



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)") 1

"FAX" Numbers: "Hearings Division" 1

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 2

CASE NOTES

Evidence: ALJ's Admission of Retired "AP's" Report - No "Abuse of Discretion" - Record Did Not Establish "AP" Refused "Cross-Examination" - "310(2)", "007-0005(2)" 2

Evidence: Allowance of Physician's Testimony in Response to Leading Questions - No Abuse of Discretion - ALJ Not Bound by Statutory/Common Law Rules of Evidence - "283(6)" 4

Extent: Impairment Findings - "AP-Ratified" Findings "More Accurate" Than Arbitrator Findings - "Specific/Detailed" "Strength Loss Findings, Rather Than General Normal (5/5) Findings" 5

Temporary Disability: Leaving "Modified Job" - Claimant Misunderstood "AP" Work Restrictions - "Lost Wages" Not "Due to Compensable Injury" 6

Work Disability: "SVP" - Combination of "DOTs" for "At Injury" Job - Based on Job Description & Vocational Expert's Report, Corroborated by Claimant's Affidavit - "035-0012(5)" 7

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. Information on how to participate by phone can be found at <https://www.oregon.gov/wcb/Documents/brdmtgs/2020/121520phoneconfinst.pdf>.

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 any 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**Update**

Evidence: ALJ Allowance of Claimant's Report (Via "7-Day" Rule)/Denials of Carrier's "Rebuttal" Request & "Post-Hearing" Reports - No "Abuse of Discretion"

8

- 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.

CASE NOTES

Evidence: ALJ's Admission of Retired "AP's" Report - No "Abuse of Discretion" - Record Did Not Establish "AP" Refused "Cross-Examination" - "310(2)", "007-0005(2)"

Merley A. Kofron, 72 Van Natta 1020 (October 26, 2020). Analyzing ORS 656.283(6), ORS 656.310(2), and OAR 438-007-0005(2), the Board found no abuse of discretion in an Administrative Law Judge's (ALJ's) admission of a

Carrier objected to a report because of a physician's unavailability for cross-examination; i.e., retirement.

Claimant responded there was no evidence that physician refused to be cross-examined.

ALJ has broad discretion concerning the admissibility of evidence, provided substantial justice is achieved.

Other than contacting claimant's counsel, carrier had not undertaken further efforts to arrange a deposition with the "retired" physician.

Board found no abuse of discretion in ALJ's admission of report because record did not establish that the physician had refused cross-examination.

claimant's former attending physician's report over the carrier's objection that the retired physician's report should be excluded because it had been unable to cross-examine the physician. At a hearing regarding the carrier's denial of her occupational disease claim for neck and shoulder conditions, claimant submitted a report from her former attending physician (which explained the physician's disagreement with the opinion expressed by a physician who had performed an examination at the request of the carrier). Explaining that it had been informed that the former attending physician had retired and that the physician's employer had not provided further contact information, the carrier objected to the report due to the physician's unavailability for cross-examination. See ORS 656.310(2); OAR 438-007-0005(2). In response, claimant asserted that the record neither established that the former attending physician had refused to be cross-examined nor that the carrier had issued a subpoena to the physician.

The Board found no abuse of discretion in the ALJ's admission of the disputed report based on a determination that the record did not establish that the retired attending physician had refused to participate in a deposition or that the physician's retirement prevented such participation. Citing ORS 656.283(6), and *Brown v. SAIF*, 51 Or App 389, 394 (1981), the Board stated that an ALJ is not bound by common law or statutory rules of evidence, may conduct a hearing in any manner that achieves substantial justice, and has broad discretion concerning the admissibility of evidence. Referring to ORS 656.310(2), OAR 438-007-0018, *Williamson v. SAIF*, 10 Or App 504, 508 (1972), and *William Shelton*, 62 Van Natta 1051, 1056 (2010), the Board reiterated that each party has the right to cross-examine any physician who has authored a report presented by the opposing party. Finally, relying on *SAIF v. Kurcin*, 334 Or 399 (2002), the Board observed that it reviews an ALJ's evidentiary ruling for an abuse of discretion.

Turning to the case at hand, the Board acknowledged that the carrier had contacted the former attending physician's clinic and learned of the physician's retirement. Nonetheless, the Board determined that, other than conveying that information to claimant's counsel, the carrier had not undertaken any further efforts to contact the physician to arrange a deposition. Under such circumstances, the Board concluded that the record supported the ALJ's finding that the record did not establish that the physician had refused to participate in a deposition. Consequently, the Board found no abuse of discretion in the ALJ's admission of the former attending physician's report.

In reaching its conclusion, the Board rejected the carrier's arguments that claimant was obligated to locate her retired former attending physician and required to establish "good cause" for the admission of the disputed report. See OAR 438-007-0005(2). Reasoning that the "good cause" portion of the rule pertains to a situation where a medical expert had refused to be available for cross-examination, the Board determined that the rule had no application to the present case because the record did not establish that the physician had refused cross-examination. Furthermore, the Board reiterated that carriers are required to "make all reasonable efforts to compel" cross-examination. See *Shelton*, 62 Van Natta at 1063 (quoting *Rosemary E. Szabo-Berry*, 43 Van Natta 2606, 2608 (1991)).

Evidence: Allowance of Physician’s Testimony in Response to Leading Questions - No Abuse of Discretion - ALJ Not Bound by Statutory/Common Law Rules of Evidence - “283(6)”

Nathanael L. Nolan, 72 Van Natta 1087 (November 30, 2020). Analyzing ORS 656.283(6), and OAR 438-007-0005, the Board found no abuse of discretion in an Administrative Law Judge’s (ALJ’s) evidentiary ruling that overruled a claimant’s objections to a physician’s deposition testimony on the basis that the physician was responding to leading questions posed by the carrier. After a physician (who conducted an examination at the request of the carrier) issued a report concluding that a work event was not a material contributing cause of claimant’s need for treatment/disability for a supraspinatus tendon condition, claimant requested a deposition. At the deposition, during cross-examination, claimant objected to the physician’s responses to the carrier’s questions, asserting that the carrier had posed leading questions. At the subsequent hearing, claimant requested that the physician’s disputed responses not be considered. The ALJ overruled claimant’s objections and, addressing the merits of the denied claim, upheld the carrier’s denial. Claimant requested Board review, contesting the ALJ’s evidentiary ruling and asserting that the claim was compensable.

At a deposition, claimant objected to physician’s testimony, asserting that the carrier had posed leading questions.

The Board found no abuse of discretion in the ALJ’s overruling of claimant’s objection. Citing ORS 656.283(6), the Board stated that an ALJ is not bound by common law or statutory rules of evidence or by technical/formal rules of procedure and may conduct a hearing in any manner that will achieve substantial justice. Relying on *SAIF v. Kurcin*, 334 Or 399, 409 (2002), and *Brown v. SAIF*, 51 Or App 389, 394 (1981), the Board reiterated that an ALJ has broad discretion regarding the admissibility of evidence and that its review of such evidentiary rulings are for an abuse of discretion.

Although noting that leading questions are generally disfavored, the Board found no abuse of discretion in the ALJ’s admission of the disputed testimony.

Turning to the case at hand, the Board acknowledged that leading questions are generally disfavored and may have less evidentiary weight. See ORS 40.370(3); *Nga H. Burson*, 50 Van Natta 1580, n 1 (1998). Nevertheless, reasoning that an ALJ is not bound by common law or statutory rules of evidence, the Board found no abuse of discretion in the ALJ’s admission of the disputed testimony. See ORS 656.283(6); *Tuan Tran*, 70 Van Natta 1160, 1161 (2018).

Neither statute nor rule require the application of formal evidentiary rules; ALJs are not bound by common law or statutory rules of evidence.

In reaching its conclusion, the Board disagreed with claimant’s contention that a reference to “cross-examination” in ORS 656.310 and OAR 438-005-0005 allowed for the application of formal evidentiary rules (specifically ORS 40.370(3) regarding leading questions) to the questioning of physicians. In doing so, the Board reasoned that neither ORS 656.310 nor OAR 438-005-0005 referenced ORS 40.370(3) nor required the application of formal evidentiary rules. Furthermore, the Board did not consider the reference in ORS 656.310 and OAR 438-005-0005 to “cross-examination” sufficient to supersede the express directive in ORS 656.283(6) that an ALJ is not bound by common law or statutory rules of evidence.

Finally, addressing the merits of the disputed claim, the Board found that the opinions from the physicians supporting the compensability of claimant's denied conditions were more persuasive than the contrary opinions. Consequently, the Board set aside the carrier's denial.

Extent: Impairment Findings - "AP-Ratified" Findings "More Accurate" Than Arbiter Findings - "Specific/Detailed" "Strength Loss Findings," Rather Than General Normal (5/5) Findings

Nicholas D. Carey, 72 Van Natta 1037 (November 2, 2020). Analyzing OAR 436-035-0007(5), claimant's permanent impairment for a shoulder condition, the Board based its evaluation on the impairment findings from a functional capacity evaluation (FCE) (as ratified by his attending physician) because the FCE findings provided detailed strength loss testing of specific muscle groups, whereas the "normal" (5/5) findings from a medical arbiter had generally referred to "bilateral arm muscle groups" and, as such, the FCE findings were "more accurate" than the arbiter's findings. A Notice of Closure included in its permanent disability award impairment for claimant's shoulder condition, which was based on his attending physician's ratification of specific "strength loss" findings from an FCE. Following a medical arbiter examination (which reported "5/5 strength in the bilateral muscle groups tested"), an Order on Reconsideration reduced claimant's permanent impairment award. Claimant requested a hearing, seeking reinstatement of the Notice of Closure's entire permanent disability award (including the strength loss impairment). In doing so, he contended that the FCE specific strength loss findings (ratified by the attending physician) were more accurate than the arbiter's general strength loss findings.

Functional capacity evaluation (ratified by the attending physician) provided detailed strength loss testing of specific muscle groups, whereas medical arbiter found "5/5 strength" in "bilateral muscle groups tested."

The Board agreed with claimant's contention. Citing OAR 436-035-0007(5), and *Khrul v. Foreman Cleaners*, 194 Or App 125, 130-32 (2004), the Board stated that, when a medical arbiter is used, impairment is established by the objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician are more accurate and should be used. Relying on *Elizabeth A. Niece*, 72 Van Natta 6, 9 (2020), the Board reiterated that, when an attending physician's findings are more accurate than the arbiter findings, the attending physician's findings are used. Finally, referring to ORS 656.283(6), and *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000), the Board observed that, as the party challenging the Order on Reconsideration, claimant had the burden of establishing error in the reconsideration process.

Impairment is established by the findings of the medical arbiter, except where a preponderance of the evidence demonstrates that the attending physician's findings are more accurate.

Arbiter's finding of no strength loss in "bilateral arm muscle groups" was general and did not refer to particular muscle groups, whereas "AP-ratified" findings were detailed and referred to specific muscle groups.

Turning to the case at hand, the Board acknowledged that the medical arbiter had found no strength loss in claimant's "bilateral arm muscle groups tested." Nonetheless, in contrast to claimant's attending physician-ratified findings (which had provided detailed strength loss testing of specific muscle groups), the Board reasoned that the arbiter's findings were general and did not refer to particular muscle groups. Moreover, the Board noted that the attending physician had reported that claimant had "problems" with internal/external rotation, as well as diminished shoulder strength.

Under such circumstances, the Board found that the “attending physician-ratified” specific findings were more accurate than the arbiter’s general findings, and should be used in lieu of the medical arbiter’s findings. Consequently, concluding that claimant had established error in the reconsideration process, the Board reinstated the permanent impairment award granted by the Notice of Closure (which had been based on the “attending physician-ratified” findings).

Temporary Disability: Leaving “Modified Job” - Claimant Misunderstood “AP” Work Restrictions - “Lost Wages” Not “Due to Compensable Injury”

Dave Morgan, 72 Van Natta 1068 (November 17, 2020). Applying ORS 656.268(4)(a), the Board held that claimant was not entitled to additional temporary disability benefits because he had left his modified job without authorization from his attending physician. Following claimant’s compensable low back injury, his attending physician released him to work, subject to lifting, standing, and bending limitations. Subsequently, claimant returned to a modified job with his employer that accommodated his physician’s restrictions. Thereafter, asserting that his attending physician’s restrictions allowed him to work only four hours per day, and to not work when his back hurt, claimant periodically left work. When the carrier did not pay temporary disability benefits for these periods when claimant did not work, he requested a hearing, contending that he was entitled to such benefits.

The Board disagreed with claimant’s contention. Citing *Lederer v. Viking Freight, Inc.*, 193 Or App 226, 237, *adh’d to as modified on recons*, 195 Or App 94 (2004), the Board stated that an attending physician’s authorization of an inability to perform regular work is a prerequisite for temporary disability benefits. Relying on *Cutright v. Weyerhaeuser Co.*, 299 Or 290, 296 (1985) and *Madrigal v. J. Frank Schmidt & Son*, 172 Or App 1, 7 (2001) the Board reiterated that temporary disability benefits are intended to provide replacement for wages lost due to the compensable injury. Referring to *Carrie Carso*, 64 Van Natta 1477 (2012), the Board noted that entitlement to temporary disability is not necessarily established whenever a claimant’s “post-injury” wages are less than wages-at-injury.

Turning to the case at hand, the Board acknowledged that claimant believed that his attending physician’s “modified duty” release had permitted him to stop working when his back was hurting and to limit his duties to four hours per day. Yet, after reviewing the attending physician’s restrictions, the Board found that claimant’s understanding of those restrictions was not accurate. Consequently, the Board determined that claimant’s absences from work were not consistent with his attending physician’s restrictions. Accordingly, the Board concluded that claimant’s lost wages were not “due to the compensable injury” and, as such, the carrier was not obligated to pay additional temporary disability benefits.

In reaching its conclusion, the Board distinguished *Robert L. Ryan*, 61 Van Natta 1939 (2009), where it had awarded TPD benefits for hours in which the claimant was receiving medical treatment for the compensable injury, and hours in which the employer did not have modified duty work available. In contrast to

Claimant periodically left “modified” work, asserting that his “AP” restrictions allowed him to work only four hours per day.

“AP’s” authorization is a prerequisite for temporary disability benefits.

Claimant’s understanding of his “AP” work restrictions was not accurate; thus, his lost wages were not “due to compensable injury.”

No entitlement to TPD benefits for hours in which worker voluntarily refused available modified work.

Ryan, the Board reasoned that claimant had left his available modified work for reasons authorized by his attending physician's restrictions. Moreover, the Board noted that, consistent with the present case, in *Ryan*, it had held that the claimant was not entitled to TPD benefits for hours in which he voluntarily refused available modified duty work.

Finally, the Board referred to *Jason D. Brown*, 61 Van Natta 1412, 1418-19, *adhered to on recon*, 61 Van Natta 1875 (2009), where it had not awarded additional temporary disability benefits because the claimant had left available modified duty work early because he was bored. Consistent with its *Brown* rationale, the Board reasoned that claimant's lost wages had been incurred without the authorization of his attending physician and, as such, did not entitle him to additional temporary disability benefits.

Work Disability: "SVP" - Combination of "DOTs" for "At Injury" Job - Based on Job Description & Vocational Expert's Report, Corroborated by Claimant's Affidavit - "035-0012(5)"

Yumiko Kaminishi, 72 Van Natta 1049 (November 3, 2020). Analyzing OAR 436-035-0012(5), the Board held that, in calculating claimant's work disability award for a shoulder condition, the social vocational preparation (SVP) value for her "at-injury" job was based on a combination of two job descriptions in the Dictionary of Occupational Titles (DOTs) because those descriptions best represented the duties she performed in her job in the five years preceding the Notice of Closure (NOC). Claimant worked as a "cook" in the "prepared foods" department of a grocery store. After an Order on Reconsideration awarded work disability (based on an SVP value of 1, which used a combination of two DOT descriptions; *i.e.*, "sales clerk, food" and "cook (hotel/restaurant)"), claimant filed a hearing request, seeking an increased award. Specifically, she contended that the DOT description of "cook (hotel/restaurant)" (which had an SVP value of 1) did not represent the duties/requirements of her "at injury" job.

The Board agreed with claimant's contention. Citing OAR 436-035-0012(5)(a), the Board stated that SVP is defined as the amount of time required by a typical worker to acquire the knowledge, skills, and abilities needed to perform a specific job. Again referring to OAR 436-035-0012(5)(a), the Board noted that the SVP value is based on the jobs successfully performed by the worker in the five years prior to the issuance of the NOC and the value is determined by identifying the job's highest SVP in the DOT or a specific job analysis. Finally, relying on OAR 436-035-0012(5)(b), the Board emphasized that when an "at-injury" job is most accurately described by a combination of DOT codes, all such codes are applicable.

Turning to the case at hand, the Board acknowledged that claimant performed many of the cooking tasks included in the "cook (hotel/restaurant)" DOT code description. Nonetheless, after reviewing the employer's job description and a vocational rehabilitation counselor's report (as well as claimant's affidavit concerning his job duties), the Board concluded that a combination of "cook, short order (hotel/restaurant)" and "sales clerk, food (retail trade)" DOT codes more appropriately described her duties.

Claimant, who worked as a cook in the prepared foods department of a grocery store, asserted that the DOT description of "hotel/restaurant cook" did not represent the job at injury.

When the "at-injury job" is most accurately described as a combination of DOT codes, all such codes are applicable.

Vocational rehabilitation counselor report and employer's job description were not consistent with DOT code for "hotel/restaurant cook"; rather "cook, short order" and "sales clerk, food (retail trade)" DOT descriptions were more appropriate.

In reaching its conclusion, the Board noted the description of claimant's "at-injury" job was more consistent with a "sales clerk, food (retail trade)" because she worked for a grocery store (rather than a hotel/restaurant). Moreover, the Board observed that a vocational rehabilitation counselor had clarified claimant's job description as a "prepared foods clerk," which used the same DOT code as a "short order cook" description. Finally, the Board remarked that the employer's job description did not indicate a "2+ year experience" training requirement for the position, which would have been consistent with the prerequisites of a "cook (hotel/restaurant)" DOT description.

Under such circumstances, the Board determined that claimant's "at-injury" job was best represented by a combination of "short order cook (hotel/restaurant)" and "sales clerk food (retail trade)" DOT descriptions. Because both DOT descriptions had an SVP value of 3 (rather than the value of 1 for "cook (hotel/restaurant)" as used in the Order on Reconsideration), the Board applied an SVP value of 3 in calculating claimant's work disability. Consequently, the Board increased claimant's work disability award.

APPELLATE DECISIONS UPDATE

Evidence: ALJ Allowance of Claimant's Report (Via "7-Day" Rule)/Denials of Carrier's "Rebuttal" Request & "Post-Hearing" Reports - No "Abuse of Discretion"

Mondelez International-Kraft Foods v. Stark, 307 Or App 659 (November 18, 2020). The court affirmed, without opinion, the Board's order in *Marty J. Stark*, 70 Van Natta 499 (2018), previously noted 37 NCN 4:7, which found no abuse of discretion in an ALJ's evidentiary rulings that: (1) admitted a report submitted by claimant under the "7-day" rule; (2) denied the carrier's motion for "rebuttal" evidence (rather than an opportunity to "cross-examine" the author of claimant's report); and (3) excluded the carrier's "post-hearing" reports.

Court affirmed Board's order that there was no abuse of discretion in ALJ's evidentiary ruling.