Workers' Compensation Board

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News & Case Notes

Carrier neglected to timely provide records in response to a Board letter.

BOARD NEWS

Mediation Evaluation Project

WCB is conducting a mediation evaluation project from April 1, 2021, through June 30, 2021. Evaluations will be sent to all attendees of mediations. The purpose of the project is to increase feedback to WCB from mediation participants about their mediation experience. Evaluations will be mailed out and will include a postage-paid return envelope for the participant's convenience. WCB appreciates this opportunity receive valuable feedback from participants during this three-month period.

New Web Page Launched: "Attorney Fee" Statistical Information (For Future Biennial Review of Attorney Fee Schedules & Analyzing Effects of 2020 Rule Amendments)

As summarized in previous issues of the Board's News & Case Notes, during their December 15, 2020, public meeting, the Members announced that information regarding ALJ and Board attorney fee awards would be shared with the public.

Consistent with that announcement, a web page has been created that concerns statistical reports, including attorney fees. The web page can be found at: https://www.oregon.gov/wcb/legal/Pages/statistical-reports.aspx

CASE NOTES

Own Motion: Penalties/Attorney Fees - Unreasonable Delay in Claim Closure - Discovery Violations - "262(11)(a)," "012-0055," "012-0017(1)," "012-0110(1)"

Dean R. Allen, 73 Van Natta 226 (March 30, 2021). Analyzing ORS 656.262(11)(a), OAR 438-012-0017(1), OAR 438-012-0055, and OAR 438-012-0110(1), the Board awarded penalties and attorney fees for a carrier's unreasonable delay in closing an Own Motion claim under OAR 438-012-0055 and for discovery violations. The Board had previously set aside the carrier's Own Motion Notice of Closure (NOC) as prematurely closed and remanded the claim to the carrier for further processing, directing it to close the claim pursuant to OAR 438-012-0055. When the carrier eventually closed the claim some seven months later, claimant sought penalties and attorney fees for unreasonable claim processing. After the carrier neglected to timely provide the record in response to a Board letter, claimant also sought penalties and attorney fees for the carrier's discovery violation.

The Board granted claimant's requests. Citing ORS 656.262(11)(a) and *Larry D. Higgins*, 71 Van Natta 808, 813-14 (2019), the Board stated that a carrier is liable for a penalty and attorney fee when it unreasonably delays or unreasonably refuses to pay compensation. Referring to *Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991), the Board noted that the standard for determining unreasonableness is whether, from a legal standpoint, the carrier had a "legitimate doubt" as to its liability. Relying on *Liberty Northwest Ins. Corp. v. Hughes*, 197 Or App 533, 558 (2005), *Daren L. Johnson*, 65 Van Natta 2006, 2013-14 (2013), and *Billy J. Arms*, 59 Van Natta 2927, 2929 (2007), the Board reiterated that "unreasonableness" and "legitimate doubt" are to be considered in light of the evidence available at the time of the carrier's claim processing action/inaction.

After directive to close the claim, carrier scheduled medical exam five months later, and did not close the claim for another two months.

Turning to the case at hand, the Board found that, notwithstanding its earlier express directive to close the claim, the carrier's next action to close the claim occurred almost five months later, when it scheduled a medical examination for claimant with another physician. The Board further noted that, after the attending physician had concurred with the examining physician's findings, the carrier still did not close the claim for another two months. Finally, the Board observed that the carrier had not provided an explanation for its delay. Under such circumstances, the Board concluded that the carrier's claim processing had been unreasonable and, as such, a penalty and attorney fee were warranted.

Rule requires carrier to submit exhibits in chronological order with an exhibit list.

Addressing the discovery issue, citing OAR 438-012-0017(1) and OAR 438-012-0110(1), the Board stated that parties are obligated to timely comply with Board rules and requests. Referring to OAR 438-012-0060(3), the Board noted that, within 14 days after a Board letter acknowledging a claimant's request for Own Motion relief, the carrier must submit all relevant information, marked as exhibits, arranged in chronological order, and accompanied by an exhibit list. Finally, relying on OAR 438-012-0110(1) and *Doug R. Cooley*, 70 Van Natta 1072, 1079-80 (2018), the Board reiterated that a carrier's failure to timely comply with a Board rule or request, if found unreasonable, may result in the imposition of penalties and attorney fees.

Applying those principles to the present case, the Board found that the carrier had not timely complied with the Board's request to submit the relevant documents. The Board further noted that, when the carrier finally submitted the relevant documents, it had not marked the documents as exhibits as required by OAR 438-012-0060(3) and the Board's acknowledgment letter.

Under such circumstances, the Board determined that the carrier's failure to timely comply with the Board's discovery rules/requests had been unreasonable. Nevertheless, because there were no additional "amounts then due" on which to assess another penalty, the Board only awarded a carrier-paid attorney fee under ORS 656.262(11)(a). *See Michael Inskeep*, 67 Van Natta 522, 523 (2015).

"Recon" Proceeding: "Recon" Request Untimely Filed With "ARU" - "NOC" Mailed to Claimant/Attorney More than 60 Days Before Request Filed - "60-Day" Period Began With Mailing of "NOC" to Claimant/Attorney (Not Their Receipt)

ARU denied reconsideration request as untimely. Claimant contended NOC was invalid because carrier did not send a copy to her attorney.

Monique Devin, 73 Van Natta 188 (March 5, 2021). Analyzing ORS 656.268(5)(b), (e), OAR 436-030-0020(5), (8), and OAR 436-030-0145(1)(a), the Board held that the record established that claimant's request for reconsideration of a Notice of Closure (NOC) was untimely because it had been filed with the Appellate Review Unit (ARU) more than 60 days after the issuance of the NOC. After ARU denied claimant's reconsideration request because it was filed more than 60 days after the NOC's mailing date, claimant requested a hearing, contending that the NOC was invalid because the carrier had not mailed a copy of the NOC to her attorney.

The Board disagreed with claimant's contention. Citing ORS 656.268(5)(b) and OAR 436-030-0020(8), the Board stated that the carrier must mail the NOC to the worker, the employer, DCBS, and the worker's attorney, if represented. Referring to OAR 436-030-0020(5) and *Long v. Argonaut Ins. Co.*, 169 Or App 625, 628-29 (2000), the Board observed that a NOC is effective as of the date it is mailed to the worker and the worker's attorney. Finally, relying on ORS 656.268(5)(e), OAR 436-030-0145(1)(a), and *Juan Lopez-Ciro*, 72 Van Natta 166, 167 (2020), the Board reiterated that a request for reconsideration must be filed within 60 days of the Notice of Closure's mailing date.

Board was persuaded that all the required entities were mailed a copy, including claimant's attorney.

Turning to the case at hand, the Board noted that the NOC and the carrier's accompanying cover letter indicated that it had mailed copies of the NOC to claimant, her attorney, the employer, and DCBS. Because the record lacked admissible evidence to the contrary, the Board was persuaded that the carrier had mailed copies of the NOC to all the required individuals/entities on the mailing date recited in the NOC and the carrier's cover letter. Because claimant had not filed her request for reconsideration within the 60-day statutory deadline from the issuance of the NOC, the Board concluded that her reconsideration request was untimely.

In reaching its conclusion, the Board distinguished *Madewell v. Salvation Army*, 49 Or App 713 (1980), where the court had held that a claimant's hearing request from a carrier's denial was timely because, although it was received 61 days after the date of the carrier's denial letter, there was no evidence of a "mailing date" for the letter. In contrast to *Madewell*, the Board reasoned that the present record included unrebutted evidence of a "mailing date" for the NOC. Specifically, the Board noted that the NOC had expressly identified a "mailing date" and included checked boxes indicating that the carrier had mailed the notice to all the requisite individuals/entities.

Stephanie A. Sherman, 73 Van Natta 210 (March 11, 2021). Applying its *Devin* rationale, the Board held that, because the record established that the carrier had mailed copies of a NOC to claimant and her attorney, her request for reconsideration was untimely when it was filed with ARU more than 60 days after

the issuance of the NOC. Finding that the NOC had identified a "mailing date" and the carrier's internal noting system had recorded a "postmark" date and correct addresses for claimant and her attorney, the Board was persuaded that the carrier had mailed the NOC to claimant and her attorney and because claimant's reconsideration request had been filed after the expiration of the 60-day statutory appeal period from the NOC, it was untimely.

Administrative rule requires mailing, not receipt, of a Notice of Closure.

In reaching its conclusion, the Board disagreed with claimant's assertion that she and her attorney must *receive* the Notice of Closure in order for it to be effective because ORS 656.268(5)(b) uses the term "issue" and OAR 436-030-0015(1)(a) uses the term "provide." However, the Board noted that OAR 436-030-0020(8) (the corresponding administrative rule for ORS 656.268(5)(b) concerning the issuance of a NOC) specifically required mailing (not receipt) of a NOC. In addition, the Board observed that OAR 436-030-0015(1)(a) stated that the carrier must provide the notice "as prescribed in OAR 436-030-0020," which also specifies mailing (not receipt) and that OAR 436-030-0020(5) provided that the NOC is effective the date it is mailed to (not received by) the worker and the worker's attorney. Finally, relying on the *Long* holding, the Board reiterated that a NOC is effective when "mailed."

Finally, the Board distinguished *Ashley A. Rehfeld*, 62 Van Natta 1722 (2010), in which the record had established that a carrier had not "mailed" a denial to the claimant because it sent the notice to the wrong address and, as such, the statutory time period to appeal the denial had not run. The Board reasoned that, in contrast to *Rehfeld*, the record in the present case established that the carrier had mailed a copy of the NOC to claimant's correct address. In doing so, the Board acknowledged that claimant's copy of the NOC had been returned to the carrier. However, the Board observed that the carrier had addressed the NOC correctly and claimant had not collected it from the post office (although the United States Postal Service had attempted to deliver it and left claimant notice of the attempted delivery).

Scope of Acceptance: Currently Claimed Condition Same as Previously Accepted Condition - Carrier's Denial Set Aside

Responsibility: "308(1)" Applied - Later Work Injury Involved "Same Condition" as Earlier Accepted Claim - "OCI" For Later Carrier Not Major Cause of Disability/Need for Treatment for "Combined Condition" - No "New Compensable Injury"

John W. Miller, 73 Van Natta 177 (March 5, 2021). Applying ORS 656.308(1) and ORS 656.005(7)(a)(B), the Board held that an earlier carrier with a previously accepted low back condition was responsible for claimant's L4-5 disc condition because the record did not establish that claimant had

Two carriers had accepted back injuries from separate work incidents. Both denied L4-5 disc condition.

sustained a new compensable injury regarding that condition while working for a later carrier. Two carriers, which had each accepted back injuries related to separate work incidents, denied the compensability and responsibility of claimant's current L4-5 disc condition.

Physician opinions established that current L4-5 condition was the same condition accepted by first carrier.

Addressing the first carrier's compensability contention, the Board observed that the carrier had previously accepted an L4-5 disc "protrusion" and had subsequently denied an "opposite side bulging" of the disc. Nonetheless, the Board noted that the carrier's acceptance had not been limited to the bulging of one side of the disc. Moreover, the Board reasoned that the physicians' opinions established that claimant's current L4-5 disc condition was the same condition that the carrier had previously accepted.

Addressing the second carrier's compensability contention and citing ORS 656.005(7)(a) and *Maureen Y. Graves*, 57 Van Natta 2380 (2005), the Board reiterated that a claimant must prove that the claimed condition exists and that the second work injury was a material contributing cause of his disability/need for treatment of the condition. Referring to ORS 656.005(7)(a)(B), ORS 656.266(2)(a), and *SAIF v. Kollias*, 233 Or App 499 (2010), the Board added that, if the otherwise compensable injury combined with a preexisting condition, the carrier must prove that the otherwise compensable injury was not the major contributing cause of the disability/need for treatment for the combined condition. Finally, relying on *Multifood Specialty Dist. v. McAtee*, 333 Or 629 (2002), the Board reiterated that ORS 656.005(7)(a)(B) provides the standard for determining the occurrence of a new compensable injury under ORS 656.308(1).

Injury with later carrier was a material, but not the major cause. First carrier remained responsible.

Turning to the case at hand, after reviewing the physicians' opinions, the Board found that claimant's work event with the later carrier was a material contributing cause of the disability/need for treatment of the L4-5 disc condition. However, the Board further determined that the "otherwise compensable injury" with the later carrier had combined with claimant's preexisting condition, but was not the major contributing cause of claimant's need for treatment/disability of the combined L4-5 disc condition. Consequently, the Board concluded that the prior carrier remained responsible for the claimed L4-5 disc condition.

Standards: Work Disability - Record Did Not Establish "Release to Regular Work"- "AP's" "Regular Work Release" Concurrence Based on Inaccurate Information/Inconsistent with "AP's" Other Reports - "214(2)," "726(4)(f)(E)," "214(1)(d)," "035-0005(15)"

Jeff L. Davis, 73 Van Natta 168 (March 2, 2021). Analyzing ORS 656.214(1)(d), ORS 656.214(2), ORS 656.726(4)(f)(E), and OAR 436-035-0005(15), the Board held that claimant was entitled to a work disability award because, although his attending physician eventually concurred with an examining physician's report that had released him to regular work, the record did not establish that he had been released to regular work. In requesting a hearing regarding an Order on Reconsideration (which had not granted a work disability award), claimant contended both the examining physician's "regular

work release" opinion and his attending physician's subsequent concurrence with that opinion did not persuasively establish that he was able to return to his regular work as a result of his compensable shoulder condition.

The Board agreed with claimant's contention. Citing ORS 656.214(2), ORS 656.726(4)(f)(E), and *Sandra L. Read*, 72 Van Natta 278, 279 (2020), the Board noted that, because claimant had not returned to regular work, he was entitled to a work disability award unless he was released to regular work by his attending physician. Referencing *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999), and *Luther Rolle*, 65 Van Natta 416, 419 (2013), the Board further observed that medical opinions are evaluated in context and, if an attending physician's statement that a claimant is released to regular work is inconsistent with the balance of the attending physician's opinion without a persuasive explanation for the attending physician's change of opinion, the record does not persuasively establish that a claimant has been released to regular work. Finally, relying on *Jerry B. Eads*, 64 Van Natta 451, 458 (2012), the Board stated that a physician's opinion that essentially relies on another provider's opinion is evaluated in the same manner as the ratified opinion.

If release to regular work is inconsistent with the balance of the opinion, there must be a persuasive explanation.

Turning to the case at hand, the Board noted that the examining physician had also opined that claimant's preexisting shoulder conditions, rather than his accepted injury, were the primary cause of his continued shoulder issues, and that he had no impairment related to his accepted conditions. Nevertheless, the Board observed that the carrier had not issued a "pre-closure" "combined condition" denial and that claimant had ultimately been awarded permanent impairment related to his accepted shoulder condition.

Although opinion attributed cause of complaints to preexisting conditions, carrier did not issue a pre-closure denial of a combined condition.

Under such circumstances, the Board found that the record did not support the foundation for the examining physician's opinion. Moreover, the Board reasoned that, not only was the attending physician's concurrence with the examining physician's likewise deficient, but the attending physician's concurrence was inconsistent with the balance of the physician's earlier opinions, which indicated that claimant was unable to return to his regular work. Consequently, the Board concluded that the record did not establish that claimant had been released to regular work and, consequently, he was entitled to a work disability award.

APPELLATE DECISIONS UPDATE

Combined Condition: "Combined Condition" Consists of Two Separate Conditions

Carillo v. SAIF, 310 Or App 8 (March 17, 2021). Analyzing ORS 656.005(7)(a)(B), the court reversed the Board's order in *Mario Carillo*, 70 Van Natta 1856 (2018), previously noted 37 NCN 12:4, which, in upholding an injury denial of claimant's shoulder condition, found that his "work-related" symptoms of a preexisting condition had combined with the preexisting condition itself and that the carrier had proven that his work incident was not the major contributing cause of his need for treatment/disability for his combined shoulder condition. In reaching its conclusion, the Board had rejected claimant's contention that a combined condition consists of two separate medical conditions that combine and that a symptomatic flare-up of a preexisting condition cannot combine with

Board had reasoned that a combined condition can be two simultaneous medical problems.

the preexisting condition itself. In doing so, the Board had relied on *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, 636 (2002), for the proposition that a "combined condition" is "two medical problems simultaneously" to determine that claimant's symptomatic flare-up of his preexisting condition (which was caused in material part by his work incident) was a "medical problem" separate from the preexisting condition.

Citing Brown v. SAIF, the court reasoned that a combined condition is two separate conditions that combine.

On appeal, the court agreed with claimant's contention. Citing *Brown v. SAIF*, 361 Or 241, 255-56 (2017), the court reiterated that the term "combined condition" suggests two *separate* conditions that combine. The court further reasoned that the Supreme Court's statement in *McAtee* that a "combined condition" involves "two medical problems simultaneously" was not inconsistent with the *Brown* court's description of a "combined condition." *See also Fred Meyer, Inc. v. Evans*, 171 Or App 569, 573 (2000) ("The operative principle [of ORS 656.005(7)(a)(B)] is that multiple conditions combine to create a disability or need for treatment."); *Luckhurst v. Bank of America*, 167 Or App 11, 16-17 (2000) ("[I]n order for there to be a 'combined condition,' there must be two conditions that merge or exist harmoniously * * * rather than one condition made worse" by a work-related injury.) Finally, referring to *Evans v. SAIF*, 268 Or App 761, 770-71 (2015), the court remarked that a preexisting condition and its symptoms are not separate conditions.

Remanded to Board to consider whether symptomatic flare-up was compensable as a worsening of a preexisting condition.

Based on the aforementioned case precedent, the court concluded that the Board had erred in determining that the symptoms of claimant's preexisting condition combined with the preexisting condition itself to give rise to a combined condition claim. Consequently, the court remanded to the Board to consider, in the first instance, whether claimant's symptomatic flare-up was compensable as a worsening of his preexisting condition.

In reaching its conclusion, the court emphasized that neither *Brown* nor *Hammonds v. Liberty Northwest Ins. Co.*, 296 Or App 241 (2019), had addressed the narrow question presented in the case at hand; *i.e.*, whether symptoms of a preexisting condition brought on by work activity can "combine" with the preexisting condition to give rise to a combined condition. Furthermore, to the extent that *Hammond* might be understood to have addressed that question, the court disavowed such an understanding.

APPELLATE DECISIONS
COURT OF APPEALS

There were no other textual decisions issued by the court in March 2021 concerning a Board order.

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