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BOARD NEWS

Reopening Update: Parties May Request In-Person Proceedings Beginning October 1

The Workers' Compensation Board announced that, due to the current surge in Delta-variant COVID-19 cases, hearings and mediations will continue to be conducted by telephone or video proceedings. However, effective October 1, 2021, parties will be able to submit a request that a proceeding be conducted in person.

The in-person proceedings will be conducted with public safety protocols in place. Face masks will be required for all participants and the hearings venues will be equipped with plexiglass barriers and portable air cleaners with High Efficiency Particulate Air (HEPA) filters.

Board Chair Connie Wold issued the announcement on Friday, September 10: <https://www.oregon.gov/wcb/Documents/announcements/091021-covidhearingupdate.pdf>

Additional information regarding the timing and process for requesting an in-person proceeding will be announced soon by Presiding Administrative Law Judge Joy Dougherty.

Attorney Fee Statistical Report Published

The Workers' Compensation Board (WCB) published its annual update of statistical information regarding attorney fees on August 11, 2021. The report can be found on the WCB statistical reports web page: <https://www.oregon.gov/wcb/legal/Pages/statistical-reports.aspx>

The report is an update of the statistical tables and charts previously published in June 2020 and includes data on fee awards from the 2020 calendar year.

"Quarterly" Board Meeting - September 29, 2021

The Board Members have scheduled a public meeting for September 29, 2021, 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).

Premature Closure: "AP" Concurrences Did Not Constitute "Qualifying Statements" of "No Permanent Disability" - Conflicting Opinions Concerning Claimant's Restrictions/Limitations Required Clarification Before Claim Closure - Insufficient Info to Close Claim - "030-0020(1)(a), (b)"

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Under "bifurcation" rule, amount of the attorney fee award determined if the compensability decision becomes final.

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/2021/092921-brdmtgconfinstructions.pdf>

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>

CASE NOTES

Attorney Fee - "Bifurcation" of Board Award Under "386(1)" - Separate Case Number Assigned - Determination of Specific Amount of Award Deferred Until Merits of Compensability Decision Becomes Final - "015-0125"

Dick A. Veldsma, 73 Van Natta 639 (August 13, 2021). Applying OAR 438-015-0125, after overturning a carrier's compensability denial, the Board did not award a specific attorney fee under ORS 656.386(1) for claimant's counsel's services at the hearing level and on Board review because a request for "bifurcation" of the attorney fee award had been filed.

Regarding the claimant's attorney fee award under ORS 656.386(1) for finally prevailing over the carrier's compensability denial, the Board noted that claimant's counsel had requested "bifurcation" of the attorney fee award from the merits of the compensability issue pursuant to OAR 438-015-0125. Under such circumstances, the Board assigned a separate case number regarding the attorney fee award, which would be bifurcated from the compensability issue and would become ripe for a determination of the specific amount of the award if the compensability decision became final. See OAR 438-015-0125.

Claim Filing: Oral Report to Supervisor of Work Incident W/I 90 Days - Carrier Did Not Overcome Presumption of Timely/Sufficient Notice - "265(4)"

Robert E. Suacci, 73 Van Natta 661 (August 20, 2021). Analyzing ORS 656.265(1)(a), (2), (4), and ORS 656.310(1)(a), the Board held that the claimant's injury claim was timely because the record persuasively established that he had provided sufficient notice of a work injury to his employer and that the employer had knowledge of the injury within 90 days of the work incident. More than 90 days after the work incident, claimant completed a formal injury report for a back/leg condition. The carrier's claim denial asserted untimely notice to the employer.

The Board found that claimant had provided sufficient, timely notice of his work incident. The Board found that claimant had informed his supervisor that he "jacked" his back when he took a "hit" while operating the employer's truck.

The Board noted that the supervisor testified that claimant had told him that he “sustained an injury” when he took “a hit” driving a truck over rocky terrain at work. Finally, while acknowledging that claimant and his supervisor had differed on the exact date of this conversation, the Board was persuaded that the conversation had occurred within 90 days of the work incident.

Under such circumstances, the Board found that the employer had knowledge of claimant’s injury within 90 days of the work incident. Furthermore, because claimant had also provided formal notice to the employer within one year of the work incident as required by ORS 656.265(4), the Board concluded that his injury claim was not barred.

Claim Processing: Carrier’s Alleged Violation of “Simultaneous Notification” Statute/Rule (“331(1)(b)”/“060-0015(2)”) Did Not Invalidate Denial - Alleged Violation Was “WCD” Matter for Possible Civil Penalty

Alma Gomez, 73 Van Natta 617 (August 3, 2021). Analyzing ORS 656.331(1)(b) and OAR 436-060-0015(2), the Board held that a carrier’s alleged violation of the “simultaneous notification” statute/administrative rule (which required a claimant’s attorney to receive simultaneous notice of a claim denial) did not invalidate an otherwise valid denial, but rather could be considered by the Workers’ Compensation Division (WCD) for purposes of a civil penalty.

Combined Condition: Symptomatic Exacerbation of Preexisting Condition - Not Two “Separate Conditions” - Carrier Did Not Establish Existence of “Combined Condition” - “005(7)(a)(B)”/“266(2)(a)”

Daniel Earhart, 73 Van Natta 649 (August 18, 2021). Applying ORS 656.005(7)(a)(B) and ORS 656.266(2)(a), the Board held that a carrier had not met its burden of proving that an “otherwise compensable injury” was not the major contributing cause of claimant’s disability/need for treatment for an alleged combined low back condition because the physicians’ opinions on which the carrier had relied did not persuasively support the existence of two separate conditions.

Dismissal Order: Failure to Appear at Hearing - No ALJ “Show Cause” Order - Claimant’s “Post-ALJ Order” Explanation on Board Review Constituted “Postponement” Motion - Remand for ALJ Consideration of Explanation/Motion - “006-0071(2)”

Brian P. Howell, 73 Van Natta 657 (2021). Analyzing OAR 438-006-0071(2), the Board held that, because an ALJ’s order had dismissed claimant’s hearing request for a failure to appear at a scheduled hearing (without

also including a “show cause” order), it was appropriate to remand the case to the ALJ for consideration of claimant’s “post-ALJ order” explanation for not attending the hearing.

Extent: Permanent Impairment - “ROM” Loss Entirely Attributable to Denied Conditions - No “Combined Condition” Identification - No PPD Award Granted

Shanda Pedroza, 73 Van Natta 668 (August 24, 2021). Analyzing OAR 436-035-0007(1)(a), (1)(b)(C), (5), and OAR 436-035-0006(1), in rating claimant’s permanent impairment for accepted shoulder conditions, the Board did not award permanent disability because the medical arbiter’s range of motion (“ROM”) findings were entirely due to denied conditions and no preexisting/combined condition had been identified.

Premature Closure: “AP” Concurrences Did Not Constitute “Qualifying Statements” of “No Permanent Disability” - Conflicting Opinions Concerning Claimant’s Restrictions/Limitations Required Clarification Before Claim Closure - Insufficient Info to Close Claim - “030-0020(1)(a), (b)”

Kevin S. Affeld, 73 Van Natta 672 (August 24, 2021). Applying ORS 656.268(1)(a), and OAR 436-030-0020(1)(a), (b), the Board held that claimant’s thumb injury claim was prematurely closed because his attending physician’s concurrence with a report releasing claimant to his regular work did not constitute a “qualifying statement” of no permanent disability when the physician had also concurred with a work capacity evaluation regarding claimant’s physical limitations.

APPELLATE DECISIONS **UPDATE**

Course & Scope: “Arising Out Of” Employment - Eye Injury From Exploding Beverage - Rest Break at Job Site While Sitting in Employer’s Truck

SAIF v. Chavez-Cordova, 314 Or App 5 (August 18, 2021). The court affirmed the Board’s order in *John Chavez-Cordova*, 72 Van Natta 12 (2020), previously noted 39 NCN 1:5, that found that claimant’s eye injury, which occurred when he was struck by the cap of an energy drink bottle when the beverage exploded while he was sitting in his employer’s truck on a job site during a mandatory paid rest break, arose out of his employment. On appeal, the carrier contended that the risk of injury to claimant from being hit in the eye from an exploding beverage bottle did not arise out of his employment because the risk was personal to him in that the exploding beverage was a “personal instrumentality”; *i.e.*, a danger that claimant had brought to the work place.

The court disagreed with the carrier's contention. Citing *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 598 (1997), the court stated that an injury "arises out of" employment if it arises from the nature of the claimant's work or from a risk to which the work environment exposes the worker. Relying on *Phil A. Livesley Co. v. Russ*, 296 Or 25, 29-30 (1983), the court reiterated that risks are generally categorized as employment-related risks, personal risks, or neutral risks. Referring to *Sheldon v. U.S. Bank*, 364 Or 831, 834 (2019), *Panpat v. Owens-Brockway Glass Container, Inc.*, 334 Or 342, 350 (2002), and *SAIF v. Marin*, 139 Or App 518, 523, *rev den*, 323 Or 535 (1996), the court noted that neutral risks have no particular employment or personal character and are compensable if work conditions caused the claimant to be in a position to be injured.

Court agreed with Board that the risk was not personal to claimant, but was a neutral risk.

Turning to the case at hand, the court was skeptical of treating beverage bottles (which it considered ubiquitous in the work place) as inherently hazardous objects or personal instrumentalities of risk. Determining that substantial evidence supported the Board's finding that claimant had not caused the contents of the bottle to explode or the cap to hit his eye, the court agreed with the Board's conclusion that the risk of the explosion/eye injury was not a risk personal to claimant. Reasoning that the cause of claimant's injury was similar to those described as "unexplained," the court also agreed with the Board's determination that claimant's injury was caused by a neutral risk.

Even injuries caused by "imported" risks can be compensable if some nexus to employment.

Acknowledging the carrier's assertion that the risk of the claimant's eye injury had been "imported" to the workplace by his bringing the beverage to the job site, the court observed that even injuries caused by "imported" risks can be compensable if there is some nexus to the employment. *Larson*, 1 *Workmen's Compensation Law*, Section 9.03[3]. In any event, even assuming that claimant's energy drink constituted an "imported" risk, the court concluded that his consumption of the drink had an employment connection because he was required to take his paid breaks at the job site and because the employer did not provide drinks (and acquiesced in and contemplated that claimant would drink beverages while on his breaks).

Course & Scope: "Arising Out Of" Employment - "Mixed Risk" Doctrine - Hip Prosthesis Failed While Claimant Standing in Line at Work to "Log Out" For Break - Both "Employment/Personal" Contributions

SAIF v. Blankenship, 314 Or App 34 (August 18, 2021). The court affirmed the Board's order in *Timothy W. Blankenship*, 71 Van Natta 1128 (2019), previously noted 38 NCN 10:4, that found that claimant's leg injury, which occurred when his hip prosthesis became displaced while he was standing in line at work to "log out" for a scheduled work break, arose out of his employment. In reaching its conclusion, the Board had applied the "mixed risk" doctrine, reasoning that claimant's personal risk (*i.e.*, his preexisting degrading hip condition) and an employment risk (*i.e.*, his moving about the workplace) had together produced the harm and because his employment was at least in part a contributing factor, his injury was compensable. See *Hamilton v. SAIF*, 256 Or App 256, 260, *rev den*, 354 Or 148 (2013); *Larson*, 1 *Larson's Workers' Compensation Law*, Section 4.04, 4-3 (2017).

On appeal, the carrier contended that: (1) claimant's movement at the time of his injury did not arise out of his employment because he had not been engaged in a work activity; and (2) his injury arose from purely a personal risk, with no relation to his employment.

The court disagreed with the carrier's contention. Citing *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 598 (1997), the court stated that an injury "arises out of" employment if it arises from the nature of the claimant's work or from a risk to which the work environment exposes the worker. Relying on *Phil A. Livesley Co. v. Russ*, 296 Or 25, 29-30 (1983), the court reiterated that risks are generally categorized as employment-related risks, personal risks, or neutral risks. Referring to *Sheldon v. U.S. Bank*, 364 Or 831, 834 (2019), and *SAIF v. Marin*, 139 Or App 518, 523, *rev den*, 323 Or 535 (1996), the court noted that neutral risks have no particular employment or personal character and are compensable if work conditions caused the claimant to be in a position to be injured.

Turning to the case at hand, the court recognized that it had not previously applied the "mixed risk" doctrine. See *Hamilton*, 256 Or App at 260. Nevertheless, the court was persuaded that the doctrine provided an appropriate analysis in the present case. Consequently, the court concluded that when an injury results at least in part from an employment-related risk, the injury is considered to have arisen out of the employment, even if a personal risk is also in play.

Addressing the carrier's contentions, the court rejected the carrier's arguments that claimant had not been engaged in a work activity when his injury occurred. In doing so, the court concluded that substantial evidence supported the Board's finding that claimant's "logging out" for a mandatory work break was required by claimant's employer and, therefore, a part of his employment.

Concerning the carrier's second assertion, the court acknowledged that claimant's leg injury (from the degrading of his hip prosthesis) could have happened anywhere and did not depend on the unique circumstances of him standing in line at work. Nonetheless, the court reasoned that the fact remained that his injury did happen at work and, moreover, that movement about the work area in carrying out job duties is generally considered to be work-related. See *Wilson v. State Farm Ins.*, 326 Or 413, 417 (1998).

Court applied the "mixed risk" doctrine in finding the injury compensable.