Hearings Division Outlines Process for Parties to Submit Request for In-Person Events

The Workers’ Compensation Board announced that it will begin accepting requests for in-person events. Starting on October 1, 2021, parties may submit a joint motion requesting that a hearing be conducted in person. Such requests will be centralized with Presiding Administrative Law Judge Joy Dougherty.

If granted, the matter will be special set for a date certain. Availability of in-person events will be determined by location, and the availability of safety measures to reduce the likelihood of transmission of COVID-19.

Priority will be given to in-person hearings. However, parties may also contact Judge Dougherty if there is an urgent need for an in-person mediation.

Read the full announcement here: https://www.oregon.gov/wcb/Documents/announcements/093021-covidhearingupdate.pdf

Email Address Change for WCB Staff

Email addresses across Oregon state government will be changing on November 1, 2021. Employees of the Workers’ Compensation Board (WCB) will have email addresses ending in @wcb.oregon.gov (instead of the current @oregon.gov).

Here are some important facts on the change:

- The previous @oregon.gov and @state.or.us addresses will continue to work for now, but we recommend you update your address books and contact lists to avoid any delays in emailing staff.
- On and after November 1, 2021, email from WCB staff will come from the @wcb.oregon.gov address.
- Depending on your security settings, you may need to add @wcb.oregon.gov addresses to your “approved senders” or “safe senders” list. Keep an eye on your spam or junk folders for any redirected email from WCB.
- The staff member's name will not be changing. If the email address is the firstname.lastname or includes the middle initial, that name will remain the same. The only change is to @wcb.oregon.gov.
• Public email boxes, such as the “Request” box (request.wcb@oregon.gov) will also be changing. However, because some of these email boxes are identified in the Chapter 438 administrative rules, the Board plans to update the rules before changing those email addresses on its website. The @oregon.gov email boxes continue to be active for now.

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.

CASE NOTES

Jurisdiction: Appeal Filed More Than 180 Days After the Denial – No Showing That Claimant Lacked Mental Competency to Timely File Appeal – Hearing Request Dismissed

Jessica S. McQueen, 73 Van Natta 710 (September 23, 2021). Analyzing ORS 656.319(2) and (3), the Board held that the record did not persuasively establish that the claimant’s hearing request was timely filed. Specifically, the Board determined that the hearing request was filed more than 180 days after the carrier’s denial.

A request filed more than 180 days after a denial confers jurisdiction only if claimant can show a lack of mental competency to file within the statutory time period. ORS 656.319(2). The record did not include this requisite showing. Because the claimant’s hearing request was untimely, neither the Board nor the ALJ had the authority to consider the merits of the carrier’s denial. Accordingly, the Board dismissed the claimant’s hearing request.

Jurisdiction: Hearing Request for Penalties and Attorney Fees Dismissed – Aggravation Rights Have Expired – Claimant Can Seek Own Motion Relief

Timothy Joy, 73 Van Natta 712 (September 24, 2021). Applying ORS 656.278, and Tony L. Clark, 66 Van Natta 91 (2014) and Evalyn V. Stevens, 59 Van Natta 1925 (2007), the Board held that the Hearings Division (and the Board on review) did not have subject matter jurisdiction over the claimant’s request for penalties and penalty-related attorney fees regarding the claimant’s requests for closure of a claim in which the aggravation rights had expired.
Claimant did not contest the finding that the claim had not been initiated/reopened before his aggravation rights had expired, but contended that the carrier had an obligation to respond to his request for closure.

However, noting that jurisdiction of claims for which aggravation rights have expired falls under its Own Motion jurisdiction, the Board dismissed claimant’s hearing request. In doing so, the Board noted that its determination did not preclude claimant from seeking “post-aggravation rights” Own Motion relief under ORS 656.278.

Occupational Disease: Opinion That Claimant Had a New “Injury” Ultimately Not Inconsistent with Occupational Disease Claim – Physician Consistently Attributed Major Cause to Employment Conditions and Work Activity

*Alexis Whittemore*, 73 Van Natta 701 (September 10, 2021). Applying ORS 656.802(2)(a), the Board found compensable the claimant’s occupational disease claim for a shoulder condition caused by work activities as a paraeducator for special needs children. In doing so, the Board found persuasive the opinion of a physician who initially examined claimant to determine the relationship of her right shoulder symptoms to a prior injury or to a potential “new injury” with her current employer. However, because the physician subsequently addressed the claimant’s right shoulder condition as an occupational disease in response to a contrary opinion, the physician’s opinions were neither inconsistent nor an unexplained change. *See Larae C. Monical*, 62 Van Natta 1637 (2010); *George D. Smirnoff*, 56 Van Natta 67 (2004).

Despite initially describing the claimant’s claim as a “new injury,” the physician consistently attributed the major contributing cause of claimant’s right shoulder condition and its need for treatment to her employment conditions and work activities as a paraeducator. The physician weighed the relative contribution of other potential causes of claimant’s right shoulder condition, and rebutted a contrary medical opinion which had attributed the claimant’s condition to obesity and deconditioning. *See Allied Waste v. Crawford*, 203 Or App 512 (2005). Finally, the Board considered the contrary medical opinion to be internally inconsistent and unpersuasive. *Howard L. Allen*, 60 Van Natta 1423 (2008). Thus, the Board concluded that the claimant persuasively established the compensability of her right shoulder condition as an occupational disease. ORS 656.266(1); ORS 656.802(2)(a).

Remand: Hearing Was Not Recorded – Parties Could Not Reach Stipulation Regarding Events at Hearing – Remanded to Reopen Record

*Justin Martinez*, 73 Van Natta 724 (September 30, 2021). Applying ORS 656.295(5), the Board vacated and remanded the matter to the ALJ to reopen the record for the purpose of reproducing the events at hearing. Following a
request for review, it was discovered that there was no recording of the hearing, and the parties were unable to reach an agreement or stipulation regarding those events.

In the absence of a recording or a stipulation by the parties, remand was warranted on the basis that the case had been improperly, incompletely, or otherwise insufficiently developed.

Work Disability: Work Restrictions Did Not Preclude Claimant From Returning to Regular Work – Chronic Condition Limitation Did Not Establish Inability to Walk/Stand for Up To Two-Thirds of the Time

Erin E. Farr, 73 Van Natta 714 (September 27, 2021). Applying ORS 656.214(2)(a), ORS 656.726(4)(f)(E), and OAR 436-035-0009(4), the Board held that the claimant was not entitled to a work disability award because, although she did not return to her regular work, the claimant’s attending physician released her to return to her regular full-duty work without restrictions.

In doing so, the Board noted that a job analysis of claimant’s regular work (the accuracy of which claimant did not dispute) established that she was required to “frequently” walk and stand for up to two-thirds of the time (i.e., up to five and one-third hours in an eight-hour shift). See OAR 436-035-0012(8)(n). Thus, the Board found that the claimant’s attending physician’s opinion that she limit her walking and standing to six hours per day did not impose any restrictions that would preclude her from returning to her regular work.

In reaching its conclusion, the Board acknowledged that the claimant had a “chronic condition” limitation, meaning that she was unable to repetitively use her right ankle for more than two-thirds of a period of time. OAR 436-035-0019. However, the Board explained that because the claimant’s job-at-injury required her to walk and stand for up to two-thirds of the time, her inability to repetitively use her right ankle for more than two-thirds of a period of time did not preclude a finding that she was released to regular work. See Raymundo Herrera, 63 Van Natta 126 (2011).

Attorney Fee: Services During “Recon” Proceeding Resulting in TTD Award – Obtaining TTD Benefits Pursuant to “268” Prior to ALJ Decision – “Carrier-Paid” Fee Under “383(1)”

Dancingbear v. SAIF, 314 Or App 538 (September 15, 2021). The court reversed the Board’s order in Makayla N. Dancingbear, 70 Van Natta 550 (2018), previously noted 37 NCN 4-5, which had held that claimant’s counsel was not entitled to a carrier-paid attorney fee under ORS 656.383(1) when
an Order on Reconsideration awarded claimant temporary disability benefits. In reaching its conclusion, the Board had reasoned that, because ORS 656.268(6)(c) provides for an “out-of-compensation” attorney fee for a claimant’s counsel’s services during the reconsideration proceeding equal to 10 percent of the additional compensation awarded to claimant from an Order on Reconsideration, the legislature could not have intended to also award a carrier-paid fee for the same “reconsideration” services. On appeal, claimant contended that the Board had incorrectly interpreted ORS 656.383(1) because the statutory text unambiguously provides for a carrier-paid fee for a claimant’s counsel’s services in obtaining temporary disability compensation under ORS 656.268 (which necessarily includes the reconsideration proceeding).

The court agreed with claimant’s contention. Summarizing ORS 656.383(1), the court stated that the statute provides for a carrier-paid attorney fee if claimant’s counsel “is instrumental in obtaining temporary disability compensation benefits pursuant to ORS 656.210 * * *, 656.268 * * * prior to a decision by an [ALJ].” Referring to ORS 656.268, the court noted that the statute mandates and governs the reconsideration process, which results in an Order on Reconsideration.

Turning to the case at hand, the court determined that, under a plain-text reading of ORS 656.383, an Order on Reconsideration temporary disability award is one made pursuant to ORS 656.268. In reaching its determination, the court reasoned that, if the legislature intended to exclude a temporary disability award by a reconsideration order from a carrier-paid fee under ORS 656.383(1), it could have done so.

Additionally, the court concluded that the legislature’s use of the term “obtain” temporary disability benefits (rather than the word “award”) reflected an intention to allow a carrier-paid fee for such benefits that the attorney’s efforts yielded for the claimant regardless of how those were benefits were attained. Under such circumstances, the court found that the term “obtain” was broad enough to encompass a temporary disability award granted by an Order on Reconsideration.

The court further perceived no conflict between ORS 656.268(6)(c) (which provides for an “out-of-compensation” fee granted from increased compensation awarded by an Order on Reconsideration) and ORS 656.383(1) (which would allow for a carrier-paid fee for an Order on Reconsideration temporary disability award if claimant’s counsel was instrumental in obtaining such compensation). Reasoning that neither statute is ambiguous concerning its awards of attorney fees, the court concluded that the statutes collectively authorize both a carrier-paid and an “out-of-compensation” attorney fee for services during the reconsideration proceeding if a claimant’s counsel was instrumental in obtaining such compensation. In reaching its conclusion, the court noted that its interpretation was entirely consistent with the legislature’s intention to provide more attorney fees for claimants’ attorneys in order to ensure that claimants would have access to representation.

The court also disagreed with the carrier’s assertion that ORS 656.388(6) (which prohibits the Board from approving an attorney fee payable by a claimant if fees have been awarded in connection with the same proceeding under ORS 656.268) prevented the Board from awarding an attorney fee pursuant to ORS
Statutes authorize both an assessed fee and an out-of-compensation fee.

Noting that ORS 656.388(6) prevents the Board from awarding an additional “out-of-compensation” attorney fee “in connection with the same proceeding under ORS 656.268,” the court reasoned that the statute had no effect on the Board’s authority to award a “carrier-paid” fee pursuant to ORS 656.383(1).

Finally, the court observed that the Board had not reached the question of whether the Order on Reconsideration’s suspension of its temporary disability award because claimant had not attended an arbiter examination meant that claimant’s counsel had not been instrumental in obtaining such benefits prior to an ALJ decision. Accordingly, the court remanded for the Board to consider that issue.

Combined Condition: New/Omitted Medical Condition Claim – “005(7)(a)(B)” Applicable – No Previous Acceptance of “Combined Condition” Required

**Sexton v. Sky Lakes Medical Center**, 314 Or App 185 (September 1, 2021). Analyzing ORS 656.005(7)(a)(B), the court affirmed the Board’s order in *Phyllis D. Sexton*, 70 Van Natta 389 (2018), that upheld a carrier’s denial of claimant’s new/omitted medical condition claim for a L4-5 disc bulge. In reaching its conclusion, the Board had determined that the carrier had met its burden of proving that “the otherwise compensable injury” was not the major contributing cause of claimant’s need for treatment/disability for her combined condition. See ORS 656.266(2)(a). On appeal, claimant contended that a “combined condition” analysis was not applicable because the carrier had not previously accepted a combined condition and because she had proven that her work injury was a material cause of her need for treatment/disability for her claimed L4-5 disc bulge, her claim was compensable.

The court disagreed with claimant’s contention. Citing ORS 656.005(7)(a)(B), the court stated that a “combined condition” is compensable only if, so long as and to the extent that “the otherwise compensable injury” is the major contributing cause of the disability/need for treatment of the combined condition. Relying on *Tektronix, Inc. v. Nazari*, 117 Or App 409 (1992), *adh’d to as modified on recons*, 120 Or App 590, 594, *rev den*, 318 Or 27 (1993), the court reiterated that “the objective of the legislature was to adopt the major contributing cause standard of proof with respect to any claim for benefits or disability related to a preexisting, noncompensable condition.” Finally, referring to *Hammond v. Liberty Northwest Ins. Corp.*, 296 Or App 241, 247 (2019), the court noted that it had applied the *Nazari* reasoning to the current version of the statute.

Turning to the case at hand, the court acknowledged that its *Nazari* decision was addressing an initial claim. Nonetheless, the court reasoned that the *Nazari* logic also applied to a new/omitted medical condition claim. In doing so, the court reiterated its *Nazari* rationale that requiring a previous acceptance
of a preexisting condition that the carrier determined not to be compensable would be illogical because the carrier "would be required to accept a claim for which no benefits are due." *Nazari*, 117 Or App at 412.

In reaching its conclusion, the court recognized that, in *Brown v. SAIF*, 361 Or 241, 272 (2017), the Supreme Court had held that the phrase "otherwise compensable injury" in ORS 656.005(7)(a)(B) means a “previously accepted condition.” Nevertheless, noting that *Brown* had involved whether a claim must have previously been accepted in the setting of a combined condition “ceases” denial (where a combined condition had been accepted and denied under ORS 656.262(6)(c)), the court reasoned that the *Brown* holding was not controlling in the context of new/omitted medical condition claims.