



News & Case Notes

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BOARD NEWS

Upgrade to WCB Portal Case Status Screen

The Board has made a change to the WCB Case Status screen in the portal to enable users to better view all of their most recent cases.

From the WCB Case Status page, portal users can select **Sort by** “Case Number Desc (descending),” which will generate a list of all case types by the highest case numbers (i.e., 21-xxxxx).

WCB’s numbering system has separate sequencing for the different case types. Regular cases have a number for the year (21), followed by a 5-digit number. However, other case types have their own 5-digit number, followed by letters. CDA cases have a “C” following the digits, pre-litigation settlement cases have an “S,” and Own Motion cases have “OM.”

The new view on the Portal, when sorting by “Case Number Descending,” now displays the highest case numbers for each “type” of case in a single list. In other words, you can see your most recent CDA and Settlement cases, alongside your Regular cases, in one place.

WCB Case Status is your best spot on the Portal to find updated case information. It is current with our main database, and provides the status of litigation cases, party information, copies of orders and settlements, and buttons to directly upload settlements.

Practice tip: The “Filter” box on the upper right of your screen works best by entering the case number or claimant’s last name.

For more information, contact us at portal.wcb@oregon.gov

Email Address Change for WCB Staff

Email addresses across Oregon state government changed 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.

Temporary Disability: Nurse
Practitioner Approved Physical
Therapy and Off Work Status
After Declaring Claimant
Medically Stationary – Carrier
Did Not Strictly Comply With
Rules on Terminating Benefits –
Penalty and Attorney Fee
Awarded 8

- 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.

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. 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 Presiding 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>

Requests for Hearing - File Once, Not Twice

There are five ways a party can request a hearing before the Hearings Division of the Workers’ Compensation Board:

- Regular mail
- Fax
- Email
- WCB Portal
- Hand delivery

<https://www.oregon.gov/wcb/hearings/Pages/filing-instructions-hrg.aspx>

However, if you file your request multiple times using several of these methods, processing errors can occur. For example, duplicate requests can lead to creation of a second WCB case number. Sometimes a second hearing is set, with another ALJ on a different date and time. Once created, tracking the extra case number becomes the responsibility of the parties and the Hearings Division. If the parties request to dismiss an unnecessary case number, while leaving the correct case number open, such processing requires extra care and attention on behalf of all the parties.

We understand that verification of receipt is important when deadlines are near. When filing a hearing request through the WCB Portal, the submitter will receive an immediate confirmation email showing the date and time of filing, along with a copy of the request. If you file in such manner, there is no need to file an extra copy by another method. If you did not get an email acknowledgment, you can contact us for assistance at portal.wcb@oregon.gov.

For email filings, a submission to request.wcb@oregon.gov will also generate an automated email confirming the submission was received.

For regular mail, fax, and hand delivery submissions, you can verify the WCB case number within a few days of the Board's receipt by checking WCB Case Status in the Portal. A hearing notice will also be generated.

CASE NOTES

Combined Condition: Carrier Does Not Meet Burden of Proof – Opinions Lacked Definition of Work Injury and How It Combined with Pre-Existing Condition

Ariel Fillinger, 73 Van Natta 730 (October 5, 2021). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the record persuasively established that the claimant's new/omitted medical condition claim was compensable. Because an "otherwise compensable injury" was undisputed, the Board addressed the carrier's burden to prove that the "otherwise compensable injury" combined with a statutory "preexisting condition." The Board analyzed the opinions on which the employer relied, and found that they did not adequately define the work injury, nor explain *how* it combined with the preexisting condition.

Because those opinions were conclusory and not well explained, the Board found that the carrier did not meet its burden to establish the existence of a combined condition. Accordingly, the Board set aside the carrier's denial of the claimant's new/omitted medical condition claim.

Finally, the Board awarded an assessed attorney fee under ORS 656.386(1). Applying OAR 438-015-0010(4), the Board found that the amount requested for claimant's counsel's services at the hearing level was reasonable. However, the Board stated that the amount requested on Board review (based on 19 reported hours and a proposed \$1,000 contingent hourly rate) was excessive. Instead, the Board considered 16 hours and a \$450 contingent hourly rate to be reasonable for claimant's counsel's services at that level.

Requested fee for services at hearing and review addressed.

Consequential Condition: Swelling From Accepted Bee Sting Worsened Ulnar Neuropathy – *Vasquez* Cited

Laurie L. Whitley, 73 Van Natta 738 (October 7, 2021). Applying ORS 656.005(7)(a)(A) and *SAIF v. Walker*, 260 Or App 327, 336-39 (2013), the Board determined that claimant’s new/omitted medical condition claim for a worsened left ulnar neuropathy condition was a compensable “consequential condition” claim. Citing *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992) and *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1997), the Board explained that a separate condition arising from the compensable injury must be analyzed as a “consequential condition.”

Physician attributed the neuropathy to resultant swelling from the bee sting, not the sting itself.

The attending physician attributed claimant’s worsened left ulnar neuropathy to swelling caused by an allergic reaction to claimant’s compensable, work-related, bee sting. The Board compared the claimant’s circumstances to *Vasquez v. SAIF*, 237 Or App 59 (2010) where the claimant requested acceptance of a carpal tunnel syndrome condition that was caused by swelling resulting from the compensable injury and the court determined that a “consequential condition” analysis was appropriate. Analogizing to the case at hand, the Board noted that the attending physician did not attribute the worsened left ulnar neuropathy to the accepted bee sting injury itself, but rather to the resultant swelling that led to increased left ulnar nerve compression. As such, the Board determined that a “consequential condition” analysis was appropriate.

Citing *Mathew Samkuttu*, 72 Van Natta 735, 739 (2020), the Board noted that, although the attending physician was initially unaware of an earlier bee sting that also caused swelling of claimant’s left upper extremity, his ultimate opinion was based on a corrected, and accurate, history. Thus, the Board declined to discount his opinion. Finally, turning to the contrary opinions of the other medical examiners, the Board found that the attending physician persuasively rebutted their opinions. As such, the Board determined that the claimant’s new/omitted medical condition claim for a worsened left ulnar neuropathy was compensable.

Consequential Condition: Ganglion Cyst a Result of Arthritis from Accepted Condition and Surgery – No Requirement to Weigh Subsequent Work Activities Where No Opinion Suggested Such Activities Contributed – *Wehren* Cited

Jose A. Oliva-Aguilera, 73 Van Natta 783 (October 19, 2021). Applying ORS 656.005(7)(a)(A) and ORS 656.266(1), the Board held that the claimant’s new/omitted medical condition claim for a right ganglion cyst condition was compensable as a consequential condition. In doing so, the Board found persuasive the opinion of the treating surgeon, who explained that the claimed condition likely arose as a result of arthritis that had developed from the previously accepted condition and related surgery.

“Magic words” not necessary to establish causation.

The Board acknowledged that the physician had not expressly stated that the accepted condition and surgery were the “major contributing cause” of the claimed condition, but citing *Freightliner Corp. v. Arnold*, 142 Or App 98, 105 (1996), the Board reiterated that “magic words” are not necessary to establish causation.

Further, the Board concluded that the physician was not required to weigh the relative contribution from claimant’s subsequent work activities, because no physician had suggested that such activities contributed to the development of the claimed condition. See *Jackson County v. Wehren*, 186 Or App 555, 560 (2003).

Finally, the Board discounted the contrary medical opinion because it was based on general medical studies rather than the claimant’s particular circumstances. See *Sherman v. Western Employer’s Insurance*, 87 Or App 602 (1987). The Board acknowledged that the physician was the only one to examine claimant after the cyst developed, but observed that the physician’s opinion was not based on observations made during the exam. See *Juan P. Perez*, 67 Van Natta 1124 (2015).

Medical Opinion: Reasonable Change of Opinion – Based on Further Workup Including Examination Findings and Injections

Adrian Silva-Zavala, 73 Van Natta 749 (October 8, 2021). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the treating physician offered a reasonable explanation for a change in opinion, and that the record persuasively established that the claimant’s new/omitted medical condition claim for a left sacroiliac (SI) joint injury was compensable.

Initial opinion said “possibly” related to injury.

In doing so, the Board acknowledged the physician’s initial opinion that the condition was only possibly related to the injury. Following further workup that did not substantiate lumbar pathology, the physician ultimately concluded that the work event involved an SI joint injury, noting claimant’s examination findings, imaging studies, and temporary anesthetic response to an injection. The Board found this to be a reasonable explanation for his change of opinion. See *Kelso v. City of Salem*, 87 Or App 630, 633 (1987); *Cody G. Spicer*, 72 Van Natta 752, 756 (2020).

Moreover, his opinion persuasively rebutted, and was otherwise more well reasoned than, the contrary medical opinion. See *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008); *Rebecca Larsen*, 66 Van Natta 1123, 1127 (2014). Thus, the Board concluded that the claimant persuasively established the compensability of his new/omitted medical condition claim. ORS 656.005(7)(a); ORS 656.266(1).

Mental Disorder: Consequential Somatic Symptom Disorder – Attributed to Loss of Vocational Ability, Mobility, and Sleep from Compensable Injury

Rosa A. Perez-Reynoso, 73 Van Natta 764 (October 14, 2021). Applying ORS 656.005(7)(a)(A) and *Boeing Co. v. Young*, 122 Or App 591, 596 (1993), the Board determined that the claimant’s mental disorder claims for somatic symptom disorder and depression as new/omitted medical conditions were compensable “consequential conditions.” In doing so, the Board relied on the opinions of the attending physician and a worker-requested psychological examiner that attributed the claimed somatic symptom disorder and depression to claimant’s loss of vocational ability, mobility, and sleep following the work-related injury.

The Board also determined that the opinions of the worker-requested psychologist and the attending physician persuasively established the compensability of the new/omitted medical conditions. Applying *Minor v. SAIF*, 290 Or App 537, 548, the Board noted that the psychologist reviewed the history relied on by the carrier’s psychological examiner and based the opinion on a sufficiently complete and accurate medical history.

Responding to the carrier’s concerns that the claimant required assistance in completing some psychological assessments, the Board cited *Dorothy S. Calliham*, 59 Van Natta 137, 138 (2007), in explaining that the record did not contain any medical opinions supporting the contention that claimant’s testing results were compromised by such assistance.

Analyzing the opinion of the carrier-requested psychologist, the Board observed that the psychologist found that claimant had objective findings of depression, but did not explain why the presence of those findings did not establish the existence of the depression condition. Regarding the claim for somatic symptom disorder, the Board noted that the carrier-requested psychologist did not address the presence of symptoms of the disorder. Citing *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) the Board considered the carrier-requested psychologist’s opinion to be internally inconsistent, because she did not apply her stated criteria for the diagnosis of the somatic symptom disorder to claimant’s symptoms. In contrast, the Board noted that the worker-requested psychologist found that claimant’s symptoms, which matched the criteria described by the other examiner, substantiated the somatic symptom disorder diagnosis. As such, the Board concluded that the new/omitted medical condition claims were compensable.

Finally, the Board affirmed the ALJ’s \$15,000 attorney fee award for services at the hearing level. Applying the factors contained in OAR 438-015-0010, the Board disagreed with the carrier’s contention that the case was not complex. The Board reasoned that the involvement of two mental disorder claims, in addition to a dispute as to the applicable burden of proof, made the case more complex than average. Lastly, the Board considered it speculative for the carrier to assert that the benefit obtained for the claimant would be insubstantial.

Psychologist reviewed an accurate history relied on by another examiner.

Contrary opinion did not explain why presence of findings did not establish existence of depression condition.

Own Motion: Review of Closure – Additional Impairment for Sensory Loss – No Reevaluation of ROM Loss – Arbiter Attributed ROM Loss to Previously Accepted Arthritis

Randol Pachl, 73 Van Natta 774 (October 19, 2021). Applying ORS 656.278(2)(d), and relying on the medical arbiter's findings, the Board awarded additional impairment for claimant's "post-aggravation rights" new/omitted medical condition claim for right cubital tunnel syndrome.

Newly-accepted cubital tunnel syndrome resulted in sensory loss.

Claimant's prior whole person impairment award was 23 percent. In rating impairment for the newly-accepted right cubital tunnel syndrome, the medical arbiter found a Grade 2 (less than normal) sensation to the right ring and little fingers (whole digits). After converting the impairment values for the digits to an impairment value for the hand/arm, the resulting total impairment value was 24 percent. Because claimant's prior whole person impairment was 23 percent, the Board granted claimant an additional 1 percent whole person impairment. The Board also calculated 32 percent work disability, an increase of 1 percent above the prior work disability award.

In calculating impairment for the new/omitted condition, the Board observed that the medical arbiter attributed 100 percent of the loss of range of motion (ROM) in claimant's right elbow to the previously accepted "post-traumatic arthritis condition," unrelated to the new/omitted medical condition claim for right cubital tunnel syndrome. Therefore, it did not reevaluate claimant's impairment value for the loss of ROM and he was given the same 16 percent ROM value. Likewise, the Board also acknowledged the medical arbiter's finding of a "chronic condition" limitation of the right elbow, but reasoned that claimant had previously been awarded a 5 percent impairment value for this "chronic condition." Thus, it declined to award an additional "chronic condition" impairment value for the same body part.

Own Motion: On Reconsideration, No Permanent Disability for Facet Cyst – Arbiter Report Ambiguous – AP Report Used for Rating – *Caren* Inapplicable – Declined to Remand for Clarifying Report

Monika M. Gage, 73 Van Natta 755 (October 12, 2021). On reconsideration of its earlier Own Motion opinions (*Monika M. Gage*, 73 Van Natta 55, *recons*, 73 Van Natta 276 (2020)), analyzing ORS 656.278(2)(d) and OAR 436-035-0007(5), the Board continued to find that claimant was not entitled an additional permanent disability award for her "post-aggravation rights" new/omitted medical condition (L4-5 facet cyst).

The Board reiterated that it found the medical arbiter panel's opinion to be ambiguous and that a preponderance of the evidence demonstrated that the attending physician's impairment findings were more accurate and should

be used to rate claimant's permanent disability. The attending physician had opined that the newly accepted condition did not result in any additional permanent impairment or work restrictions.

The Board also disagreed with claimant's assertion that, because the medical arbiter panel's report preceded *Caren v. Providence Health Sys. Or.*, 365 Or 466 (2019), the Board was required to obtain a supplemental clarifying opinion from the medical arbiter panel that addressed the correct legal standard; *i.e.*, whether claimant's impairment as a whole was caused in material part by the compensable injury.

Board relied on attending physician's opinion, which did not support additional impairment for the newly-accepted condition.

The Board explained that, because its evaluation of the closed Own Motion claim was based on the attending physician's opinion that did not support a conclusion that claimant sustained "additional impairment," claimant was not entitled to a redetermination of her permanent disability before the application of the limitation in ORS 656.278(2)(d) or a permanent impairment award for her "post-aggravation rights" new/omitted medical condition claim under the Director's standards. *Kim M. Gilliam*, 71 Van Natta 207 (2019); *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003).

Based on its reliance on the attending physician's impairment findings, and in the absence of a redetermination of claimant's permanent disability, the Board found that the rationale of *Caren* and its progeny have no application. Thus, the Board declined to remand the claim to the Director to obtain a clarifying or second examination by the medical arbiter panel, and noted that it has previously held that it lacked the authority to do so. See *Pacheco-Gonzalez v. SAIF*, 123 Or App 312 (1993); see also *Tanya M. Jones*, 72 Van Natta 1122 (2020); *Daniel B. Lukich*, 55 Van Natta 412 (2003); *Melody R. Ward*, 52 Van Natta 241 (2000).

Temporary Disability: Nurse Practitioner Approved Physical Therapy and Off Work Status After Declaring Claimant Medically Stationary – Carrier Did Not Strictly Comply With Rules on Terminating Benefits – Penalty and Attorney Fee Awarded

Robert M. Haskin, 73 Van Natta 792 (October 21, 2021). Applying ORS 656.266(1) and ORS 656.262(4)(g), the Board held that the carrier was required to pay additional temporary disability benefits to the claimant, plus a penalty and an associated attorney fee.

Claimant's treating nurse practitioner, shortly after declaring claimant medically stationary, went on to approve a physical therapy plan and noted that claimant was unable to go back to work. The Board found that an objectively reasonable carrier would have understood the medical record to excuse the claimant from work for the disputed time period.

Additionally, the Board held that the carrier did not strictly comply with OAR 436-060-0020(4) in terminating the claimant's temporary disability benefits. Under that rule, the carrier must write to the worker asking whether there is a

reason beyond the worker's control preventing the worker from receiving care. Because the carrier did not do so, the Board held that its failure to pay temporary disability benefits was unreasonable and awarded a 25 percent penalty and penalty-related attorney fee under ORS 656.262(11)(a).

Lastly, the Board declined to address the carrier's issue of claimant's temporary disability rate, first raised on closing argument. *See Leslie Thomas, 44 Van Natta 200, 200 (1992)* (defense not raised before closing argument was not timely raised).

APPELLATE DECISIONS

There were no significant cases decided by the court this month.