Workers' Compensation Board

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News & Case Notes

BOARD NEWS

ALJ Recruitment

The Workers' Compensation Board intends to fill an Administrative Law Judge position in the Salem Hearings Division. The position involves conducting workers' compensation and OSHA contested case hearings, making evidentiary and other procedural rulings, conducting mediations, analyzing complex medical, legal, and factual issues, and issuing written decisions that include findings of fact and conclusions of law. Applicants must be members in good standing of the Oregon State Bar or the Bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia. The position requires periodic travel, including but not limited to Eugene, Roseburg, and Coos Bay, and working irregular hours. The successful candidate will have a valid driver's license and a satisfactory driving record. Employment will be contingent upon the passing of a fingerprint-based criminal background check. The announcement was posted on June 14, 2021, on the Department of Consumer and Business Services (DCBS) website at https://www.oregon.gov/dcbs/jobs/Pages/jobs.aspx and contains additional information about compensation and benefits of the position and how to apply. Questions regarding the position should be directed to Ms. Kerry Garrett at (503) 934-0104. The close date for receipt of application materials is July 26, 2021. DCBS is an Equal Opportunity, Affirmative Action Employer Committed to Workforce Diversity.

Annual Adjustment to Maximum Attorney Fee and Hourly Rate for Statement Fee Effective July 1, 2021

The maximum attorney fee awarded under ORS 656.262(11)(a), ORS 656.262(14)(a), and ORS 656.382(2)(d), which is tied to the increase in the state's average weekly wage (SAWW), will rise by 14.059 percent on July 1, 2021. On May 27, 2021, the Board published Bulletin No. 1 (Revised), which sets forth the new maximum attorney fees. The Bulletin can be found on the Board's website at: https://www.oregon.gov/wcb/Documents/wcbbulletin/bulletin1-rev2021.pdf

An attorney fee awarded under ORS 656.262(11) shall not exceed **$5,471**, absent a showing of extraordinary circumstances. OAR 438-015-0110(3).

An attorney fee awarded under ORS 656.262(14)(a) shall be **$418** per hour. OAR 438-015-0033. This rule concerns the reasonable hourly rate for an attorney's time spent during a personal or telephonic interview conducted under ORS 656.262(14).

An attorney fee awarded under ORS 656.308(2)(d) shall not exceed **$3,946**, absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5).

These adjusted maximum fees apply to attorney fees awarded under ORS 656.262(11)(a) and ORS 656.308(2)(d) by orders issued on July 1, 2021 through June 30, 2022, and to a claimant's attorney's time spent during a personal or telephonic interview or deposition under ORS 656.262(14)(a) between July 1, 2021 and June 30, 2022.

CASE NOTES

Course & Scope: "Course Of" Employment - "Parking Lot" Exception to "Going and Coming" Rule Applied - Employer Had Sufficient Control Over Shared Parking; "Arising Out Of" Employment - Occurred During Normal Ingress/Egress From Workplace

Brian J. Schnell, 73 Van Natta 516 (June 24, 2021). Applying the parking lot exception to the "going and coming rule," the Board held that claimant's injury from a fall while riding his bicycle occurred in the course and scope of his employment. Further determining that the injury arose out of a neutral risk to which claimant was exposed by employment, the Board held that the injury arose out of employment. The carrier asserted that the "course of" employment prong was not satisfied because the employer did not have sufficient control of the parking lot, and further contended that the injury did not "arise out of" employment because riding a bicycle was unrelated to claimant's work duties.

The Board disagreed with the carrier's contentions. Citing *Norpac Foods, Inc. v. Gilmore*, 318 Or 363 (1994), the Board stated that an injury sustained while the worker is going to, or coming from, the place of employment generally does not occur "in the course of" employment. However, again referring to *Gilmore*, as well as *Beverly M. Helmken*, 55 Van Natta 3174 (2003), *aff'd without opinion*, 196 Or App 787 (2004), the Board reiterated that the "parking lot" exception to the "going and coming" rule applies when a worker traveling to or from work sustains an injury "on or near" the employer's premises over which the employer exercises "some" control. In addition, referring to *Redman Indus., Inc. v. Lang*, 326 Or 32 (1997) and *Bruntz-Ferguson v. Liberty Mut. Ins. Co*., 310 Or App 618 (2021), the Board observed that injuries "arise out of" employment if they result from risks distinctly associated with the employment or neutral risks if the conditions of employment put the claimant in a position to be injured.

Employer had the right to request maintenance to the parking lot and was responsible for paying a portion of the common area costs.

Turning to the case at hand, the Board found that the employer had the right to request maintenance of the parking lot, and the landlord did not reserve the "sole" or exclusive right to perform such maintenance. The Board further noted that the employer was responsible for paying for a portion of the common area maintenance costs associated with the area. Relying on *Bruntz-Ferguson*, *Sally Houk*, 72 Van Natta 372 (2020), and *Catherine A. Sheldon*, 72 Van Natta 580 (2020), the Board found these factors sufficient to establish that the employer had some "control" over the parking lot. The Board therefore concluded that claimant's injury occurred "in the course of" his employment.

In addition, the Board noted that claimant was injured while riding a bicycle during his regular egress from the work site. Referring to *Bruntz-Ferguson* and *Cheryl T. Torkko*, 49 Van Natta 1910 (1997), the Board noted that normal ingress and egress are generally considered "neutral" risks causally connected to employment unless the employee engages in activities outside of regular and anticipated ingress and egress. Finding no such circumstances, the Board concluded that the injury "arose out of" employment.

Jurisdiction: Request for Hearing on Wage Rate Filed More Than 2 Years After Initial Calculation - Carrier Had Ongoing Obligation to Determine Accuracy of Payments - "Same Wage" Calculation by Employer Did Not Include Overtime Hours

Justin A. Swint, 73 Van Natta 504 (June 16, 2021). Applying ORS 656.319(6), OAR 436-060-0150(6), and OAR 436-060-0025(2), on remand, the Board determined that the claimant's hearing request was timely and he was entitled to payment of temporary disability based on his wages that included overtime hours instead of the carrier's "same wage" payments that did not include overtime. Further, the Board awarded a penalty and penalty-related attorney fee.

Citing ORS 656.319(6), the Board observed that a hearing for failure to process, or for incorrect processing of the claim, may not be granted unless the request for hearing is filed within two years after the alleged action or inaction occurred. Citing *French-Davis v. Grand Central Bowl*, 186 Or App 280 (2003), the Board explained that an analysis under ORS 656.319(6) begins with identification of the "action or inaction" that resulted in a failure to process or incorrect processing of the claim. Citing ORS 656.262(4)(b), the Board noted that, instead of paying temporary disability benefits, an employer may make "wage-continuation" payments consisting of the "same wage" and pay interval as the worker received at the time of the injury. Finally, citing *Armando Morin*, 68 Van Natta 1760 (2016), the Board reasoned that each payment of temporary disability benefits creates a time-specific obligation.

Board's analysis begins with identification of the action or inaction that resulted in a failure to process or process incorrectly.

Applying *Morin* to the case at hand, the Board rejected the carrier's contention that the hearing request was untimely because the initial wage calculation occurred over two years before the request. Instead, the Board concluded that the accuracy of each payment made within two years of the hearing request was reviewable under ORS 656.319(6). In doing so, the Board distinguished *Jesse G. Ayala, Jr.*, 66 Van Natta 1845 (2014), which had held that the Board lacked jurisdiction over the conversion of temporary total disability benefits to temporary partial disability due to employment termination more than two years before the claimant's hearing request. In contrast, because the carrier in *Swint* had an ongoing obligation to accurately pay the claimant's temporary disability benefits, the Board found that claimant's hearing request was timely as to payments that were due within two years prior to the claimant's hearing request.

Hearing request was timely as to payments made within two years prior to the date of the request.

Turning to the merits of the temporary disability dispute, the Board reasoned that the carrier's "same wage" calculation did not include overtime hours that the claimant had regularly worked before the injury, the Board reasoned that the carrier did not pay the claimant the "same wage." Therefore, concluding that the carrier did not comply with OAR 436-060-0025(2), the Board found that claimant was entitled to the difference between the wages he received and the amounts he would have received based on his TTD rate calculated under ORS 656.210 and OAR 436-060-0025. The Board further noted that the employer did not offer any reasonable explanation of why it believed it could pay the claimant less than his TTD rate, nor of why a "base wage" without consideration of overtime wages would be the "same wage" under ORS 656.262(4)(b) and OAR 436-060-0025(2). Consequently, the Board awarded a penalty and related attorney fee.

Medical Services: On Remand From the Supreme Court - Psychological Evaluation Compensable For Condition Caused in Material Part by the "Work Injury"

Attorney Fee: Fee Request Included Hours Spent and Contingent Hourly Rate - Starting Point for Application of Rules-Based Factors

Elvia Garcia-Solis, 73 Van Natta 481 (June 14, 2021). Applying ORS 656.245(1)(a) on remand, the Board held that claimant's medical services claim for a psychological evaluation was compensable because the requested medical service was for the "PTSD-like symptoms" caused in material part by the work injury. The Board also awarded a $89,930 attorney fee award for claimant's counsels' services at the hearing level, on Board review, on judicial review, and on remand.

Citing ORS 656.245(1) and *Garcia-Solis v. Farmers Ins. Co.*, 365 Or 26 (2019), the Board explained that, to establish the compensability of a requested medical service, the claimant must establish that the service is for a condition caused in material part by the work injury event.

Carrier had previously conceded at hearing and on review that the claim was for a condition for purposes of "245(1)."

Turning to the case at hand, the Board rejected the carrier's contention that the "PTSD-like symptoms" were not a condition for purposes of ORS 656.245(1), reasoning that the carrier had conceded that issue at the hearing and Board review levels. The Board further concluded that an unrebutted medical opinion established that the requested medical service was for the "PTSD-like symptoms" caused by the work injury event.

Regarding the attorney fee, the Board observed that the determination of a reasonable attorney fee involves the consideration of the "rule-based" factors listed in OAR 438-015-0010(4). Citing *Karista D. Peabody*, 73 Van Natta 244, *recons*, 73 Van Natta 322 (2021), the Board noted its previous reasoning that if a claimant's counsel's fee request is based on the hours spent on the case and a proposed contingent hourly rate, it is appropriate to use that information as a starting point for the application of the rule-based factors.

Board reviewed counsel's reported hours for attorney and paralegal time.

Here, the Board used, as a starting point for its application of the factors, claimant's counsels' reported hours and proposed contingent hourly rates. Regarding the 60.95 attorney hours and 4.9 paralegal hours reported for services at the hearing level and on Board review, the Board reduced those hours based on the time entries that either preceded, or were unrelated to, claimant's trial counsel's representation concerning the disputed medical service. The Board found the remaining 36.8 attorney hours and 4.8 paralegal hours to be reasonable. The Board further concluded that the proposed $400 contingent hourly rate for claimant's trial counsel and the $125 hourly rate for paralegal services were reasonable.

Concerning the hours reported by claimant's appellate counsel for services on judicial review, the Board concluded that the 45.1 hours reported for legal research and briefing at the Court of Appeals (for the court's initial review and on reconsideration) were reasonable, based on the complexity and novelty of the issue and the court's formal requirements for briefing. The Board also found the 50.7 hours reported for services on judicial review related to tasks other than legal research and briefing to be reasonable given the complexity of the case and the duration of the litigation. However, the Board found the 100.6 hours reported for legal research and briefing at the Supreme Court to be excessive, given appellate counsel's extensive experience in workers' compensation and appellate litigation. Acknowledging the complexity of the issue and the court's formal briefing requirements, the Board also found that much of the argument submitted to the Supreme Court was duplicative of the petition for reconsideration submitted to the Court of Appeals. Based on fee submissions in similar cases and the Board Members' extensive experience as workers' compensation practitioners, the Board concluded that 60 hours would be reasonable for claimant's appellate counsel's services at the Supreme Court. Analyzing the 23.4 reported hours for services on remand, the Board also did not consider those hours reasonable because the arguments on remand were substantially less complex than those presented on judicial review. Based on its review, the Board concluded that 10 hours would be reasonable for services performed on remand.

Proposed contingent hourly rate deemed reasonable based on the rule-based factors.

Finally, the Board concluded that claimant's appellate counsel's proposed $450 contingent hourly rate was reasonable given the contingent nature of the practice, counsel's extensive experience, the significant value of the interest involved, and the high risk of going uncompensated in the particular case. Consequently, the Board awarded an $89,930 attorney fee award for claimant's counsel's services at the hearing level, on Board review, on judicial review, and on remand.

Occupational Disease: Series of Work-Related Injuries Establish Compensability of O.D. - 656.802(1) - "Employment Conditions" Include Discrete Injuries

Attorney Fee: Counsel's Fee Request Included Hours Spent and Contingent Hourly Rate - OAR 438-015-0010(4)-Based Factors Applied

An occupational disease can be established through evidence of discrete injuries causing a separate condition over time.

Randy G. Simi, 73 Van Natta 526 (June 25, 2021). Analyzing ORS 656.802(2)(a) on remand, the Board concluded that the claimant's occupational disease claim for several right shoulder conditions was compensable, based on a persuasive medical opinion that the conditions were caused over time by a series of work-related injuries. Citing ORS 656.802(1)(a)(C), the Board reiterated that to establish the compensability of an occupational disease, the claimant must prove that "employment conditions" were the major contributing cause of the disease. Quoting the court's decision in *Simi v. LTI, Inc.*, 300 Or App 258 (2019), the Board noted that work-related injuries constitute "employment conditions" for purposes of the statute. Further relying on the court's opinion, the Board explained that an occupational disease can be established by medical evidence that discrete work-related injuries have caused a separate condition, arising over time as a result of the cumulative effect of those injuries.

Turning to the case at hand, the Board observed that medical evidence attributed major causation of the claimed occupational disease to a series of work injuries, as part of the natural history of rotator cuff tears, in which tears progress and recur with time and further injury. Although the medical evidence had focused on the one particular injury as the major cause of a "recurrent or worsened" right rotator cuff tear, it persuasively established that the overall right shoulder pathology resulted from multiple work-related injuries over time. Accordingly, the Board found the occupational disease claim compensable.

Regarding the attorney fee award, the Board applied ORS 656.386(1) and ORS 656.388(1) and determined that $28,050 was a reasonable attorney fee award for claimant's counsel's services at the hearing, on Board review, and on remand. Citing OAR 438-015-0010(4), the Board observed that the determination of a reasonable attorney fee involves the consideration of the "rule-based" factors. Citing *Karista D. Peabody*, 73 Van Natta 244, *recons*, 73 Van Natta 322 (2021), the Board noted its previous reasoning that if the claimant's counsel's fee request is based on the hours spent on the case and a proposed contingent hourly rate, it is appropriate to use that information as a starting point for the application of the rule-based factors.

Turning to the case at hand, the Board used, as a starting point, claimant's counsel's request for a $33,350 fee for services at the hearing level and on Board review (based on 79.25 reported hours and a $425 proposed contingent hourly rate) and a $12,200 fee for services on remand (based on 28.75 reported hours and a $425 proposed contingent hourly rate). Analyzing the time reported for services at the hearing level and on Board review, the Board acknowledged the complexity of the legal issue, the extensive record, and the preparation of two depositions. However, the Board also noted that claimant's attorney had

The Board did not credit time devoted to issues which claimant did not prevail on in their attorney fee determination.

devoted time to the carrier's denial of several left shoulder conditions over which claimant did not prevail, the initial written closing argument was brief and focused primarily on an undisputed issue, and the opening brief on Board review was duplicative of written closing arguments. Based on their experience as Board Members and fee submissions in similar cases, the Board considered 58 to be a reasonable number of hours for claimant's counsel's services at the hearing level and Board review.

The Board also found the time reported for services on remand to be unwarranted. The Board reasoned that the issues on remand were far less complex than those presented at the hearing level and on Board review and that the arguments regarding the medical evidence on remand were duplicative of those presented at the prior levels. Under such circumstances, the Board concluded that 8 hours were reasonable for claimant's counsel's services on remand.

Turning to the $425 proposed contingent hourly rate, the Board found that rate to be reasonable based on claimant's counsel's extensive experience, the contingent nature of the practice of workers' compensation law, and the particularly high risk of going uncompensated. Consequently, the Board awarded a $28,050 attorney fee award, based on 66 hours and a $425 contingent hourly rate, for claimant's counsel's services at the hearing level, on Board review, and on remand.

Penalty: No "Legitimate Doubt" When Carrier Denied Claim Without Conducting a Reasonable Investigation - OAR 436-060-0140(1) - Although a Delay in Seeking Treatment Raised Doubts, Carrier Did Not Make "Good Faith Effort" to Ascertain the Facts - Denial Issued Five Days After Claim Was Received

Hobby L. Brooks, 73 Van Natta 494 (June 14, 2021). Applying ORS 656.262(11)(a) and OAR 436-060-0140(1) on remand, the Board determined that the claimant was entitled to a penalty and penalty-related attorney fee based on the carrier's failure to perform a "reasonable investigation."

"Unreasonableness" and "legitimate doubt" are considered in light of all the evidence available to the carrier at the time of denial.

Citing ORS 656.262(11)(a) and *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991), the Board observed that whether a carrier has unreasonably delayed or refused to pay compensation depends on whether the carrier had a legitimate doubt as to its liability. Citing *Brown v. Argonaut Ins.*, 93 Or App 588 (1988) the Board explained that "unreasonableness" and "legitimate doubt" are considered in light of all the evidence available to the carrier at the time of the denial. Citing OAR 436-060-0140(1), *James Hurlocker*, 66 Van Natta 1930, 1937 (2014) and *Kenneth A. Foster*, 44 Van Natta 148 (1992), *aff'd without opinion*, 117 Or App 543 (1993), the Board noted that a "legitimate doubt" does not exist when the carrier denies a claim without conducting a reasonable investigation. The Board defined a "reasonable investigation" under OAR 436-060-0140(1) as consisting of "whatever steps a reasonably prudent person with knowledge of the legal standards for determining compensability would take in a good faith effort to ascertain the facts underlying a claim."

Turning to the case at hand, the Board acknowledged that the initial treatment records, MRI report, and claim filing document raised doubt concerning the claimant's delay in seeking medical treatment and notifying the employer regarding the injury. However, the Board concluded that the carrier's review of those documents did not constitute a "good faith effort to ascertain the facts underlying [the] claim."

Board reasoned that carrier could have obtained additional records or an examination before denying the claim.

In particular, the Board noted that, although the carrier had 60 days in which to accept or deny the claim under ORS 656.262(6), the carrier issued its denial only 5 days after receiving the claim. The Board noted that the carrier had several options for making a "good faith effort" to ascertain the facts underlying the claim before its decision was required. The Board reasoned that the carrier could have waited to obtain additional medical records, interviewed the claimant, contacted the attending physician to obtain further information, or obtained an insurer-requested medical examination before denying the claim. Noting that the carrier did not take any of these investigative steps, or any other steps, the Board concluded that the carrier's investigation was not a "good faith effort" to ascertain the facts underlying the claim. Accordingly, the carrier did not conduct a reasonable investigation and did not have a "legitimate doubt" regarding the compensability of the claim when it issued the denial. Consequently, the Board awarded the claimant a penalty and penalty-related attorney fee.

Penalty: Penalty and Attorney Fee Awarded for Failure to Pay ORS 656.262(14)(A) Attorney Interview Fee - Carrier Mailed Check But Claimant Attorney Did Not Receive It - Claimant Not Required to Complete "Replacement Check" Form - Carrier Did Not Respond to Multiple Inquiries Regarding Payment

Robert P. Kelly, 73 Van Natta 520 (June 24, 2021). Analyzing ORS 656.262(14)(a) and OAR 438-015-0033(2) and (3), the Board directed the SAIF Corporation to pay claimant's attorney for the time he spent participating in claimant's interview, and awarded a penalty and attorney fee for SAIF's unreasonable delay/failure to pay the fee. After the claimant's attorney submitted a bill for the interview fee, SAIF mailed claimant's counsel a check. However, claimant's counsel did not receive the check. When SAIF did not respond to claimant's counsel's multiple inquiries regarding the check's status, claimant requested a hearing, seeking an order directing SAIF to issue a replacement check.

Claimant's counsel sought an order directing SAIF to issue a replacement check for attorney fee.

The Board agreed with claimant. Citing ORS 656.262(14)(a) and OAR 438-015-0033(2), the Board stated that a carrier must "pay the attorney a reasonable attorney fee" for the actual time spent during a worker's interview or deposition. The Board further observed that OAR 438-015-0033(3) describes the requirements for a claimant's attorney to obtain the attorney fee. Finally, the Board noted that ORS 656.262(11)(a) provides for a penalty and attorney fee if a carrier unreasonably delays or refuses to pay an attorney fee.

Despite SAIF issuing payment, Board found that claimant's counsel did not "obtain" the fee under "0033."

Turning to the case at hand, the Board found that the record persuasively established that claimant's attorney met the requirements to obtain the attorney fee under OAR 438-015-0033. Furthermore, the Board observed that claimant's counsel had not obtained the attorney fee because, although SAIF mailed a check within 30 days of receiving the bill, claimant's counsel did not receive it. In addition, the Board noted that SAIF confirmed that the check had not been cashed.

Board concluded that ORS 293.475 does not apply to SAIF and noted there is no requirement to sign an additional form to secure a replacement check.

In reaching its conclusion, the Board disagreed with SAIF's contention that, pursuant to ORS 293.475 (which applies to a "board, department, commission, and officers of the state") claimant's counsel must first complete a "replacement-check" form. Citing ORS 656.753(1) and (3), the Board noted that ORS chapter 293 did not apply to SAIF (except as provided in ORS 293.240, ORS 293.260, ORS 293.262, and "as otherwise provided by law"). In addition, the Board stated that ORS 656.262(14)(a) and OAR 438-015-0033 do not require a claimant's attorney to sign an additional form to secure a "replacement check."

The Board also disagreed with SAIF's contention that it timely issued payment because it mailed the check within 30 days of receiving the bill. The Board stated that the instant matter concerned whether claimant's counsel had obtained payment, not whether payment was timely. Accordingly, the Board directed SAIF to issue a replacement check to claimant's counsel for the time spent during claimant's interview.

Finally, the Board awarded a penalty and attorney fee under ORS 656.262(11)(a) for SAIF's unreasonable delay/failure to pay the ORS 656.262(14)(a) attorney fee. Specifically, the Board stated that SAIF's failure to respond to claimant's counsel's multiple inquiries regarding the lack of payment (for which it provided no persuasive explanation) was unreasonable.

APPELLATE DECISIONS UPDATE

Medical Service: "Prosthesis Repair" Not "For"/ "Directed To" Accepted Knee Fracture (Rather "For" Denied Knee Infection) - Not Compensable Under "245(1)(a)"

Edwards v. Cavenham Forest Industries, 312 Or App 153 (June 3, 2021). Analyzing ORS 656.245(1)(a), the court affirmed the Board's order in *Jack L. Edwards*, 71 Van Natta 506 (2019), previously noted 38 NCN 5:5, which found that claimant's medical services (antibiotic prescription and surgical scrubbing of a hip prosthesis) were not compensable because the services were directed to a denied hip infection (rather than to a previously accepted hip prosthesis). On appeal, claimant contended that the disputed medical services were compensable as treatment for his original compensable hip fracture or, alternatively, as treatment for a consequential condition caused by the original hip fracture.

Reviewing for legal error and substantial evidence and reasoning under ORS 183.482(8)(a), the court affirmed the Board's decision. Referring to ORS 656.245(1)(a) and *SAIF v. Sprague*, 346 Or 661 (2009), and *Vukasin v. Liberty*

Medical services for consequential conditions are compensable only if they are directed to medical conditions caused in major part by the work accident.

Northwest Ins. Corp., 271 Or App 142 (2015), the court summarized the first sentence of the statute, which provides that, for "ordinary conditions," medical services are compensable if they are "for conditions caused in material part by the injury for such period as the nature of the injury or the process of recovery requires." Relying on *Garcia-Solis v. Farmers Ins. Co.*, 365 Or 26 (2019), the court noted that medical services are compensable under the first sentence of ORS 656.245(1)(a) if they are for conditions caused in material part by the work accident.

Addressing the second sentence of ORS 656.245(1)(a) (concerning medical services for consequential and combined conditions) the court stated that medical services for consequential conditions (*i.e.*, a condition that is compensable because the compensable injury is the major contributing cause of the consequential condition) are compensable only if they are "directed to medical conditions caused in major part by the injury." Referring to the *Garcia-Solis* and *Sprague* decisions, the court described the second sentence as follows: For medical conditions caused in major part by an accepted condition, medical services are compensable only for medical conditions caused in major part by the work accident.

Prior Board decision that upheld denial of the consequential condition claim was not appealed.

Applying its rationale to the present case, the court observed that claimant had not sought judicial review of that portion of the Board's decision that had upheld the carrier's denial of claimant's hip infection as a consequential condition. Because the hip infection had not been found to be caused in major part by the accepted hip fracture, the court determined that claimant could not prevail on his claim for medical services directed toward the infection.

No medical opinion attributed the medical services to the accepted hip fracture condition.

The court next turned to whether the medical services were for an "ordinary condition" (*i.e.*, the accepted hip fracture), rather than a "consequential condition" (*i.e.*, the hip infection). The court emphasized that the key question under the first sentence of ORS 656.245(1)(a) is whether the medical services were *for* — not caused by — the condition that was caused by the workplace accident. The court found that no physicians' opinion attributed the disputed medical services to the hip fracture. Because the disputed medical services were not for the original condition and claimant did not appeal the portion of the Board's decision which had upheld the carrier's denial of the hip infection as a consequential condition, the court affirmed the Board's decision that the medical service claim was not compensable.

Finally, to the extent claimant's hip *implant* continued to require medical services, the court noted that he had requested coverage for repair, replacement, or maintenance of his hip prosthesis under ORS 656.245(1)(c)(E), which was a matter pending before the Workers' Compensation Division and was not before the court.

Dissent stated that majority's conceptualization of accepted condition did not fully account for the "nature" of the injury.

Judge James dissented. Recounting claimant's extensive history of seven hip surgeries (culminating in a total hip arthroplasty), James disagreed with the majority's conceptualization of claimant's medical condition as simply a "hip fracture," which James did not believe accurately and fully captured the "nature" of his injury. Reasoning that there was no dispute that the need for any of claimant's various surgeries were materially caused by the nature of claimant's hip injury, Judge James asserted that the record established that the disputed medical services (surgery and debridement) were compensable under ORS 656.245(1)(a).