump truck, or truck with a hydraulic lifting device, as described in the DOT code for "Garbage Collector Driver (motor trans.)."

Claimant's affidavit supported DOT code for a job with a "very heavy" work category.

Under such circumstances, the Board found that the record established that the DOT description for "Garbage Collector (motor trans.)" more accurately described claimant's job than the DOT description for "Garbage Collector Driver (motor trans.)." The Board also noted that, to the extent that a combination of those DOT descriptions applied, the highest strength category is used. OAR 436-035-0019(a)(A). Thus, the Board concluded that claimant's BFC was "very heavy."

Subject Worker: Injury While Performing Unpaid Teaching Assistant Duties - No Reasonable Expectation of Remuneration - "005(30)"

Claimant, a college student in a volunteer "TA" position, was also employed by the college in two paid positions.

Unpaid "TA" duties that claimant was performing when injured did not constitute "remuneration" under "005(30)."

Joshua Wuhrman, 72 Van Natta 967 (October 15, 2020). Analyzing ORS 656.005(30), the Board held that claimant was not a subject worker when he sustained an injury while performing his duties as a volunteer, unpaid teaching assistant (TA) because he did not have a reasonable expectation of remuneration for his services. Claimant, a college student, was a volunteer teaching assistant (TA), who also was employed by the college in two other paid positions. Before performing his TA duties on the day he was injured, claimant was notified by the college (and he understood) that he would not be paid for his TA services. After claimant was injured while performing his TA duties, he filed a claim. The carrier denied the claim, asserting that he was not a subject worker when he sustained his injury. Claimant requested a hearing, contending that, when he sustained his injury, he was a subject "worker" under ORS 656.005(30). In doing so, claimant argued that his unpaid TA duties were related to his paid employment, or, alternatively, that the experience he received as a TA constituted "remuneration."

"Worker" means: (1) undertaking an obligation to furnish services; and (2) doing so for (and with the expectation of) remuneration.

The Board disagreed with claimant's contentions. Citing ORS 656.005(30), the Board stated that a "worker" is a person "who engages to furnish services for a remuneration, subject to the direction and control of an employer." Relying on *Gadalean v. SAIF*, 364 Or 707, 716-17 (2019), the Board noted that a claimant is a "worker" if: (1) the claimant undertook an obligation to furnish services; and (2) did so for (and with the expected result of) remuneration. Again referring to *Gadalean*, the Board observed that when an employer has agreed that a claimant will provide services, but has also told the claimant that there will be no remuneration, the claimant cannot have reasonably expected remuneration and, thus, does not constitute a "worker."

Claimant acknowledged he did not expect to be directly compensated for his services as an unpaid "TA."

Turning to the case at hand, the Board found that the college had expressly informed claimant by email that he would not be compensated for his TA duties on the day in question. Moreover, the Board noted that claimant acknowledged that he did not expect to be directly compensated for his TA services that day.

Under such circumstances, the Board was not persuaded that claimant had a reasonable expectation of remuneration for his TA services on the day of his injury. Consequently, the Board determined that claimant was not a "worker" under ORS 656.005(30).

Because "TA" activities on day of injury were not part of regular paid work activities, claimant was not subject worker.

In reaching its conclusion, the Board acknowledged that, unlike *Gadalean* (where the claimant was injured while performing a mandatory pre-employment evaluation), claimant in the present case had an ongoing employment relationship with the college. Nonetheless, observing that it has previously differentiated between a claimant's injury sustained while performing activities related to future employment from injuries occurring while performing regular work activities, the Board reasoned that because claimant's TA activities on the day he was injured were not part of his regular paid work activities, he was not a subject worker. *See Matthew W. DeRoest*, 64 Van Natta 1432, 1435 (2012); *Debra L. Coker*, 50 Van Natta 2360, 2361 (1997).

Claimant's opportunity to gain experience and a possibility that compensation would ultimately come from such experience did not constitute "remuneration"; i.e., no direct "quid pro quo."

The Board further recognized claimant's argument that his TA experience should be considered "remuneration" under ORS 656.005(30). Relying on *Martelli v. R.A. Chambers & Assoc.*, 99 Or App 524, 527 (1989), and *Dykes v. SAIF*, 47 Or App 187, 190 (1980), and *Matthew S. Applegate*, 58 Van Natta 2253, 2259-60 (2006), the Board reiterated that direct monetary payments from an employer are not necessary to establish "remuneration." Nevertheless, consistent with the *Martelli* rationale, the Board stated that "remuneration" contemplated a more direct *quid pro quo* between payment and services than the possibility that compensation as a worker will ultimately come from the services provided by the worker to the employer.

Applying the *Martelli* reasoning to the case at hand, the Board did not consider the possible benefits to claimant from his TA services on the day in question to consist of a direct *quid pro quo* between his services and future compensation. Thus, the Board concluded that claimant's opportunity to gain TA experience did not constitute "remuneration."

Finally, the Board distinguished *Randall v. SAIF*, 307 Or App 6, 9-10 (2020), where a claimant was found to be a subject worker when she was injured before the start of her unpaid orientation because she was scheduled to participate in a paid training session immediately following the orientation. In contrast to *Randall* (where the court had held that the claimant had a reasonable expectation that she would be paid when she came to the employer's office), the Board reasoned that claimant in the present case did not have a reasonable expectation of remuneration while performing his TA services (which were separate from, and not mandated by, his agreement to provide other paid services for the college concerning other positions).

APPELLATE DECISIONS UPDATE

Extent: Impairment Findings - Carrier Denied "Condition," But Not "Combined Condition" - "Full Measure" of Impairment Rated

Under "Caren" rationale, a worker is entitled to the full measure of impairment compensation unless the carrier has issued a "pre-closure" denial of the worker's "combined condition."

Johnson v. SAIF, 307 Or App 1 (October 7, 2020). On remand from the Supreme Court, 365 Or 657 (2019), on reconsideration of its initial opinion, 291 Or App 1 (2018), the court reversed the Board's order in *Marisela Johnson*, 67 Van Natta 1458 (2015), previously noted 34 NCN 8:6, that apportioned claimant's permanent impairment (for a loss of grip strength) between her accepted hand condition and her denied shoulder condition. In accordance with the Supreme Court's directive, the court reconsidered its earlier opinion (which had affirmed the Board's decision) in light of *Caren v. Providence Health System Oregon*, 365 Or 466, 487 (2019), which had held that when a worker's impairment is caused by a combination of a work-related injury and a cognizable preexisting condition, and the work-related injury is a material contributing cause of the total impairment, a worker is entitled to be compensated for the "full measure" of impairment, unless the carrier has issued a "pre-closure" denial of the worker's combined condition that has contributed to the worker's total impairment.

Legislature intended that injured workers would be fully compensated for new impairment if it is due in material part to compensable injury, except where a carrier issues a "combined condition" denial.

Although carrier denied shoulder condition, it had not denied the "combined condition" identified by the medical arbiter, which had resulted in claimant's lost range-of-motion; thus, claimant was entitled to be awarded "full measure" of her impairment, without apportionment.

The court acknowledged that *Caren* did not explicitly address the issue of whether a worker should be compensated for the "full measure" of impairment caused in material part by a work injury in combination with a noncognizable preexisting condition that the carrier has previously denied outright. Nonetheless, the court noted that *Caren* had held that, when a worker's impairment is due to a combining of the compensable injury and a preexisting condition, "the legislature intended that injured workers would be fully compensated for new impairment if it is due in material part to the compensable injury, except where an employer has made use of the statutory process for reducing liability after issuing a combined condition denial." *Caren*, 365 Or at 468.

Applying the *Caren* rationale to the case at hand, the court recognized that the carrier had denied claimant's shoulder condition. Nevertheless, reasoning that the carrier had not denied the "combined condition" that had been identified by the medical arbiter (which had resulted in claimant's "apportioned" lost range-of-motion hand impairment between the accepted hand condition and the denied shoulder condition), the court concluded that claimant was entitled to be awarded the "full measure" of her impairment without apportionment.

Subject Worker: Injury Before "Unpaid" Orientation - Immediately Preceding "Paid" Training - Reasonable Expectation of Remuneration - "005(30)"

Randall v. SAIF, 307 Or App 6 (October 7, 2020). On remand from the Supreme Court, *Randall v. SAIF*, 365 Or 657 (2019), the court adhered to its initial opinion, *Meyers v. SAIF*, 291 Or App 331 (2018), which had reversed the Board's order in *Mary K. Meyers*, 67 Van Natta 1725 (2015), previously noted 34 NCN 9:8, that had concluded that claimant was not a worker at the time of her injury, which had occurred while she was on her way to an unpaid orientation (which involved completing paperwork and was scheduled to immediately precede her paid training as a telemarketer). Pursuant to the Supreme Court's directive, the court reconsidered its previous holding in light of *Gadalean v. SAIF*, 364 Or 707 (2019), which held that when an employer does not offer to pay a putative employee for services, the person is not a "worker" within the meaning of ORS 656.005(30) because the person has not taken on an obligation to provide services with a reasonable expectation of remuneration.

Claimant had been invited to orientation, with paid training to immediately follow. Thus, when injury occurred (while claimant was arriving for orientation), she had a reasonable expectation that she would be paid for the training.

Despite the fact that unpaid orientation had not been completed when injury occurred, court concluded that claimant was a "worker" under "005(30)."

Turning to the case at hand, the court reasoned that, unlike *Gadalean* (where the claimant had no reasonable expectation of remuneration), the present claimant had been invited to come for an orientation and paid training, which would have occurred immediately after the orientation. Consequently, distinguishing *Gadalean*, the court concluded that, when claimant arrived for the orientation, she had a reasonable expectation that she would be paid for the training.

Accordingly, the court held that the *Gadalean* holding did not require it to change its opinion that claimant was a worker within the meaning of ORS 656.005(30) at the time of her injury, despite the fact that she had not completed the unpaid orientation. In reaching its conclusion, the court noted that the

Gadalean court had explicitly stated that it did not address whether a person who is injured before starting services for remuneration is a "worker." *Gadalean*, 364 Or at 718, n 5.

Subject Worker: "027(15)" - "Non-Subject Worker" Exemption - "Truck Driver" Lacked "Leasehold Interest" in Equipment (Truck) "Leased" to Trucking Company

Claimant did not have a "transferable interest" in the truck which he leased from the trucking company.

SAIF v. Ward, 307 Or App 337 (October 21, 2020). Analyzing ORS 656.027(15), the court affirmed the Board's order in *Carl S. Ward*, 71 Van Natta 484 (2019), previously noted 38 NCN 4:7, which held that claimant (a truck driver) was a "subject worker" when he sustained his work-related injury in a motor vehicle accident because he had not "furnished" his truck to a leasing company because he did not have a transferable interest in the truck (which he had leased from the trucking company). On appeal, the carrier contended that claimant was not a "subject worker" under ORS 656.027(15) because he had "an ownership or leasehold interest in equipment and * * * furnishes, maintains, and operates [it]."

The court disagreed with the carrier's contention. Citing ORS 656.027, the court stated that "all workers" are subject workers unless an exemption was applicable. Referring to ORS 656.027(15), the court identified two requirements for the aforementioned statutory exemption to "subject worker": (1) the worker must have "an ownership or leasehold interest in equipment;" and (2) the worker must "furnish[], maintain[], and operate[]" that equipment. Noting the statute's conjunctive stature, the court determined that the two requirements are separate and independent from each other; *i.e.*, the ownership/leasehold interest in the equipment must be in some way distinct from the furnishing, maintaining, and operating of that equipment.

"027(15)" requires that for the driver to be a "non-subject worker," the driver must have the right to possess, use, and control the equipment for purposes other than providing it back to the company.

After reviewing the statute's text, context, and legislative history, the court reasoned that a truck driver can "furnish" equipment to a trucking company by providing the equipment in the service of the trucking company; *i.e.*, by producing the equipment to haul loads for the company. Nonetheless, the court further concluded that ORS 656.027(15) requires a leasehold interest that exceeds the right to furnish the equipment to the company such that the driver has right to possess, use, and control the equipment for purposes other than providing it to the company.

Turning to the case at hand, the court acknowledged that the lease agreement concerning the truck provided that claimant had "exclusive possession, control, and use of the equipment" for the duration of the lease. Nonetheless, the court reasoned that the lease's statement was belied by the practical considerations regarding the many restrictions placed by the trucking company on claimant's use of the vehicle; *e.g.*, prescribed routes; availability for vehicle inspection; maintenance directives; company signage.

Given such circumstances, the court concluded that, despite being called a "lease," the agreement did not confer any interest in the leased vehicle to claimant beyond the authority to use it in service to the trucking company and

Despite being called a "lease," the agreement only conferred the driver's right to furnish the equipment to the trucking company; therefore, "non-subject worker" exemption under "027(15) did not apply.

its direction. As such, the court reasoned that the only right of use and possession conferred by the lease was the right to furnish the equipment to the trucking company.

Reiterating that the leasehold interest described in ORS 656.027(15) must, at a minimum, allow the lessee sufficient authority over the equipment in some way other than furnishing, maintaining, and operating it in service of the lessor, the court determined that the lease agreement in the present case did not convey such an interest. Accordingly, the court held that the Board had not erred in finding claimant to be a subject worker.

APPELLATE DECISIONS
COURT OF APPEALS

Claim Processing: Carrier Not Required to Process "Pre-Acceptance" New/Omitted Medical Condition Claim

Siquina-Tasej v. SAIF, 307 Or App 202 (October 7, 2020). The court, *per curiam*, affirmed the Board's order in *Pascual Siquina-Tasej*, 69 Van Natta 908 (2017), that had held that a carrier was not required to process claimant's purported "new/omitted medical condition" claim that was filed before the carrier's initial claim acceptance. The court cited *Coleman v. SAIF*, 304 Or App 122, *rev den*, 367 Or 76 (2020).

Extent: Impairment Findings - "ROM"/"Instability" Impairment Due to "Unclaimed/Unaccepted" Preexisting Condition - No "Combined Condition," But Without "Pre-Closure" Denial, "Full Measure" of Impairment Rated

Robinette v. SAIF, 307 Or App 11 (October 7, 2020). The court reversed the Board's order in *Theresa M. Robinette*, 71 Van Natta 269 (2019), that, in awarding permanent disability for an accepted knee condition (for a surgery and chronic condition), had not included permanent impairment for claimant's lost range of motion and instability because a medical arbiter had attributed those impairments to preexisting conditions (which had neither been claimed/accepted/denied either separately or as part of a combined condition). The court summarized *Caren v. Providence Health System Oregon*, 365 Or 466, 487 (2019), which had held that when a worker's impairment is caused by a combination of a work-related injury and a cognizable preexisting condition, and the work-related injury is a material contributing cause of the total impairment, a worker is entitled to be compensated for the "full measure" of impairment, unless the carrier has issued a "pre-closure" denial of the worker's combined condition that has contributed to the worker's total impairment.

Turning to the case at hand, the court found *Caren* distinguishable on its facts for two reasons. First, the court did not consider the present case to be about apportionment, *per se*, which related to a determination of impairment

Court distinguished "Caren": (1) no part of "ROM"/ instability impairment related to claimant's work injury (thus, no apportionment); and (2) no "combined condition."

benefits when a type of impairment is caused in part by the work injury and in part by other, non-work-related causes. Rather, the court determined that no part of claimant's range of motion or instability impairment was attributable to the work injury. Second, the court stated that the present case was not about whether the carrier was required to deny a "combined condition." Specifically, the court emphasized that there was no contention that the impairment values for range of motion and instability represented a combining of claimant's work injury and her preexisting condition (which had not been identified until the claim was closed and the record did not address whether it was legally cognizable); *i.e.*, the two impairments were not related to the compensable injury.

Consistent with "Caren" rationale, court held that if a carrier intends to assert that claimant's impairment is not related to a work injury, carrier must issue a "pre-closure" denial of condition causing impairment.

Nonetheless, the court reasoned that the *Caren* rationale is applicable even in the context of claims that do not involve some combining of the work injury and the preexisting condition. In doing so, the court explained that if the carrier intends to assert that a portion of the claimant's impairment is not related to the work injury, the carrier is required to issue a "pre-closure" denial of the condition giving rise to the impairment and, only then is the carrier entitled to a reduction in impairment benefits for the portion of impairment attributable to a cognizable preexisting condition.

Because carrier had not denied condition to which lost "ROM"/instability impairments were attributable, claimant was also entitled to be compensated for those impairments.

Applying such reasoning, the court found that claimant's impairment "as a whole" included her whole-person impairment, of which the work injury was a material contributing cause, as well as her impairment due to lost range of motion and instability. Because the carrier had not denied the condition to which claimant's lost range of motion/instability impairments were attributable, the court concluded that she was also entitled to be compensated for those impairments.